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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
R.S.B.C. 1996, c. 210 (as amended)

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

B E T W E E N:

Jessica Dunkley

COMPLAINANT

A N D:

University of British Columbia and Providence Health Care (St. Paul's Hospital)

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Marlene Tyshynski
Counsel for the Complainant:	David Tarasoff Emily Luther
Counsel for the Respondent UBC:	Don Jordan Rosyln Goldner
Counsel for the Respondent Providence Health Care:	Penny Washington Esther Jeon Erica Lambert A/S
Dates of Hearing:	April 23 to 26, July 9 to 11 and July 26 and 27, 2012
Additional Written Submissions:	Completed December 21, 2012

I INTRODUCTION

1. Summary of the Complaint and Response

[1] Dr. Jessica Dunkley is Deaf. She is of Aboriginal decent as a Metis. Dr. Dunkley has been Deaf since birth and is the daughter of Deaf parents. She has required accommodations due to her deafness throughout her education including her undergraduate education at the University of British Columbia ("UBC") and at medical school at the University of Ottawa. Dr. Dunkley graduated from medical school in May 2010.

[2] As is customary for fourth year medical students Dr. Dunkley interviewed with prospective universities that offered residencies. To practice medicine a medical school graduate must successfully complete a residency in an accredited program and pass licencing exams.

[3] On March 8, 2010 Dr. Dunkley was assigned to a dermatology residency at UBC through the Canadian Residents Matching Service ("CaRMs"). Dr. Dunkley contacted the UBC Access and Diversity Office (the "A&D Office") the same day to ask for accommodation of her disability as she required sign language interpreters because she is Deaf. Her residency was to commence on July 1, 2010.

[4] On April 26, 2010 the Post Graduate Medical Education ("PGME") Office in the Faculty of Medicine at UBC informed St. Paul's Hospital, Providence Health Care ("PHC") that Dr. Dunkley a Deaf resident was assigned to its Post Graduate Year One ("PGY 1") program.

[5] Initially UBC told Dr. Dunkley and PHC that the A&D Office was the resource that would address Dr. Dunkley's accommodation request.

[6] On June 21 Dr. Dunkley was informed that arrangements had not been made to provide her with interpreter services for her start date of July 1, 2010.

[7] Subsequent to her July 20, 2010 meeting with representatives of the PGME Office, PHC, Vancouver Coastal Health Authority ("VCHA") and others, Dr. Dunkley

filed her complaint with the Tribunal (July 23, 2010). The gist of her complaint was that she was not being allowed to proceed with her residency program as scheduled because she was not provided with interpreters and she had concluded that the Respondents were not making a good faith effort to accommodate her disability.

[8] Dr. Dunkley completed three, four week block rotations (one in research and two in family medicine) and one week in an outpatient rotation at a rheumatology clinic without the assistance of interpreters.

[9] In total Dr. Dunkley was provided with interpreter services for a couple orientation days and some Academic Half Days.

[10] On October 12, 2010, Dr. Dunkley was placed on paid leave.

[11] On January 20, 2011, Dr. Dunkley was placed on unpaid leave.

[12] On February 2, 2011 the Faculty of Medicine, UBC wrote to VCHA that:

> …Following our joint assessment of the request and based on the projected costs of the interpreter services that Dr. Dunkley will require throughout her training we have concluded that the Office of Postgraduate Education is unable to provide the requested accommodation. We confirm that the Health Authority has also concluded that it does not have funds to support this request.
>
> As you know, [the ENT Specialist]has opined that interpreter services will be required by Dr. Dunkley for both clinical and educational activities. In the absence of funding for these services Dr. Dunkley is unable to proceed in the program. She has been placed on unpaid leave pending resolution of her claim that the University and the employer have failed to accommodate her disability.
>
> We do not believe any further steps need to be taken at this time

[13] On April 8, 2011, Dr. Dunkley filed an amendment to her complaint setting out the accommodation process and result and alleging discrimination based on her disability.

[14] Dr. Dunkley alleges that UBC denied her a service customarily available to the public, that is, residency training, because of her disability and/or discriminated against her with respect to that service on the basis of her disability without a *bona fide* and reasonable justification contrary to s. 8(1)(a) and (b) of the *Code.*

[15] Dr. Dunkley alleges that PHC discriminated against her regarding her employment because of her disability contrary to s. 13 of the *Code* in that her

disability was a factor in the decision to suspend and effectively dismiss her from employment.

[16] The Respondents say that Dr. Dunkley failed to prove a *prima facie* case of discrimination against either of them.

[17] In the alternative, the Respondents say that their conduct was justified as they would suffer undue hardship due to the cost of the interpreter services Dr. Dunkley's accommodation required.

2. Procedural History

[18] The hearing dates were April 23, 24, 25 and 26; and July 9, 10, and 11, 2012. July 26 and 27, 2012 were devoted to oral submissions.

[19] On November 15, 2012, the Tribunal provided the parties an opportunity to make further submissions given that the Supreme Court of Canada had rendered its decision in *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*") on November 9, 2012. Submissions were completed by December 21, 2012.

[20] The Tribunal Member who heard the complaint was unable to render the decision, following which the Chair had discussions with the parties about the completion of this matter. In March 2015 the Chair assigned the complaint to me to determine if the complaint is justified, and if so, to make an order under s. 37 of the *Code*, based on the hearing audio recordings, transcripts, and the documents entered at the hearing.

[21] During the hearing, Member Geiger-Adams made a ruling respecting the qualifications of an expert, with reasons to follow. Those reasons were completed by Member Geiger-Adams and are attached as Appendix A to this decision.

3. Organization of Decision

[22] First, I refer to the law relevant to witness credibility and introduce the witnesses.

[23] Then I set contextual information about residency requirements, the institutions involved and the UBC residency program. Following this I set out a detailed chronology of Dr. Dunkley's residency and the response of UBC and PHC to her

request for accommodation. I then address the law and the facts relevant to the issues I am required to determine in this complaint and provide reasons for my decision.

4. The Issues

1. Has Dr. Dunkley established a *prima facie* case of discrimination against UBC under s. 8 of the *Code* (services)?

2. Has Dr. Dunkley established a *prima facie* case of discrimination against PHC under s. 13 of the *Code* (employment)?

3. If the answer to question 1 is yes, has UBC established a *bona fide* and reasonable justification ("BFRJ") for its conduct?

4. If the answer to question 2 is yes, has PHC established a *bona fide* occupational requirement ("BFOR") for its conduct?

[24] The parties agree that the only justification at issue respecting questions 3 and 4 is whether UBC and/or PHC established that either would suffer undue hardship because of the cost of providing Dr. Dunkley with the interpreter services she required.

II DECISION

[25] I find that Dr. Dunkley's complaint of discrimination is justified against UBC and PHC and order remedies accordingly.

III WITNESSES

1. Legal Principles regarding Credibility

[26] In *Bradshaw v. Stenner*, 2010 BCSC 1398, para. 186, the Court said:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally

> (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[27] I did not conduct the hearing and did not see the demeanor of the witnesses. My findings of fact are based on the audio recordings, the transcripts of the hearing and the documentary evidence.

2. The Witnesses for the Complainant

[28] Dr. Dunkley testified on her own behalf and called three other witnesses: Denise Sedran, Dr. Debra Russell, and Todd Agan.

Denise Sedran

[29] Denise Sedran is an American Sign Language ("ASL") English interpreter. She has 26 years of experience and has National certification. She graduated from a formal interpreter education program in Winnipeg, Manitoba, in 1986. Throughout her career she furthered her education by attending professional development workshops, seminars, and self-directed learning. Ms. Sedran specializes in medical, mental health and post-secondary interpreting.

[30] Ms. Sedran met Dr. Dunkley in May 2010 when Dr. Dunkley hosted an information session for interpreters interested in interpreting for her residency. Ms. Sedran was hired by the PGME Office to interpret for Dr. Dunkley on a few occasions. After Dr. Dunkley was put on unpaid leave from her residency program Dr. Dunkley commenced a Master's in Public Health at UBC in September 2011. Ms. Sedran worked virtually full-time interpreting for Dr. Dunkley in her Master's program. These interpreter costs are covered by the A&D Office.

[31] Ms. Sedran is an acquaintance of Rebecca Knowles, a VCHA human resources advisor at the time relevant to the complaint and a witness for PHC in this hearing.

Dr. Russsell

[32] Dr. Russell has a PhD in Educational Psychology, a Master's of Educational Policy and Administration from the University of Calgary and a Bachelor of Education

from the University of Alberta. She has a Certificate of Interpretation for the Association of Visual Language Interpreters of Canada and a rehabilitation practitioner certificate program from Red Deer College. The subject matter of her PhD dissertation was the study of the accuracy and effectiveness of ASL interpretation when working with legal discourse in legal settings.

[33] Dr. Russell has held the David Peikoff Chair of Deaf Studies (one of two world-wide appointments) since 2003. She is the Director of the Western Canadian Centre for Studies in deafness at the University of Alberta. She is a contract Faculty Member of the Department of Education and Counselling Psychology and Special Education at UBC (since 2003), a contract Faculty Member of the Department of Sign Language Interpretation, Lakeland College, Edmonton, and was a contract Faculty Member in the Department of Sign Language Interpretation at Douglas College, Vancouver, BC (from 1994 to 2008). She is a Director of DLR Consulting – Certified ASL/English Interpreter & Consultant, Calgary.

[34] Dr. Russell provided comprehensive contextual background about the Deaf, in particular the accommodation requirements of Deaf professionals and about accommodation models. She contacted many sources to obtain information relevant to the design and costing of the provision of interpreter services which would enable Dr. Dunkley to function as a dermatology resident.

Todd Agan

[35] Todd Agan is a "designated interpreter" for Dr. Moreland, a Deaf internal medicine physician. (A "designated interpreter" generally means an ASL interpreter who works exclusively with a Deaf professional and develops expertise in signing for that professional.) Dr. Moreland and Mr. Agan work for the University of Texas Health Science Centre, School of Medicine. Mr. Agan has been interpreting for Dr. Moreland since Dr. Moreland's first year in medical school.

[36] Mr. Agan also works part-time as an adjunct faculty instructor for the San Antonio College Interpreter Training Program.

[37] Mr. Agan has worked as an interpreter for 19 years. His qualifications include a bachelor's degree in ASL and English interpretation. He holds National credentials

through the Registry of Interpreters for the Deaf, and State credentials through the Texas Board for Evaluation of Interpreters.

[38] Since being engaged as Dr. Moreland's interpreter Mr. Agan has also interpreted at several national conferences for a variety of Deaf medical professionals in various stages of their training. Mr. Agan has also interpreted for two other Deaf medical students.

[39] I found Mr. Agan's evidence of particular assistance in that he was the only witness with personal experience interpreting for a Deaf medical student and resident.

3. The Witnesses for PHC

[40] PHC called four witnesses. They are Dr. Maria Corral, Rebecca Knowles, Sandy Coughlin, and Mary Proctor.

Dr. Corral

[41] Dr. Corral is the Director of the PGY 1 residency program at St. Paul's Hospital among several other positions. In her capacity as the PGY 1 Director she reports to the Director of Post Graduate training in dermatology, UBC. At the time relevant to this complaint this was Dr. Warshawski.

[42] Dr. Corral stated that together with her administrative assistant she is responsible for assigning and supervising PGY 1 rotations at St. Paul's Hospital.

[43] Dr. Corral is also the Director of Medical Education at PHC. In addition, she is the Head of the Department of Psychiatry at PHC and she holds a clinical professorship at UBC in psychiatry.

[44] Dr. Corral had ongoing contact with Dr. Dunkley.

Ms. Knowles

[45] Ms. Knowles was hired by VCHA in April of 2010. At this time VCHA was responsible for Lower Mainland Consolidated Human Resources ("Consolidated HR"). She was in this position from April to November 2010 during which time PHC was her client.

[46] Ms. Knowles testified that in her position her task was as follows:

> … to take, with Lower Mainland Consolidation and with Vancouver Coastal Health, assume responsibility for HR. In terms of any files involving duty to accommodate, [the advisors] were tasked with a very limited set of duties, which was to assess from a labour relations perspective, for example, provide an opinion whether we thought it might be undue hardship or not, or, for example, there's a family status request for accommodation, we were to look at that and see if it met the parameters for family status.

[47] She first became involved with Dr. Dunkley's accommodation request in late June 2010 when her "promotion manager" who had been dealing with the file asked her to take it over because Ms. Knowles was stationed at PHC.

[48] In November 2010, Ms. Knowles moved to another position, albeit with the same employer. She no longer had conduct of Dr. Dunkley's file.

[49] She testified that the Consolidation HR devolved in the spring of 2011.

[50] In September 2011, Ms. Knowles was hired as a HR advisor at PHC and continues in that position.

[51] Ms. Knowles' involvement with Dr. Dunkley was that she had conduct of Dr. Dunkley's disability accommodation file from late June to November 2010. Ms. Knowles provided a calculation of the cost of providing ASL interpreters to accommodate Dr. Dunkley.

Ms. Coughlin

[52] Ms. Coughlin was the team lead of Disability Management with Consolidated HR. She too was an employee of VCHA in 2010. It is her evidence that at the end of 2010/beginning of 2011 Consolidated HR "was undone". She was "repatriated" back to PHC in February of 2011.

[53] As the team lead of Disability Management, her role was to oversee the consolidation of the VCHA, PHC and Provincial Health Services HR and to homogenize the processes between the three organizations. She "did not handle the day to day caseload but looked at how to provide the services for what essentially became the largest employer in British Columbia".

[54] Ms. Coughlin testified that she was asked to take on Dr. Dunkley's case by her manager because it was felt that Ms. Coughlin had more expertise in handling a request for this type of accommodation. She stated that in the 16 years she had been with PHC she had handled many accommodation requests from staff. She had never

dealt with an accommodation request requiring ASL interpreters like that of Dr. Dunkley.

Ms. Proctor

[55] Ms. Proctor is the Vice President of Finance and Planning at PHC. She has been in that position since 2006. Her educational background is a Bachelor of Commerce from Queen's University. She is a certified management accountant, and has a Master's of Arts and Leadership from Royal Roads University. She had nothing to do with Dr. Dunkley or Dr. Dunkley's accommodation request.

4. The Witnesses for UBC

[56] UBC called two witnesses, Dr. Kamal Rungta and Janet Mee.

Dr. Rungta

[57] Dr. Rungta was the Associate Dean of the PGME Office at the time relevant to this complaint until the end of his term on December 31, 2010. Dr. Rungta is now the Senior Advisor on Medical Education to the Dean of the Faculty of Medicine.

Ms. Mee

[58] Ms. Mee is the Director of the A&D Office at UBC. She reports to the Senior Director of Student Development and Services through to the Vice President, Students.

IV FACTS

[59] The parties filed an Agreed Statement of Facts. It is attached as Appendix B.

[60] I have incorporated the Agreed Statement of Facts into my decision.

[61] This portion of the decision provides a general outline of the evidence and an overview of the facts. In the decision as a whole, where there were differences in the evidence on matters relevant to a determination of the complaint, I set out the differing evidence, make a finding of fact and provide my reasons for doing so.

1. Dr. Dunkley

[62] Dr. Dunkley is Metis and was born Deaf. She has moderate to severe hearing loss in her left ear and severe to profound hearing loss in her right ear. This has been consistent since birth. Both of her parents were Deaf and thus, as she noted, her first language was ASL. Dr. Dunkley wears a hearing aid in her left ear and is adept at lip reading.

[63] As a child Dr. Dunkley started elementary school with the Vancouver Oral School for the Deaf up until grade two. This was a specialized classroom environment for Deaf children. From grade two until grade five she was placed in a public school where she used assistive listening devices. From grades five to nine she attended a private school with the added service of a teacher of the Deaf within a regular classroom and with assistive devices. In grade ten, she transferred to the BC School of the Deaf at Burnaby South Secondary where she had ASL interpreters and employed listening devices.

[64] After graduating from high school Dr. Dunkley attended Douglas College for one semester, where she had access to interpreters, note takers and tutors. Following this she attended UBC for a total of six years where she was provided with the service of interpreters, note takers, tutors, and real time captioning services. She studied three years of science, and then completed three years in physiotherapy and graduated with a Bachelor of Science in 2005.

[65] In 2006 Dr. Dunkley started medical school at the University of Ottawa. She was provided with interpreter services for the four year program. She obtained her doctorate in medicine in May 2010. The documentary evidence [July 22, 2010 e-mail] makes reference to Dr. Dunkley's CaRMS file. The e-mail from St. Paul's Hospital commented, "From reading through [Dr. Dunkley's] CaRMS file, Jessica was a brilliant, hardworking and very dedicated medical student, on most occasions rated higher than her peers."

[66] Dr. Dunkley testified that she has known since she was about ten years old that she wanted to be a surgeon. She always was interested in providing health care. She stated that as an Aboriginal person, she always saw the disparities in the Aboriginal community and the Deaf community, when it came to access to health care services. She testified that she wanted to make a difference.

[67] Dr. Dunkley said that she found the scope of practice in physiotherapy limiting. About the time she was graduating in physiotherapy she learned that there were Deaf physicians practicing in the United States and Canada and she was inspired to try to pursue a career as a doctor.

[68] Dr. Dunkley testified that she has received many awards throughout her academic pursuits. She testified that her most meaningful award was the University of Ottawa Extraordinary Woman Award, an award she shared with many other scholars and academics at the University of Ottawa. She said that she was a role model for the National Aboriginal Health Organization. She received several scholarships throughout her four years at the University of Ottawa.

[69] Dr. Dunkley explained that one of the main reasons she chose to pursue a career in dermatology was because it is a visual specialty and that is where her skills lie - that is - picking up visual cues. In addition, procedures and surgical aspects of dermatology practice can be performed in an office environment which is best suited for her as a Deaf person. She stated that in a worst case scenario if she ever completely lost her hearing, she would still be able to function as a dermatologist. Dr. Dunkley explained that institutions introduce a lot of systemic barriers for a Deaf person. In general, she would require an interpreter to function in an institution, whereas she would be able to function independently as a dermatologist without requiring the service of an interpreter because it is mainly a one-on-one field.

2. The Access and Diversity Office

[70] Ms. Mee has been with Disability Services since 1993. In 2003 Disability Services became the A&D Office. Ms. Mee testified that the A&D Office provides disability related accommodations for the faculty, the staff and the students at UBC.

[71] Ms. Mee explained that the A&D Office applies the "Academic Accommodation for Students with Disabilities": Policy 73 of the UBC Board of Governors ("Accommodation Policy").

[72] Ms. Mee explained the funding for the A&D Office. It has an operating budget that covers the staff and other expenses. It also receives an Access Fund, which covers the extraordinary cost of accommodation for people with disabilities. At the time of the hearing the Access Fund was $750,000 per fiscal year. The funding came from the

base budget of UBC. The A&D Office also receives a small subsidy from the provincial government to cover some of the costs of accommodation. The A&D Office administers its own budget. Its budget is subject to approval by the Executive of the university and then the Board of Governors.

[73] Ms. Mee testified about the general process followed when a student applies for an accommodation. She testified that the A&D advisors first talk to that applicant to understand the accommodation requirement. They also work with the applicant to implement the most appropriate type of accommodation.

[74] Ms. Mee agreed that the A&D Office always takes the cost of an accommodation into account, particularly if they are looking at two options, and one will provide an equal or better level of service and is more cost effective.

[75] No documentation was filed respecting the funding of the A&D Office.

3. Becoming a Doctor

[76] Upon graduation from a Canadian medical school one is granted a doctorate in medicine ("MD"). However, to practice as a physician, a medical school graduate must have successfully completed an accredited postgraduate training program and pass licencing exams.

[77] The postgraduate training is what prepares the medical graduate to be clinically competent in their chosen discipline through a graduated process of responsibility. Dr. Rungta testified that "undergraduate work and residency training is a continuum, starting with lesser responsibility and more supervision and graduating to a lot of responsibility with fairly minimal supervision". He said that the first two years of medical school generally are basic sciences, following this, the student moves on to clinical training for the remaining two years. Residency follows where the training gets more and more specialized. The last year of medical school is most similar to the beginning of the residency program.

[78] Dr. Corral testified that there is a very significant difference in the level of responsibility and the level of independence of the resident. Residents are still supervised but depending on the rotation and the year or residency, it is expected that they will be able to function much more independently than a medical student.

4. The Canadian Resident Matching Service

[79] CaRMs matches graduating medical students throughout Canada with residency positions across Canada.

[80] Dr. Rungta explained that during the fourth year of medical school students choose to vie for one of 800-plus residency programs that are offered across the country in various specialties and subspecialties. The students apply and in the normal course are interviewed by the programs they have applied to. The programs rank order the students they want to train based on the interviews. The medical students rank order the programs that they want to match to. A computer then generates a "match". Applicants are matched to one program only and must accept the offer from the program to which they are matched through CaRMS.

5. Accreditation by the College of Family Physicians of Canada and the Royal College of Physicians and Surgeons of Canada

[81] Dr. Corral testified that the Royal College of Physicians and Surgeons of Canada has specialty subcommittees in each of the Royal College specialties. There are over 60 of them in Canada. The Royal College publishes and regularly updates the specific requirements that an individual who practices in Canada is expected to achieve during their training as a resident. If a resident requires a modification, those modifications need to be approved by the Specialty Committee at the Royal College for that specific resident.

[82] Dr. Rungta stated that the UBC PGME program is subject to regulation by the Royal College and the College of Family Physicians. All PGME programs are delivered in accordance with the requirements of these organizations.

6. UBC and the Faculty of Medicine

[83] UBC is a university under the *University Act*, RSBC 1996, c. 468 and is composed of a chancellor, a convocation, a board, a senate and faculties, including a Faculty of Medicine.

[84] The Faculty of Medicine offers a medical school program, which upon graduation provides the recipient with an MD, and the PGME program (residency), which can only be entered with an MD and a match in the CaRMs program.

7. The Postgraduate Medical Education Program

[85] Dr. Rungta explained that UBC sponsors the PGME program on behalf of the two Colleges, which "really govern the program" – "They set the standards, the requirements, the accredited programs." The Colleges "come in" every six years to ensure the standards are being met.

[86] Dr. Rungta said that PGME "is not really a program of the university in the sense that … it's not governed by the senate," whereas other programs are bound by the laws of the senate. Other differences are that it does not have credit courses and the appeals process is different. He said it is a "contractual sponsored arrangement".

[87] Dr. Rungta explained that the Faculty of Medicine established the Faculty Residency Committee to run the PGME program. He also stated that the Faculty Residency Committee is "kind of" designated by UBC. It meets twice a year as is required by the accreditation standards of the two Colleges.

[88] The Faculty Residency Committee consists of all 64 program directors, plus a variety of people who have a stake in residency training, including the College of Physicians and Surgeons of B.C., the health authority representatives, and resident representatives, among others.

[89] I gather from Dr. Rungta's testimony that the Faculty Residency Committee reports to the PGME Office and ultimately to the Dean of the Faculty of Medicine.

[90] Dr. Rungta stated that in order to conduct business in a more functional, practical way, a Faculty Residency Executive Committee (the "Executive Committee") was set up. This is a subset of the Faculty Residency Committee and includes program directors of the major disciplines, residents, and a few other people. It is chaired by the Associate Dean of the PG Office. It generally meets monthly.

[91] No documentary evidence was filed to corroborate Dr. Rungta's testimony or otherwise about these committees.

8. Residency at UBC

[92] Dr. Rungta testified that UBC offers 64 accredited residency programs. Residency training has an academic component and a training component. He said that the status of a resident is distinct from that of a medical student. A resident is in the

dual position of both employee and person who is required to fulfill an academic component.

[93] With respect to the academic component of the programs, UBC residency requirements include weekly attendance at an Academic Half Day. Dr. Corral testified that Academic Half Days consist of various seminars and topics, some of which are presented by clinicians and academics, and others that the residents present. In addition, there are scheduled callback days which are specific days that the residents attend academic activities in their home programs.

[94] With respect to the training component of the residency program, Dr. Corral stated that resident placement decisions are made entirely by UBC and the PGME Office.

[95] Dr. Corral explained that generally PGY 1 residents stay at one site (there are exceptions). In subsequent years, PGY 2 to 5 residents are under the supervision of their home programs and are sent to various places, depending on the program.

[96] Dr. Corral stated that residents work five days a week. Dr. Corral and Dr. Rungta testified about a resident's regular work day which is usually around 10 to 12 hours per day but on occasion can be longer or shorter depending on the rotation.

[97] Residents are also scheduled for on call duties. Dr. Corral explained that on call expectations for a first year resident depend on the rotation. Some rotations, such as emergency medicine, do not have on call requirements because the residents are scheduled on a shift basis. Some ambulatory rotations have no call requirements; other rotations have on call where the resident is not required to be at the hospital. In some rotations, the resident is on call where they are expected to attend the hospital and in the normal course would sleep at the hospital and be available overnight. Dr. Corral stated that residents are on call a maximum of once every four days.

[98] Residents are members of the Professional Association of Residents of British Columbia known as PAR BC ("PAR-BC"). PAR-BC is a trade union certified under the *Labour Relations Code* as bargaining agent for residents in the province. PAR-BC is party to a collective agreement with the Health Employers' Association of British Columbia, of which PHC is a member (the "Collective Agreement"). The Collective Agreement was not entered into evidence.

9. Post Graduate Year One

[99] Dr. Corral testified that there are three PGY 1 sites in British Columbia, St. Paul's Hospital, the Royal Columbia Hospital, and the Royal Jubilee in Victoria.

[100] As the Director of the PGY 1 Office, Dr. Corral testified that she "liaises" with the PGME Dean's Office and sits on the Executive Committee.

[101] St. Paul's has approximately 15 to 16 PGY 1 residents. The PGY 1 Office is responsible for assigning the residents rotations, liaising with them, and ensuring that their PGY 1 year goes according to plan. There is liaison with the residents' home program directors in order to ensure that the appropriate rotations are assigned to meet with the requirements of the Royal College.

[102] Dr. Corral testified that the PGY 1 Office receives approximately $1,000 per year for each PGY 1 resident. That money is meant to be used by the resident for the purchase of educational materials including books and equipment. That is the extent of the PGY 1 Office budget.

[103] The PGY 1 Office is also provided with $500 per resident from a separate fund at St. Paul's Hospital to enable the residents to attend a conference. Residents are funded to attend a conference in their area of specialty or interest, and then they are required to come back and present a summary of their experience at one of the Academic Half Days.

[104] Dr. Corral testified that the PGY 1 year consists of 13 four week blocks that are specifically scheduled according to the requirements of their home program as well as the Royal College. This includes blocks set aside for elective rotations and what are called selective rotations (an elective chosen by the resident and approved by Dr. Corral as the PGY 1 director and the resident's home program director). One of the blocks is vacation.

10. Training Requirements for Dermatology

[105] The Dermatology Program Director at the time relevant to this complaint was Dr. Warshawski. He reported to the Associate Dean(s) in the PGME Office in the Faculty of Medicine. He did not testify.

[106] The Royal College of Physicians and Surgeons of Canada: Specialty Training Requirements in Dermatology where entered. The training requirements apply to those who begin training on or after July 1, 2009. They read as follows:

> MINIMUM TRAINING REQUIREMENTS
> 1. Five years of approved residency. This period must include:
> 1.1 Two (2) years of basic clinical training. This must include a minimum of twelve (12) months of Internal Medicine or Pediatrics, and must include specific rotations in Rheumatology, and Infectious Diseases. In addition, rotations in Plastic Surgery, Emergency Medicine, Oncology, Allergy and Immunology, and Pathology are recommended.
> 1.2 Three (3) years of approved residency training in Dermatology which must include:
> 1.2.1 A minimum of three (3) months (or equivalent horizontal rotation) of Pediatric Dermatology.
> 1.2.2 A minimum of one (1) year of which must be spent in a general hospital.
> 1.2.3 A minimum of six (6) months on in-patient or consultation services.
> 1.2.4 Up to one (1) year of this training may include full time clinical or basic science research related to Dermatology or Dermatopathology, provided both the resident and the site of training are approved by the program director. (as written)

11. The Memorandum of Understanding between the Ministry of Health and UBC

[107] Dr. Rungta testified that the Ministry of Health is responsible for funding the PGME program.

[108] There is a Memorandum of Understanding between Her Majesty the Queen in Right of the Province of British Columbia, represented by the Minister of Health (the "Ministry" or the "Province") and the University of British Columbia – Faculty of Medicine Vancouver BC (the "Faculty") (the "MOU"). UBC filed a copy of a MOU dated September 28, 2006. It is signed by the "Faculty", Dr. Stuart, Dean, Faculty of Medicine, and the Vice-President Administration and Finance UBC with, it would appear, "University Counsel" on behalf of the UBC. It is signed by the Deputy Minister of Health on behalf of the Province. The Preamble states:

> A. In British Columbia, there is a Postgraduate Residency Education program (the "Residency Program") for Canadian Resident Matching Service ("CaRMS") postgraduates, International Medical Graduates, and Dentistry and podiatry postgraduates (referred to jointly as "Postgraduates").
> B. The Residency Program consists of:

a. the academic component of the program known as the Postgraduate Medical Education program (the "Academic Component"), which is provided by the Faculty; and
b. the employment of Postgraduates by third party health care agencies to enable Postgraduates to obtain specialized clinical training in a clinical setting. (the "Employment Component")

C. The Province will provide funding to the Faculty for the Residency Program, and the Faculty will utilize that funding as outlined in this Agreement.

[109] The body of the Agreement states in part and as written:

> The Province and the Faculty agree to the following:
>
> OBLIGATIONS OF THE FACULTY
>
> The Faculty will operate and manage the Academic Component in a manner consistent with the Postgraduate Medical Education – Overall Statement:
>
> POSTGRADUATE MEDICAL EDUCATION – OVERALL STATEMENT
>
> Postgraduate education at the University of British Columbia is dedicated to providing the highest standard of resident training in Family Medicine and Royal College specialties and sub-specialities. The programs are devised to include all of the elements listed in the College of Family Physicians of Canada Residency Program Accreditation and Certification, and in the Royal College Guidelines, Requirements, and Objectives for training.
>
> …
>
> POWERS AND OBLIGATIONS OF THE PROVINCE
>
> 2.01 The Province will provide funding to the Faculty for the operation and management of the Academic Component and for transfer to third parties for the Employment Component in accordance with the Postgraduate Residency Education Program Funding Formula (Funding Formula) detailed in Schedule A.
>
> 2.02. Prior to calculating the annual funding to be provided to the Faculty, the Province will consult with the Dean of Medicine and the Faculty of Medicine & Ministry of Health funding Management Committee (the "Committee").
>
> 2.05 The Province will consider changes to the funding Formula, based on recommendations of the Committee. However, the Province will ultimately determine the amount of funding to be provided to the Faculty.

> 6.02 This Agreement is governed by and is to be construed in accordance with the laws of British Columbia.

[110] Dr. Rungta testified that the MOU was in force in the 2010/11 year. He stated that each year under the ongoing MOU there was a new funding letter and agreement reached. He said there is consultation on the budget but the Ministry has the final say.

[111] Dr. Rungta identified a letter dated December 24, 2010 from the Assistant Deputy Minister of Health to the Dean of the Faculty of Medicine as the funding letter for the 2010/11. This letter states that the Ministry has approved funding for 1031 postgraduate residency positions in 2010/11, based on the Postgraduate Residency Education Program Funding Formula. It states that the operating grant for Postgraduate Residency Education is $97,490,635 and that a summary of this funding is provided in Attachment 1.

[112] The Attachment indicates that in addition to the amount provided under the funding formula to cover the resident training and amounts for clinical teaching, program directors, site directors, and assessments, another $4,000,000 was provided for "support for the Faculty of Medicine".

[113] Dr. Rungta was asked about the two funding formulas in the MOU, one for the academic component and one for the employment component. He said in the academic component instruction is provided in both clinical and non-clinical settings, and the employment component "takes place within the jurisdiction of health authorities". Dr. Rungta agreed in direct examination that the academic component is managed by PGME. He agreed PGME had to manage it to meet external standards, explaining that these are the standards set by the two Colleges. Dr. Rungta said, "So the university takes on that component, and in that component it lays out very clearly how a program is structured, which is what this funding addresses." In cross-examination, Dr. Rungta added that the academic component has oversight over the clinical component in that the program director has authority through the Residency Training Committee to make sure that the clinic training happening within the health authorities is according to the College standards.

[114] Dr. Rungta agreed that the Faculty has a certain amount of discretion in terms of operating and managing the academic component, within the standards defined by the two Colleges.

[115] Dr. Rungta said the PGME does not receive any funds from the university, and agreed that all its funds come from a funding arrangement with the Province. He clarified that the funds from the Ministry go to the university which "parcels out" the funds under the agreement. Dr. Rungta testified that his budget is not subject to oversight or control like other university budgets by the Board of Governors. He agreed that the accountability under the MOU is to the Ministry.

[116] In cross-examination, Dr. Rungta was asked to confirm that the Faculty of Medicine at UBC is a party to the MOU rather than PGME. He said he was not sure he fully understood the legality of it but that PGME exists within the Faculty of Medicine.

[117] In cross-examination, Dr. Rungta agreed that the MOU anticipated consultation with the Ministry, that reaching an agreement was a collaborative effort between the parties to the agreement, and that "ultimately the Ministry makes certain decisions".

[118] Dr. Rungta identified that the word "committee" in clause 2.02 meant the Faculty of Medicine and Ministry of Health Funding Management Committee (a defined term). The clause states "The province will consider changes to the funding formula based on the recommendations of the committee".

[119] Dr. Rungta agreed in cross-examination that there is an obligation on the Province to at least consider changes to the formula based on the recommendations of the committee and similarly with reference to clause 2.02 to consult with the Dean of Medicine, the faculty and the committee.

[120] Dr. Rungta agreed that the "per resident" funding formula is utilized for both the academic and the employment components of residency.

[121] Dr. Rungta was asked about room for discretion in the budget once it was approved by the Ministry and said, "Very little. None actually." He testified that "inevitably sometimes programs that overspend and programs that require support, so ... But at the end of the year the books balance." He stated "there are 64 programs, so it's rather large in terms of the scope."

[122] Dr. Corral testified "the residents are paid through a central paying agency." The residents are not paid by the hospitals, the health authorities or UBC. She said "it is a complicated system."

12. Providence Health Care

[123] Ms. Proctor is the Vice President of Finance and Planning at PHC.

[124] She testified that PHC is a non-profit society working within the boundaries of a health authority. It has its own board of directors that hires its own chief executive officer. She testified that PHC is an affiliate of the VCHA and a signatory to a document that is called a Master Denominational Agreement. (This agreement was not entered.) She testified that this arrangement allowed PHC to maintain its separate legal and society status. However, she testified that "all of our planning and all of our funding comes under the VCHA. So all of our information is consolidated with the VCHA and submitted to the government."

[125] PHC owns and operates St. Paul's Hospital, Mount St. Joseph's Hospital, Holy Family Hospital, Brock Fahrni Residence, Langara Residence, Honoria Conway Assisted Living, Community Dialysis Units, and Marion Hospice. It has about 6,000 employees. Its annual budget in the last fiscal year was just over $730 million.

[126] Ms. Proctor testified about the major sources of revenue. She said that the bulk of PHC's funds come from the VCHA, which is funded through the Ministry.

[127] Ms. Proctor outlined PHC's other funding sources dedicated to specific programs. I do not find it necessary to set this out.

[128] Ms. Proctor testified that PHC prepared a "separate budget" that was approved by its board of directors. The PHC budget is submitted to the VCHA. She testified that the budgets of PHC and the VCHA are combined and submitted to the Ministry.

[129] Ms. Proctor testified that PHC is not entirely free to decide how the funds are used. She testified that PHC is required to provide medical services in all of the institutions it runs. She said that about 60 percent of the budget is compensation for staff to provide those services, and the rest of the budget is for drugs and medical supplies. PHC is required by the Ministry to keep administration costs under 10 percent.

[130] Ms. Proctor testified that "every year when we do our budget we are told the assumptions we are to use, and the assumption from the Ministry is that we cannot cut patient services and we must submit a balanced budget". She said that the "main containment" is keeping administrative costs under 10 percent, balancing the budget, not reducing services, and living within all of the collective agreements.

[131] She testified that PHC "starts at zero" every year. Surplus or deficits are wiped out at the end of the year and rolled into equity on the balance sheet. She said that this is different than a public company. PHC entered its audited financial statements for the fiscal years 2009, 2010 and 2011.

[132] Ms. Proctor explained that the PHC financial statements were based on a budget that has been prepared and submitted to the Ministry through VCHA.

[133] Ms. Proctor testified that if more money was required during the year PHC would have to ask VCHA if they had any money that they had not allocated and would they be willing to give it to PHC. If VCHA had allocated all of its funds, it would ask the Ministry for more funding.

[134] Ms. Proctor testified that PHC applies any surpluses that may occur to reducing its deficit. Ms. Proctor said this is an "ongoing commitment." She stated that there was a small excess of revenues over expenses for the fiscal year 2011. She stated that when this occurred that money "gets rolled into PHC's net assets equity on our balance sheet." Ms. Proctor agreed that PHC was not allowed to run a deficit, but in fact, it had a historical deficit, of $85 million. Currently it was $84 million. She stated that this had been permitted by the Ministry.

[135] In cross-examination Ms. Proctor admitted that although the PHC budget was to be balanced she "was riding a 1.8 million dollar deficit right now".

[136] Ms. Proctor estimated that PHC's budget amounted to about 22 percent of the VCHA budget.

13. Chronology of Dr. Dunkley's Residency

March 2010

[137] March 8: Dr. Dunkley was informed that CaRMS had matched her to a dermatology residency at UBC. The same day Dr. Dunkley called her former advisor, Dr. Warick, at the A&D Office to set up a meeting to start to put her accommodation in place for her residency.

[138] March 18: Dr. Dunkley met with Dr. Warick. She states that she understood that interpreter services would be provided to her.

[139] March 19: Dr. Dunkley e-mailed the PGME Office. She advised that she would be starting her dermatology residency in July. She stated that she is Deaf and

uses sign language interpreters in the medical setting. She advised that she had met with her advisor at the A&D Office to start the process to arrange for her accommodation requirements. She advised that the A&D Office needed the PGME Office to contact them as they required "official documentation" and that they could not proceed any further until they confirmed that they were responsible for incurring the costs for Dr. Dunkley's ASL interpreters. Dr. Dunkley asked that this matter be brought to the attention of the most appropriate person and stated that she would appreciate having a contact person who she could communicate with on a continuous basis. She stated that the "administrative process of securing sign language interpreters can take a while and July will be just around the corner".

[140] In an undated e-mail Ms. Moen, the Director of Administration for the PGME Office, responded to Dr. Dunkley's e-mail. Ms. Moen stated that the PGME Office would look into this and get back to her as soon as possible. Ms. Moen said that she would be Dr. Dunkley's contact person. Ms. Moen was not called to testify at the hearing.

[141] March 25: First year UBC residents are placed at one of three training sites (hospitals) by lottery. Dr. Dunkley e-mailed Ms. Moen to request placement at the St. Paul's Hospital site because of her need for proximity to the Ear Nose and Throat ("ENT") department (audiology) where she could receive services quickly and for proximity to the A&D Office.

[142] Ms. Moen responded in an undated e-mail (but the next in a chain) that she had discussed Dr. Dunkley's request with the Dermatology Director (Dr. Warshawski) and the Associate Dean, Dr. Rungta. Ms. Moen stated that the doctors had considered her request reasonable and as such had granted her the St. Paul's Hospital placement. Ms. Moen stated that "we are in discussions with both the employer and the university regarding your requirements for an interpreter and will most likely have some questions for you shortly so that the resources can be in place for July 1."

[143] March 28: Dr. Dunkley suggested to Ms. Moen that the PGME Office contact Dr. Forgie the Assistant Dean, Student Affairs, Faculty of Medicine, University of Ottawa as a resource. Dr. Dunkley stated that Dr. Forgie had already investigated the funding arrangements to pay for ASL interpreters in the event that Dr. Dunkley had ended up with a CaRMS match at the University of Ottawa. Ms. Moen responded by

e-mail that she would pass this information on to the "PG Dean". She assured Dr. Dunkley that "this", which I take to mean the provision of an interpreter, "will be sorted out in time for you to start your residency-so please bear with us."

April 2010

[144] April 4: Dr. Dunkley posted "a call for interpreter" on the Provincial and National Association for Visual Language Interpreters website. She provided information about the interpreter requirements to work with a medical resident.

[145] April 7: Dr. Dunkley e-mailed Ms. Moen. She said that there are no interpreters in Vancouver who have the experience and knowledge to interpret medicine. She stated that she was hoping to have her interpreter from medical school come to assist with the training of interpreters. She stated that, in the alternative, her partner has a few years of experience interpreting in medical school. In her view, they should look to him only if necessary. She further advised that she had already sent an invitation for interpreters via the National interpreting body to see who was interested in working with her. She had received replies and was screening them to see who would be appropriate for this kind of work environment.

[146] April 23: Ms. Moen e-mailed Dr. Dunkley. She asked for the name of Dr. Dunkley's "advisor" at the A&D Office so that the PGME Office could send them confirmation that Dr. Dunkley was a resident in order to confirm that the A&D Office is responsible for Dr. Dunkley's "requirement". The e-mail states in part:

> Have you officially registered with the UBC A&D Office – or did you just have a preliminary meeting? If you have not already registered, can you please do so. The UBC A&D office will be taking the lead in assessing your accommodation requirements at this point and you should discuss your interpreter requirements and your efforts to recruit one directly with them.
>
> Have you had any contact with Dr. Maria Corral, the SPH PGY1 site director regarding accommodations you may require in the clinical setting?
>
> Thanks for your help with this. (as written)

[147] April 26: Dr. Corral testified that the PGME Office first informed her by e-mail dated April 26 that Dr. Dunkley was being placed at St. Paul's Hospital for PGY 1, dermatology and that Dr. Dunkley was Deaf and required an interpreter. Ms. Moen

stated that the PGME Office was working out the accommodation logistics and the A&D Office would be taking the lead. Ms. Moen added:

> [Dr. Dunkley] is extremely organized and proactive and did her undergraduate degree at UBC, so she is familiar with the UBC A&D Office, which is helpful for us, because this is a first for Postgrad.

[148] April 30: Dr. Dunkley e-mailed Dr. Corral advising that she would have sign language interpreters with her for her residency. She inquired about when she would be provided with her schedule and other matters related to the most effective means of communication for the purpose of scheduling her interpreters. She explained that there would be two interpreters and a pool of back-up interpreters. The PGY 1 Office responded that Dr. Dunkley should receive her schedule in two to three weeks, that it would also be on-line, and that there should not be a problem giving her interpreters access.

May 2010

[149] May 3: Dr. Dunkley e-mailed the PGY 1 Office advising that she had been invited to speak at the Deaf Canada Conference. She stated that she would need to be excused for two hours to give her paper in mid-July 2010. She wanted to ensure that she made proper arrangements.

[150] In an undated e-mail to Dr. Dunkley, the PGY 1 Office stated that UBC had let them know about two weeks ago that she was placed with them, was Deaf and that UBC and the UBC A&D Office were addressing her accommodation needs. The Administrator noted that the PGY 1 Office had not as yet heard anything from the A&D Office. The Administrator further stated that she and Dr. Corral would like to meet with Dr. Dunkley in June, after Dr. Corral returned, to discuss Dr. Dunkley's needs and St. Paul's Hospital's responsibilities.

[151] May 4: Dr. Dunkley replied that she would be on holidays in June, returning June 23, 2010. She stated that she would be in Vancouver on May 6 and 7 interviewing interpreters. She explained her need for separate e-mail communication with her interpreters for the purpose of privacy and noted that she would need interpreters over night when she is on call and when she was required to do obstetrics/gynecology or surgery where everyone is wearing a mask and she cannot lip

read. She inquired whether St. Paul's Hospital could provide a call room for her interpreter to sleep at the hospital when the interpreter is not working.

[152] May 5: The PGY 1 Office responded and, among other things, asked whether they could be in touch by e-mail during Dr. Dunkley's holiday. Ms. Moen asked for further clarification about Dr. Dunkley's interpreter requirements.

[153] May 5: Ms. Moen and Dr. Corral exchanged e-mails. Ms. Moen updated Dr. Corral about what Dr. Dunkley had said she required. Dr. Corral indicated that they required a meeting and that Dr. Dunkley needed to know that they needed more lead time and, in the least, they needed a list from her respecting her requirements. Dr. Corral raised the question of finances and whether there would be "extra costs incurred associated with Dr. Dunkley's accommodations." Dr. Corral testified that the PGY`1 Office did not have a budget to cover Dr. Dunkley's accommodation requirement for interpreters and consequently she would have to involve the Vice President of Medical Affairs and various individuals at PHC, and they in turn would have to involve individuals at VCHA to work out the details.

[154] May 6 and 7: Dr. Dunkley came to Vancouver to interview ASL interpreters.

[155] May 11: Ms. Moen e-mailed Dr. Dunkley advising that they were working with UBC counsel to determine who is responsible for the costs of Dr. Dunkley's accommodation requirements. Ms. Moen stated that "they needed more comprehensive information from Dr. Dunkley".

[156] May 18: Dr. Dunkley responded to Ms. Moen's May 11 e-mail. She apologized for the delayed response. She was out of the country for nine days. She reminded them that she would be away again from May 24 to June 23. She was in the middle of moving and was about to attend her graduation. She would try her best to compile a list of her accommodation requirements.

[157] May 23: Dr. Dunkley provided a list to Ms. Moen, stating that she required:

- a brief memo to rotation director to let them know that I use sign language interpreters and have been doing this all throughout university. They can ask me questions if they have any.
- Lecture topics and contents e-mailed to the interpreters, if possible, so they can prepare.
- Locating to be informed to page me instead of calling my name. Locating to page me for codes.

[158] May 26: Ms. Moen forwarded Dr. Dunkley's requirement list to the PGY 1 Office. Ms. Moen wrote in her cover note:

> Attached is the e-mail I received from Jessica. She did not include the interpreter requirement as she is dealing directly with the UBC Access/Disability centre. It is still unknown who will be paying for the interpreters. Will let you know as soon as we have confirmation. I expect all of us will have to meet at some point to clarify who is responsible for what. (as written)

[159] Dr. Rungta testified that he became aware of Dr. Dunkley's contact with Ms. Moen in "late-May" 2010. He testified that when he first read the e-mail chain about the accommodation request at the end of May 2010 his initial expectation was that any request for accommodation would be funded by the A&D Office and so he "went along with it, to realize later that obviously they [the A&D Office] were not responsible given the dual status of residents". He testified that this was the first time the PGME Office had encountered this kind of disability and accommodation request.

[160] Dr. Rungta agreed that at the end of May it was his understanding that the A&D Office was involved and thus he copied Dr. Warick on his correspondence.

June 2010

[161] June 1: Dr. Rungta wrote to Dr. Dunkley. The letter states in part:

> Dear Dr. Dunkley:
>
> RE: Request for Accommodation
>
> Since you first contacted our office we have been engaged in ongoing discussions regarding your request for accommodations for the duration of your dermatology residency training which is commencing July 1st, 2010. Also, we have been copied on your correspondence to Ruth Warick in the Access and Diversity office.
>
> I understand your frustration over not having received a definitive answer with respect to your request to be provided with an interpreter to accommodate your disability. As we have previously noted this is a complicated matter….
>
> We have reviewed the list of requirements that you sent in response to our latest inquiry. Assuming this is a complete list we expect that most of your requests can be accommodated. However, we require further information regarding your request to be provided with an interpreter. We need to understand the necessity for an interpreter and in particular whether other

forms of accommodation may also meet your needs. Also, we need to understand fully the costs associated with this request as this is one of the factors that will be taken into account in determining the scope of our duty to accommodate you disability. Without additional detailed information we are unable to provide a definitive response to your request for accommodation. We require the following information in order to fully assess your request:

1. Medical documentation related to your condition that supports the requested accommodations. This could be in the form of the release of your file from either the University of Ottawa, or the Access and Diversity office at UBC. You must provide written release to either, or both, of these offices authorizing disclosure of the information to this office. Alternatively you can provide an updated medical assessment that describes the impact of your condition on your training and employment while in the program.

2. Details related to your requirements for an interpreter. It would be helpful if you could provide a range of options outlining what you consider the best possible accommodation and what you consider to be your minimum requirements. Do you require an interpreter on a full time basis? How many hours a day will you require the service? Might a part time interpreter fulfill your requirements?

3. Estimates of the costs associated with employing an interpreter. The costs estimates should include all costs of the contract with the interpreter based on your expected requirements. e.g. salary and benefits expected including overtime and other expenses.

We understand that the University of Ottawa paid the full costs of the particular accommodation you requested during your undergraduate program. However, the same situation may not necessarily prevail in relation to your postgraduate training. In addition to the costs involved in engaging an interpreter there are potential insurance and liability issues related to your work in the clinical setting that require consideration. In any event we will not be in a position to make a decision until we have more complete and detailed information related to your request.

We look forward to receiving this information at your earliest convenience. We understand the need for a prompt response and will proceed as quickly as we are able. However, you must understand that we are unable to proceed any further with regard to this particular request on the basis of the information provided to date.

Regards

Kamal Rungta, MD

[162] Dr. Rungta testified that his reason for writing the June 1 letter to Dr. Dunkley was that when he became aware of the earlier correspondence he was very concerned

about being prepared to provide Dr. Dunkley training on July 1st. He testified that there were a lot of questions in his mind at that point and the letter was written to try to get a clearer sense of Dr. Dunkley's needs and the requirements of the dermatology program.

[163] June 5: Dr. Dunkley sent an e-mail to the PGME e-mail address, which was then forwarded to Ms. Moen, Dr. Rungta and Dr. Webber on June 7. In summary Dr. Dunkley explained her need for interpreters, advised that "based on her experience [she] always had at least two full time interpreters so that they could take turns throughout the day." She stated that the number of interpreters also depended on the competence of the interpreters themselves and the nature of the rotation. She stated that she had never been responsible for negotiations for rates, salary or overtime. Agreements for interpreter services were made between the university and the interpreters, thus she was not in a position to comment on costing matters. Dr. Dunkley included her Audiology Report dated February 2010 and Letter for Exam Purposes, dated April 2010.

[164] June 3: The PGY 1 Office e-mailed Ms. Moen at the PGME Office, stating:

> Maria [Dr. Corral] and I wanted to update you on our arrangements for Jessica Dunkley. We still haven't received a document from her outlining the specific accommodations we will need to arrange for her at St. Paul's. The only list we can operate with is the one you forwarded to us on May 26th in which Jessica mentions the extra call room/bed for her interpreter, memos for rotation supervisors, etc.
>
> Maria also initiated a general discussion on accommodating residents with disabilities at the last PHC Medical Education Committee meeting and we got some interesting responses from representatives of Surgery and Ob/Gyn departments with respect to accommodations during surgeries and c-sections. It was agreed that further discussion and more specific information was needed once we get the list from Jessica.
>
> Maria is going to send a memo to all teaching departments at SPH and the rest of Jessica's preceptors during her PGY1 outlining the accommodations we know of (presence of interpreters, do not use P.A. system to page her). Please let us know if you hear anything more from either Jessica or the UBC Access & Disability office and we'll stay in touch with regards to the proposed meeting with Jessica, her program director, Access and Disability office, and anyone else who should be included.

[165] June 7: Ms. Moen e-mailed the PGY 1 Office, stating "It has been determined that it is our office [PGME Office] that will be responsible for coordinating [Dr. Dunkley's] accommodation, not Access and Diversity."

[166] Ms. Mee testified that "once we realized that it was the medical residency program, then we let the program know that we were not the correct source for funding". The decision of the A&D Office to not provide services to Dr. Dunkley will be dealt with in detail later in my decision.

[167] June 7: Dr. Corral testified and entered documentation regarding her e-mail to Dr. Carere [PH], the VP of Medical Affairs, Salima Harji [PH] the Director of Medical Affairs, and others "PH" people to let them know that Dr. Dunkley had been matched to St. Paul's, she had a hearing impairment, and the PGY 1 Office had been working with the PGME Office to clarify the need for accommodation. She informed them that the PGY 1 Office was working with the PGME Office to clarify the issue of financial responsibility for the accommodation. She advised that "we will let you know more information as we know."

[168] June 21: Dr. Rungta wrote to Dr. Dunkley, advising that they have not been able to resolve "all outstanding issues to accommodate [Dr. Dunkley's] July 1, 2010 start date." He said she would be paid effective July 1. Further, "As the interpreter will not be engaged by July 1st we expect you will have to delay commencing your clinical duties for a short period. We will make every effort to integrate you in the program at the earliest opportunity." Dr. Dunkley was asked to provide any information, including any resumes she has regarding potential interpreters to the PGME Office at her earliest convenience.

[169] June 23: A memo written by Dr. Corral was sent to the Preceptors and Department Teaching Heads informing them that Dr. Dunkley was matched to St. Paul's Hospital as a dermatology resident, that she had a hearing impairment and used sign language interpreters, and that the PGY 1 Office was still working on the provision of accommodations to Dr. Dunkley along with the PGME Office. She welcomed contact or questions.

[170] June 29: By e-mail, Dr. Webber, now also the associate dean, and Dr. Rungta wrote to Dr. Warshawski. They stated that the issue of paying for the interpreters for

Dr. Dunkley had not been resolved and would delay her starting the residency program.

[171] June 29: The PGME Office e-mailed Dr. Corral to say that Dr. Dunkley would not be starting July 1 as scheduled. Dr. Corral raised the question of if Dr. Dunkley could be reassigned to start the year with a research block.

[172] Dr. Corral testified that the PGY 1 Office was informed two days before Dr. Dunkley was to start her first residence block that she would not be starting. By this time a schedule had been drawn up. Dr. Dunkley was scheduled to begin psychiatry and was on the call schedule.

[173] The PGY 1 Office informed the psychiatry rotation director that Dr. Dunkley's rotation had been cancelled. Dr. Corral pursued other alternatives that might allow Dr. Dunkley to begin her PGY 1 year on July 2nd. Dr. Dunkley stated that Dr. Corral suggested that she look for a supervisor to do some research with. Dr. Dunkley was able to find Dr. R to do a two week research elective.

[174] June 30: Dr. Corral e-mailed Dr. Dunkley to advise that she had spoken with Dr. Webber, who was able to contact Dr. Warshawski who agreed that Dr. Dunkley could start her PGY 1 year with a research elective.

July 2010

[175] Dr. Corral testified that during Block 1, the first four weeks of July, Dr. Dunkley did a research elective. (To clarify, the facts are that Dr. Dunkley did two weeks of a research block, which she continued with in October. In late July, she did a one week elective in an outpatient rheumatology clinic.) In Block 2, Dr. Corral was hoping to be able to schedule a family practice rotation or an ambulatory rotation which might not require interpreters. But at that point the PGY 1 Office could not proceed without receiving further instruction from the PGME Office regarding the need for accommodations.

[176] July 7: Dr. Corral sent the first year residents including Dr. Dunkley the "Royal College PGY 1 Program: St. Paul's Hospital" "Summary of the Expectations of PGY 1 Residents". Among other things the residents were advised that:

> In order to receive credit for your rotations and for the Academic portion of the year, you are required to attend 75% of your rotation and academic half-days.

[177] July 12: The PGY 1 Administrator e-mailed Dr. Corral to say that she had received an e-mail from Ms. Knowles about a meeting planned for July 20 at 1 pm to discuss "Jessica". The Administrator reminded Dr. Corral that her first meeting with the residents was scheduled at that time and she asked whether Dr. Corral had heard about the meeting Ms. Knowles was referring to. Dr. Corral had no notice of this meeting. She had never been contacted. The Administrator contacted Ms. Knowles to try to change the meeting time.

[178] Dr. Corral testified that she understood that Ms. Coughlin and Ms. Knowles were responsible for figuring out the types and costs of various accommodations for all individuals who work at PHC.

[179] July 13: Dr. Corral e-mailed Dr. Dunkley, saying that Ms. Knowles from VCHA advised she was trying to schedule a meeting to discuss the accommodations Dr. Dunkley required to begin her PGY 1 residence. Dr. Corral stated that she had not been contacted by Ms. Knowles, the PGME Office or the Department of Dermatology. She asked Dr. Dunkley whether a meeting had been scheduled. Dr. Dunkley informed Dr. Corral that PAR-BC was scheduled to attend a meeting with Dr. Rungta and Dr. Webber on July 20. Dr. Dunkley further advised that PAR-BC had made efforts to include Ms. Knowles and the disability management team.

[180] July 13: The PGY 1 Administrator e-mailed Dr. Dunkley about her next rotation. She wrote:

> Thanks for coming over today to talk to me about your rotation schedule. I understand that you are in a difficult situation, waiting for your clinical rotations to start. However, I would like to let you know that after a discussion with Dr. Corral we have decided to hold off with arranging any rotations in Block 2 (including Family Practice rotation) until we receive clear directions from the Postgraduate Deans Office, your Program Director, and other parties involved in discussions regarding your residency and Basic Clinical Year (PGY 1) at St. Paul's Hospital.
>
> For Block 1 you are scheduled to do Research Elective and Block 2 will be reserved for Electives as well. As of today, you are scheduled to do Family Medicine in Block 3 and I will try to help you with setting up a rotation at one of the Downtown East Side clinics, as we discussed today.

> Please stay in touch via email with Dr. Corral and myself should there be any updates or changes to your situation.

[181] July 14: Dr. Corral e-mailed Dr. Warshawski advising that Dr. Dunkley was to start her four week ICU rotation on July 26th; however, her accommodations were not in place. Dr. Corral sought advice from Dr. Warshawski on what to do. She suggested that Dr. Dunkley could do another elective. Dr. Warshawski responded, "we are going to have to proceed according to the PG Dean's office directions."

[182] July 20: Dr. Dunkley attended a meeting with Dr. Rungta and others. Based on the list of meeting attendees and testimony I find that an ASL interpreter was not at this meeting. Dr. Rungta testified that:

> …by that meeting Dr. Dunkley had begun her training and we were fortunate in that Dr. Dunkley had provided us with information that when training as a medical student in family medicine she had not required interpreters, so we reorganized her schedule such that we could begin her with family medicine. So, we had been successful in accomplishing that. We had also,…. just to facilitate things getting on, we said we would cover interpreter services for the Academic Half Day component.

[183] July 21: Dr. Rungta provided Dr. Dunkley with the following summary of the July 20 meeting. The letter states:

> Thank you for meeting with representatives from Post Graduate Education and from the employer.
>
> It was helpful for us to identify how we are going to obtain the information that will allow the University and the Health Authority to appropriately respond to your request for accommodation. As we discussed, the hospital and the University will coordinate their efforts to address this matter.
>
> We agreed to the following steps:
>
> Expedite an appointment for you to meet with an ENT specialist for an assessment and recommendations regarding what accommodations would be necessary for you in the different learning environments that you will encounter during your residency training. To that end Dr. Maria Corral will provide a list of these environments for the PGY1 year. We will consult with Dr. Larry Warshawski to determine if there are additional settings that will need to be considered over PGY 2-5.
>
> In our discussion you identified that as a medical student you did not require interpreter services during a Family Medicine block. Based on your past experience and in order for you to begin your residency training while we are

> gathering essential information, Dr. Corral will try and arrange for you to begin a Family Medicine rotation as soon as possible. Also, on a "without prejudice" basis and in good faith I agreed to provide remuneration for interpreter services for the academic half days during this rotation while we work toward a comprehensive resolution with respect to accommodation for the rest of your residency training.
>
> At the employer's request I will ask Dr. Warshawski to provide additional details with respect to the rotations to be completed during the rest of your residency training and whether it will be possible to limit your placement to as few Health Authorities as is possible without compromising your training in any way.
>
> As we discussed in the meeting there are significant differences between Undergraduate and Residency training, including the fact that you are not a student of the University and you are an employee of the Health Authority, that affect your request for accommodation.
>
> Thank you for your understanding and patience as we assess and respond to your request.

[184] Dr. Dunkley testified that at the July 20 meeting the "Health Authority" people agreed that they would expedite an appointment for her with an ENT specialist. She explained that she was told that the audiology report and letter were not sufficient. They wanted a report from an ENT specialist. Dr. Dunkley said that once she had been diagnosed as deaf by an ENT specialist she had since been followed by audiologists.

[185] July 21: Dr. Corral e-mailed the group who attended the July 20 meeting to confirm the decisions taken. She wrote:

> I wanted to summarise my understanding of the next steps from our perspective at the PGY I Program office at St. Paul's with respect to Dr. Dunkley's accommodation process:
>
> 1. We will assist Dr. Dunkley in obtaining a family physician.
> 2. We will assist Dr. Dunkley with securing a Family practice rotation within Vancouver Coastal Health to start on either July 26th or August 23rd.
> 3. We will assist Dr. Dunkley in securing an elective Ambulatory rotation within Vancouver Coast Health to start on either July 26th or August 23rd.

4. We will collect a description of the "clinical environment" for each of the following rotations (including on-call responsibilities) by July 28th.

   a. Psychiatry

   b. ICU (Intensive Care Unit)

   c. CTY (Clinical Teaching Unit)

   d. General Surgery

   e. Obstetrics and Gynecology

   f. Emergency

   g. Paediatric Emergency

   h. Paediatric Ambulatory Care

Please let me know if I have forgotten anything.

[186] Dr. Corral provided above noted item four within one week of the July 20 meeting.

[187] Dr. Dunkley said that the idea of changing her program came up at the July 20 meeting. She had indicated that she did not want to change the training program. I address this evidence below.

[188] July 21: Dr. Dunkley was advised that efforts were still being made by the PGY 1 Office to allow her to start a family practice rotation on July 26, but it was not as yet confirmed.

[189] July 23: The PGY 1 Office e-mailed Dr. Dunkley advising that there was as yet no confirmation of a family practice rotation for her on Monday, July 26. On the same day Dr. Dunkley e-mailed a doctor, introduced herself saying that her rotations were re-arranged at the last minute and asking if she could start her rotation with him on Monday. She advised that she had just been provided with his contact information from the PGY 1 Office.

[190] July 23: Dr. Dunkley filed her human rights complaint. She testified that she did so:

> Because by that time it had already been about four months and there had been very minimal progress and that I was constantly trying to be involved in this accommodation process but I felt like they were not including me in their provision of accommodating me. And I felt that they were not working in good faith to accommodate me in the residency.

[191] July 26: Dr. Dunkley completed a one week outpatient rotation at a rheumatology clinic (elective) from July 26, 2010 to August 1, 2010.

August 2010

[192] August 13: Ms. Knowles e-mailed the group who attended the July 20 Meeting to say that she understood that Dr. Dunkley had an appointment with a specialist on August 17. Once the specialist had completed his/her assessment "the Employer can begin to review the parameters of a reasonable accommodation".

[193] August 13: Dr. Dunkley emailed, among others, Ms. Knowles, Dr. Corral, Ms. Coughlin, and Ms. Victory, stating:

> For clarification, my appointment on Tuesday is at the ENT residents' clinic. I do not have an appointment with a staff physician yet. Since an appointment was not confirmed with a specialist as agreed at the July 20th meeting, I decided to take matters in my own hands and went to the ENT department at St. Paul's to request an appointment. The best option they gave me was to go to the residents' clinic on Tuesday.

[194] August 15: As follow up on the tasks set at the July 20 meeting Dr. Rungta testified that he asked Dr. Warshawski "to provide [him] with information regarding the potential environments, training environments that Dr. Dunkley would have to be trained in to understand how those environments work with respect to the accommodation required, or would work".

[195] In his August 15 e-mail, Dr. Warshawski stated that he had a long interview with Dr. Dunkley before the CaRMS applications. He had understood from her that interpreters would not be an issue as she had a good interpreter(s). He stated that he did not inquire about funding. He "wrongly assumed that there were other agencies involved." Dr. Warshawski explained that Dr. Dunkley was accepted into the program based on her outstanding CV. He stated that he did not think that her hearing would prove to be a major problem during her 3rd to 5th core dermatology years because most patient contact is one on one. The first two years of residency will be the difficult ones as Dr. Dunkley will be involved in less controlled situations. He stated that "we" can tailor her rotations and electives to help avoid situations where she may run into more challenging circumstances. In general, he assured Dr. Rungta that he thought the residency would work out and that Dr. Dunkley will be an "outstanding

practitioner". He stated that he would be delighted to join any meetings where plans for [Dr. Dunkley's] training are being formulated.

[196] August 23: Dr. Dunkley commenced the Family Practice Rotation with preceptor Dr. K.

[197] August 24: Dr. Corral called Dr. Dunkley in to a meeting after an e-mail interaction respecting the arrangement of the ENT Specialist appointment for Dr. Dunkley and Dr. Corral's view that Dr. Dunkley was getting angry and frustrated. Dr. Corral testified that at their meeting Dr. Dunkley stated quite emphatically that she felt that UBC and St. Paul's had not been supportive of her and that UBC and St. Paul's were systematically discriminating against her. She also stated that people in the Deaf community were angry and they had contacted the media. Dr. Corral testified that Dr. Dunkley said that the only accommodation for her was full-time interpreters and that she had a right to education at any cost: it should not come with a price tag.

[198] Dr. Corral testified that she said "you know I appreciated that the process was very stressful and that we were there to try and help her negotiate the process." She stressed that it would be important to work within the system to try and achieve her goals and that "we were trying to be as supportive as we could to help her gain accommodations."

[199] August 30: Dr. Dunkley saw the ENT Specialist.

[200] August 30: Dr. Rungta e-mailed Dr. Dunkley advising that he had just returned from his holiday and had received a call from the Globe and Mail to discuss her situation. He wished to have a face to face meeting with her the following day if she were available on such short notice.

[201] August 30: Dr. Rungta testified that they had funded some Academic Half Days by this point.

[202] August 31: Dr. Rungta testified about his meeting with Dr. Dunkley. He stated that Dr. Dunkley said that she had completed two weeks of research time and had ongoing work related to research projects that she was attending. He said:

> So, the first two rotations we had organized for Dr. Dunkley were ones where we felt there would be no interpreter services required in the clinical settings. So research is obviously a setting where you don't require interpreter services necessarily, and family medicine was the other one. So she had at that point

> completed two weeks of her research block, and she was currently doing the family rotation and was scheduled to start surgery in three weeks.

[203] Dr. Rungta also testified that during this meeting Dr. Dunkley told him that she required interpreters for the remainder of her program.

[204] Dr. Rungta testified that the Globe and Mail had contacted UBC as it was going to do a feature on Dr. Dunkley. Dr. Dunkley said that she was going to say that there was a flaw in the system for disabled medical students to be able to get the necessary accommodations in PGME. Dr. Rungta testified that:

> I really took to heart what Dr. Dunkley said, which is that her assumption, I think, had been because that had always been the case for her, which is that her - all her undergraduate training both at the University of British Columbia and the University of Ottawa have always been provided with no specific obstacles or barriers. And when she matched to the residency program, it was a whole different landscape. And I think it was my impression that Dr. Dunkley was operating on the fact that she was at a university and why should you know, why should it not be just as it was, but it was not as it was. And I think that that was somewhat difficult to begin to change, so to speak.

[205] August 31: In his notes, following the meeting Dr. Rungta wrote in part:

> Dr. Dunkley stated that she was going to state there was a flaw in the system for disabled medical students to be able to get the necessary accommodation from PGME.
>
> I did respond by saying that residents have different arrangements with respect to their employment and academic training (illegible) that this is province and health authority specific. In BC and Saskatchewan the resident organizations have a collective agreement with the employer as the HA in BC and the school of medicine in Sask. The (illegible) province have (illegible) association arrangement. Each University and HA has their own Disability Access policies and process. It is not at all the same landscape as the UE Medicine. It was the prospective resident's responsibility to get this info prior to ranking in CaRMS.

[206] Dr. Dunkley testified that at one point during this meeting Dr. Rungta turned away from her and she had had to remind him to look at her when she spoke. She testified that he responded by laughing and that made her feel quite hurt. Dr. Rungta testified that he didn't recall this, but if he did laugh at her, it probably was nervousness. He said that he often forgot when he was speaking with Dr. Dunkley that she had a disability because she lip read quite well when he was facing her directly.

September 2010

[207] September 1: Dr. Dunkley saw the ENT Specialist again.

[208] September 7: The ENT Specialist responded to Ms. Coughlin's inquiry of August 18 to review Dr. Dunkley's hearing impairment and its impact on her residency training by way of his report dated September 7, 2010 (the "Report"). The Specialist stated that Dr. Dunkley has had bilateral hearing impairment since birth. The testing that she participated in indicated that she has a "profound hearing loss". She is able to function well in a one to one situation, relying on a hearing aid and lip reading. His opinion was that "it would not be possible for Dr. Dunkley to complete her residency training without liberal access to a sign language interpreter" and that a sign language interpreter would be required a substantial amount of the time, especially in team situations.

[209] Dr. Rungta testified that after receiving the Report there were meetings with the employer "because they were also very interested in the Report and we at that point, I think, began to look at exactly what would be required and how much it would cost".

[210] September 12: Ms. Coughlin e-mailed Dr. Corral raising the issue of Dr. Dunkley's deafness and its impact on patient risk. Ms. Coughlin remarked that the doctors, including the Dean, thought it would be fine because Dr. Dunkley "would never actually be on her own". Ms. Coughlin remarked that they would have to clarify this so that a physician was always with Dr. Dunkley so that she was not the one directing care in a critical situation, should it arise. She remarked that she would talk to the hospital's insurers to request what they feel is an acceptable level of risk.

[211] September 13: Dr. Rungta e-mailed Dr. Corral confirming that the "employer group" was seeking information on necessary program modifications from Dr. Corral regarding PGY 1 and from Dr. Warshawski regarding PGY 2 to 5.

[212] September 14: Dr. Corral testified that in her view all issues raised other than the provision of interpreters could be accommodated.

[213] September 15: Dr. Dunkley's preceptor Dr. K for her family rotation advised Dr. Corral that, in his view, Dr. Dunkley was "not functioning at the level we would expect from a Royal College R1 resident". Dr. Corral asked him to put this in writing. Dr. Dunkley agreed to do a further rotation with Dr. K. It went well. Dr. Dunkley

testified that two things were at play which interfered with her ability to function. One was Dr. K's very strong South African accent and his tendency to mumble; the other was that she was under extreme stress as she saw her dream of working as a doctor being destroyed.

[214] September 15: Dr. Dunkley e-mailed Dr. Corral asking how she should respond to the directives and information she was receiving respecting her surgery rotation which was to start in one week when "there isn't anything in place yet".

[215] September 15: Dr. Corral e-mailed Dr. Dunkley cancelling her next rotation.

[216] September 15: Ms. Coughlin wrote to Dr. Dunkley advising that following the Report, she discussed issues relating to accommodation with physicians involved in the program, such as whether the program requires modification, costs associated with interpreters' services, and patient safety and acceptable risk.

[217] September 16: Ms. Coughlin e-mailed Anne Harvey (Corp) and Dr. O'Connor (VA) indicating among other things that the "rough estimate" for the interpreter costs are 2.5 to 3 million dollars. I deal with the evidence regarding this estimate below.

[218] In response, among other things, Dr. O'Connor stated, "We certainly should be splitting any costs (I hope yet to be determined and made as efficient as possible) as at this cost level all sorts of impacts will be felt both at UBC and VCH/PCH." This e-mail was sent to Dan Chittock [VA]; Dr. Carere [PH]; and copied to Harvey Lui [VA], Anne, Harvey [CORP]; Stuart, Gavin [VA], Clay, Adams [CORP].

[219] The September 16 e-mail from Ms. Coughlin to Anne Harvey and Dr. O'Connor included the following information:

> I was speaking with Catherine Kidd this morning and she asked I provide both of you with a history and update as to what is happening with our hearing impaired resident. I know, Anne, that you have not been made aware of this situation as yet, but it is a really big deal that will have to go to senior leadership for resolution.

[220] September 17: Ms. Coughlin e-mailed Dr. Rungta and Dr. Webber, noting Ms. Knowles estimates that the cost of providing interpreter services to Dr. Dunkley will be three million dollars.

[221] Dr. Rungta testified that sometime in September he got information through representatives of PHC about "the events that occurred in Ottawa". He stated that the information he was provided included the cost of the interpreters. Dr. Rungta "recalled

it as being one million dollars". He testified the he was informed that this amount was expended throughout the medical program but primarily during the last two years of medical training that are clinical.

[222] September 20: Dr. Dunkley commenced another block of rotation in Family Practice.

[223] September 21: Dr. Corral e-mailed Dr. Rungta and Dr. Webber (copied to Ms. Coughlin, Ms. Ciamielllo, Dr. Carere), that Dr. Corral has reviewed the goals and objectives documents for all of the rotations that a PGY1 Dermatology resident would be expected to complete during their PGY 1 at St. Paul's. She had summarized the competencies that would require modification for a hearing impaired resident and attached the document. She stated that there were "patient safety and consent issues that we believe need to be considered". Dr. Corral testified that "it came up whether there would always be somebody supervising physically in close proximity to Dr. Dunkley, supervising her work, and that is not feasible because, again, residents are expected to do a lot of the work independently and then report back to their supervisors".

[224] Mid-September: In response to the concern that she was a safety risk, Dr. Dunkley provided a list of contact names to PHC, PGME and VCHA (the "List"). They were:

Dr. Moineau:	Dean of Medical Education, University of Ottawa
Janet Null:	Dr. Dunkley's interpreter during her medical degree
Dr. Bressler:	Family Practice, Toronto
Dr. Moreland:	Internist, Texas
Dr. Osterling:	Pediatric Neurologist, Spokane
Dr. McKee:	Family Practice Rochester
Dr. Russell:	Professor, University of Alberta and David Peikoff Chair of Deaf Studies
Gary Malkowski:	former M.P.P. Toronto, special Advisor to President, Public Affairs

The Canadian Hearing Society
Deaf Access Office of British Columbia

[225] Dr. Dunkley testified about the qualifications and the assistance the people on the above noted List could offer.

- Dr. Moineau: Dean of Undergraduate Medical Education at the University of Ottawa. She would be able to comment on Dr. Dunkley's performance at the University of Ottawa.
- Janet Null: Dr. Dunkley's ASL interpreter who worked with her for the four years of medical school. Ms. Null was a nationally certified interpreter. Previous to this she worked as a mental health counsellor. Ms. Null could comment on Dr. Dunkley's expertise and experience from an interpreting perspective.
- Dr. Bressler: A deaf family physician practicing in Toronto. He went to medical school at McMaster with sign language interpreters, and also completed his residency with some sign language interpreters. He is a practicing physician with a very similar hearing loss to that of Dr. Dunkley and could contribute information respecting his experience.
- Dr. Moreland: A Deaf internist in San Antonio, Texas, who had used interpreters in medical school, residency, and as a practicing internist.
- Dr. Osterling A Deaf pediatric neurologist who also had interpreters in medical school and residency.
- Dr. McKee: A Deaf family doctor, who had interpreters in medical school and residency in Florida, and was practicing in Rochester independently.
- Dr. Russell: A professor at the University of Alberta and a director of the David Peikoff Chair of Deaf Studies. Dr. Dunkley stated that she put Dr. Russell's name on the list because she is one of the most respected scholars in Canada as an interpreter and as a professional, and she used to be one of the interpreters for Dr. Bressler while he was in medical school. Dr. Dunkley stated that, in her view, Dr. Russell could contribute from both an academic and experiential perspective.
- Gary Malkowski: A Deaf former member of the provincial Parliament in Toronto for four years. Mr. Malkowski had a team of full-time interpreters with him during his entire time he ran as an MPP, and he was a special advisor to the Canadian Hearing Society. So from a legal

perspective and as a user of interpreters in a professional setting, Dr. Dunkley thought that he would be a good contact person.

- The Deaf Access Office: which is under the provincial services for the Deaf and hard of hearing within the ministry in BC. Dr. Dunkley stated that this office dealt with accommodation issues and education and about accessing services for the Deaf.

[226] September 27: Dr. Corral testified about her meeting with Dr. Dunkley after Dr. Corral conversed with Dr. K about his concerns. Dr. Corral testified that Dr. Dunkley informed her that she felt that the rotation with Dr. K was a challenging rotation and that she concluded that she would require an interpreter for subsequent outpatient rotations based on the experiences in that rotation. Dr. Corral concluded that this meant that all future rotations would require interpreter services.

[227] September 29: Dr. Dunkley e-mailed the PGY 1 Office and Dr. Corral, stating that she would like to stay at the family medicine clinic and would take her holiday after she completed her family medicine rotation "as she knows she won't be working at the hospital by that time." The PGY 1 Office responded that this was fine.

October 2010

[228] October 7: PAR-BC emailed, among others, Ms. Coughlin (copied to among others Dr. Rungta), noting that to date no accommodation had been provided to Dr. Dunkley since July 1, 2010. Dr. Dunkley had completed her second rotation in family medicine which could have benefited with the provision of an interpreter. At this time no further information had been provided about her next rotation. The writer included a copy of the list of people Dr. Dunkley suggested that they contact to obtain further information about the Deaf and Deaf doctors.

[229] October 7, 2010: Ms. Coughlin addressed Dr. Dunkley in an e-mail, stating that she had spoken to her colleagues who had decided that they did not need to speak to the people on the contact list "to answer [their] questions". Ms. Coughlin's e-mail noted that "this was a very complex issue". This e-mail was also sent or copied to Bonnie Kwan (Par-BC), Rebecca Knowles (PH), Janice Victory (PH), Pria Sandhu (Par-BC), Maria Corral (PH), Drs. Kris Sivertz/Kamal Rungta (med UBC), Catherine Kidd (CORP).

[230] Dr. Rungta testified that "[He] was happy that … Dr. Dunkley was doing everything in her power to provide us with helpful information". He did not contact any of the persons on the List nor did he believe that anyone else had. He testified, "We did not [contact people on the List] because the issue for us was not in providing the training. I mean, at this point we really believed we could provide the training, that that was not the issue. The issue was whether we would have the necessary resources to provide the training, which includes getting the interpreters and paying them and so forth."

[231] October 12: Dr. Dunkley was asked to attend a meeting attended by Dr. Rungta and Dr. Kernahan, the PGME Office associate deans, Dr. Warshawski, Dr. Corral, a recording secretary and an interpreter. At the conclusion of that meeting Dr. Rungta told Dr. Dunkley that she was being put on paid leave from her residency until the matter of her accommodation was resolved.

[232] Dr. Rungta testified that the purpose of the meeting was to provide an update with respect to "our" attempts to resolve the requested accommodation. He said that he informed Dr. Dunkley that it was a "complicated" matter that required collaboration with the university and the hospital. He told her that "although financial considerations were not the sole consideration, they were very significant in terms of being able to provide the accommodations and … that our duty to accommodate was not open ended if we did not have the resources to accommodate her".

[233] Dr. Dunkley testified that Dr. Rungta read from a script. Dr. Rungta sent Dr. Dunkley a letter summarizing the October 12 meeting. A few excerpts follow:

> 1. Although we have discussed this previously it is important to reiterate that the process for accommodation and the issues that must be considered are considerably more complex in the Residency Training Program than in undergraduate studies. Even though you (Dr. Dunkley) will have done some clinical rotations in undergrad there is a world of difference between that training and postgraduate training with respect to the situations in which you are placed, the training and performance expectations, and your relationship with patients, your peers, supervisors and colleagues. This has made responding to the request challenging and has underscored the need for cooperation between the University and the hospital.
>
> 2. You (Dr. Dunkley) must understand that financial considerations, while not the sole considerations, do play a significant role in determining whether the full accommodation you seek can be provided. This is a reality we must face.

We have to be able to identify a source for funding this accommodation, particularly the costs of providing interpreters, as the office of the postgraduate dean does not have a budget for matters of this nature. We are working to resolve this matter but it could be a serious barrier to proceeding. Our duty to accommodate is not open ended and is limited to the point of undue hardship –financial hardship is a consideration.

3. A second point to note is that we have not had any experience in providing an accommodation of this nature and it has taken time to gain an understanding of exactly what will be required and then to determine whether or not what is needed can be provided while still meeting the goals of your training program and the standards of the Royal College while providing safe patient care. It has become clear to us that it is not possible to say with certainty and with respect to all situations that may arise during your program what will be required and what can be provided. Although we will start out with some basic principles and guidelines the nature of the exercise will require that there be ongoing assessment and possibly adaptation. Not all proposed accommodations will work and some situations may require a more dramatic accommodation than initially thought. As we go through the exercise we will always have to be evaluating whether the accommodations are meeting your training goals. Changes to the program, as sanctioned by the Royal College, maybe required to allow you to complete your training. It is not possible at this stage to provide a guarantee that we will be able to find a workable solution to the issues that we anticipate are likely to present. We will work with you to evaluate the accommodations in place as you go through the program and to find solutions to those accommodations that are not working. However, you need to be aware that even if we undertake this training program there is a possibility that the accommodation you require will interfere with you meeting your training objectives and satisfying the Royal College requirements. We do not know this at this time and our commitment is to avoid such an outcome if at all possible.

4. From our assessment of the request, and as indicated in [the Specialist's] report, it seems that the provision of interpreters is essential to you being able to complete the program. There's little value in pursuing other options or alternatives if they cannot be provided without a significant amount of interpreter service. While we understand that your assessment of your needs is that you require the equivalent of 3 full time interpreters this level of service may represent a prohibitive cost. We understand there may also be availability issues. We continue to have discussions around the costing issues and are working with the Health Authority with regard to the other issues involved in obtaining interpreters: availability; training and assessment as to suitability; employment or contractor arrangements with the employer; insurance and liability issues while in the clinical setting; patient consent; compliance with patient confidentiality and protection of privacy issues imposed on the hospitals by legislation. We do not raise these matters as barriers to you continuing in the program; however, there are matters that must be addressed and systems put in place in order to proceed.

> 5. As we have been considering your request for accommodation we have contemplated that there may have to be adjustments to your program to meet considerations of patient safety and other training concerns. We will be working with the College regarding these matters to ensure that any adaptations of adjustments to your program do not have the unintended effect of interfering with your ability to meet the College standards. While you have indicated your reluctance to modify your program you need to be aware that this is a possibility but would be done only if we were unable to find a feasible reasonable alternative. (as written)
>
> …
>
> Based on your last rotation you (Dr. Dunkley) have made it clear that there are no other rotations you can undertake without the aid of interpreters. Given the lack of resources and the uncertainty around funding, more work needs to be done before you can undertake any further clinical rotations. Dr. Dunkley will be placed on paid leave while we continue to work with the Health Authority toward assessing and implementing, where possible, the modifications needed to accommodate you in the clinical setting. We hope to have a definitive answer on funding within a couple of weeks. Depending on the outcome of those discussions we will meet with you again to determine next steps. (as written)

[234] The summary of the October 12 letter also stated that at the meeting Dr. Dunkley had suggested contacting the Indigenous Physicians Association of Canada and a local MP to try to procure funding.

[235] Dr. Rungta testified that he arrived at the number three fulltime interpreters by considering all of the information. He also said in direct examination that "it looked to us like two would be required at a minimum and we would have to have an on call list of other people as well, so I took that to mean three". At this meeting UBC sought authorization from Dr. Dunkley to have the University of Ottawa release information to it concerning her disability and the employment of interpreters. She did so and UBC obtained information from the University of Ottawa which confirmed that Dr. Dunkley required "significant interpreter services".

[236] Dr. Corral testified that the purpose of the meeting was to review the request for accommodation in more detail, and also to have a more detailed understanding of what Dr. Dunkley's experiences had been in medical school so that they could have a better understanding of her needs. Dr. Corral understood that the Report meant that Dr. Dunkley would require interpreters for all rotations.

[237] Dr. Corral testified and referred to her notes from the October 12 meeting. A summary of this evidence follows.

- Dr. Dunkley described her experience in hiring interpreters and her experience in having coached them and trained them. Dr. Dunkley explained that her plan had been to engage her previous interpreter from Toronto to help coach BC interpreters. Questions were asked about the liability insurance for the interpreters. It was described that interpreters would generally be freelancers. There was a question regarding whether an employment contract needed to be considered.

- Dr. Corral wrote that "it was very helpful for us to hear how surgical rotations were carried out and where the interpreter would be positioned and what Dr. Dunkley's requirements would be. For example, asking the surgeon not to be conversational but to be instructional. And she stated that surgeons at first had been concerned in Ottawa where she trained but then felt okay about things, and Dr. Dunkley claimed that her presence didn't slow down the process of the surgery". With respect to other rotations, such as the ER, ICU or trauma, Dr. Dunkley pointed out that there was no lag time and that the interpreters provide simultaneous translation. When there are multiple events, the interpreters provide the information; Dr. Dunkley decided what was important.

- Dr. Dunkley explained voice to text phones. She pointed out that with psychiatric patients, for example, she had never had a problem involving an interpreter, which was reassuring. Dr. Dunkley responded to questions about being on call and the role and need for interpreters. She stated that she didn't feel that there were any issues that would preclude her from being on first call.

- There were questions raised by some of the preceptors about whether Dr. Dunkley's deafness and need for interpreters would slow down the rounds process. Dr. Dunkley stated that it would not unless somebody is talking too quickly.

- Dr. Dunkley said that her training at the University of Ottawa included attendance at conferences. The university had paid for interpreters to attend conferences. If she went to a conference, the university would pay interpreters that were based in the city where the conference was held.
- Dr. Corral noted that the group were trying to think about various organizations and individuals to contact in order to appeal to them for help with funding, such as the Ministry of Native Affairs and Aboriginal organizations. Dr. Corral agreed in direct examination that "other than the costs, none of the other issues, after [she] considered them, and heard Dr. Dunkley's explanation were considered impossibilities for [her]."

[238] October 16: Dr. Dunkley e-mailed Dr. Corral, advising that she had only completed two weeks of research and thus her project was not complete. She would continue her research the following week and meet with Dr. R to continue with the next step of her research project with him.

[239] October 17: Dr. Dunkley completed her second block rotation in Family Practice.

[240] October 18: The PGY 1 Office e-mailed Dr. Dunkley to clarify whether she was on vacation or doing her research elective. Dr. Dunkley confirmed that she was doing research with Dr. R. Dr. Dunkley stated that she understood that after she completed her research elective she would be on paid leave until things were sorted out.

[241] October 19: Dr. Corral wrote by memo to Preceptors, and Department Heads, confirming that Dr. Dunkley was matched to St. Paul's Hospital as a PGY 1 resident in Dermatology, that she had a hearing impairment and required "special accommodations" during her rotations, and that Dr. Dunkley would be going on paid leave in the next few weeks so Dr. Corral was cancelling her rotations for the remainder of the year (2010). She said notification would be provided once the negotiations for funding her residency training requirements were resolved.

[242] October 21: Dr. Dunkley e-mailed Dr. Warshawski advising that she would be in touch with Dr. R respecting the completion of her research elective and reporting

that she had been attending a nursing home with Dr. K and planned to continue to do so for a few mornings a week to keep abreast on medicine.

November 2010

[243] November 22 to December 3: Dr. Dunkley worked with Dr. K as he required help at his clinic.

December 2010

[244] For three weeks in December Dr. Dunkley worked with Dr. K in Haiti providing medical assistance after the earthquake in response to the cholera epidemic.

January 2011

[245] January 6: The Associate Deans (Drs. Kernahan and Webber) of the PGME Office wrote to Libby Posgate, Executive Director Health HR Planning. Dr. Rungta testified that the intention of the letter was to have the Ministry pay the full amount for Dr. Dunkley's estimated interpreter services of $500,000 or more per year for five years. The letter states in part:

> The costs for training interpreters and providing these services are estimated in the range of $500,000 per year for each year of her five year Program. This is an estimate only as the known costs could be higher and there could be unanticipated costs particularly if Dr. Dunkley is unable to complete her training within five years. We have considered alternatives including other specialty programs but, with the exception of Family Practice Residency Training which is a two year program, the costs will be comparable. However, even this cost of providing these services for a two year period is prohibitive.
>
> If the Program is not able to obtain additional funding from the Ministry for the duration of Dr. Dunkley's training to support the requested accommodation, Dr. Dunkley will be required to withdraw from the Program.
>
> There is some urgency to obtain a final response to our request for financial assistance from the Ministry. Dr. Dunkley began her first rotation in July 2010. She has completed as many rotations as possible without fulltime interpreter services and has been placed on leave pending a final determination regarding her request. She has filed a complaint with the British Columbia Human Rights Tribunal against the University and the Health Authority. A settlement conference is scheduled in March 2011.

> Please advise whether the Ministry is prepared to commit to funding the interpreter services that Dr. Dunkley will require throughout her Dermatology Residency training. We would be pleased to provide any additional information or to discuss this matter with you further at your convenience.

[246] January 13: Libby Posgate, Ministry of Health e-mailed Ms. Coughlin and asked her to provide an estimate of the interpreter costs required to accommodate Dr. Dunkley by Monday January 17. Ms. Coughlin did so. Her estimate was $665,000 per year for five years. This will be dealt with in detail later in the decision.

[247] January 19: Dr. Corral e-mailed the PGME Office advising that Dr. Dunkley had attended an Academic Half Day the previous week without an interpreter.

[248] January 19: Dr. Corral e-mailed Dr. Kernahan and Dr. Webber, asking whether Dr. Dunkley could work when she is on "paid leave."

[249] January 20: Dr. Dunkley was invited to attend a meeting with the postgraduate associate deans. Attending the meeting were Dr. Rungta, Dr. Webber, Dr. Kernahan, Dr. Dunkley, a PAR-BC representative, an interpreter and a scribe. At the end of the meeting Dr. Dunkley was placed on unpaid leave. Afterward, UBC provided Dr. Dunkley a summary of the meeting. It stated that Dr. Rungta opened the meeting and stated the following (in part):

> …It had been estimated that the costs involved in providing interpreter services necessary to accommodate Dr. Dunkley's training requirements in the program would be at least $500,000/ year for a total cost of 2.5 million dollars for the five year program. Dr. Rungta explained that he fully recognized the obligation of UBC Postgraduate Medical Education to accommodate Dr. Dunkley's disability, but stated that the requirement to do so is only to the point of undue hardship. Given the cost of providing the interpreter services that Dr. Dunkley will require, UBC has concluded that this represents undue hardship as UBC cannot provide the accommodation she has requested.
>
> …
>
> (ii) In response to a question from Ms. Sandhu, Dr. Rungta explained that the request for accommodation has been discussed with the Health Authority and it is his understanding that they will not be able to fund the cost of interpreter services required. The Postgraduate office is open to considering any response of suggestions that Dr. Dunkley may want to bring forward although Dr. Rungta believes that all reasonable options have been considered.

> (iii) Dr. Rungta acknowledged that Dr. Dunkley has lodged a human rights complaint and that UBC is unable to provide the necessary accommodations for Dr. Dunkley's residency training, she will be placed on unpaid leave, effective from today (January 20, 2011), and will not be able to undertake any residency training including clinical work and academic activities such as attendance at "half days" while she is on leave. Dr. Dunkley was earlier placed on paid leave from October 18, 2010. In recent correspondence with Dr. Corral, Dr. Dunkley requested she be credited for clinical work she undertook while on Leave. This credit will not be granted. Dr. Dunkley accepted this decision.
>
> …
>
> (iv) Dr. Dunkley informed Dr. Rungta that following discussions with Dr. Warshawski, she has registered to attend the American Academy of Dermatology Conference to be held in February, 2011, and has made travel, hotel and other arrangements. She inquired if she will have access to Postgraduate funds available to first year residents to attend conferences. Dr. Rungta informed that in his view such funding is not available to residents on leave from the program but that he will discuss this with Drs. Warshawski and Corral before making a final decision.
>
> (v) Replying to a question from Ms. Sandhu, Dr. Rungta informed that the notes from this meeting will be sent to Dr. Dunkley as a record of the meeting and for any factual corrections.
>
> (vi) Dr. Dunkley stated that from her standpoint there was nothing further to discuss at this time. The meeting was adjourned at 1:20 p.m. (as written)

[250] Dr. Rungta testified that the purpose of this meeting was to inform Dr. Dunkley that they had been unsuccessful in securing the resources to accommodate her request for training and that she would be placed on unpaid leave until a resolution could be brought about.

[251] Dr. Dunkley testified that the January 20, 2011, meeting was scheduled at the last minute, with a one week notice. Her testimony was consistent with the summary of the meeting she was provided. However, she also noted that Dr. Rungta took the lead of the entire meeting and apologized that they did not get back to Dr. Dunkley within two weeks as they had promised [at the October 12 meeting]. She noted that it actually took over two months to finally come to a decision. Dr. Dunkley testified that Dr. Rungta said that they had tried to look for other funding sources but did not find any. He said if Dr. Dunkley could find any, she could let them know about it. He told Dr. Dunkley that she would go on unpaid leave as of January 20th, the day of the

meeting. Pria Sandhu asked how Dr. Rungta could put Dr. Dunkley on unpaid leave if he is not the employer. Dr. Dunkley testified that he faltered and said that he believed that the hospital had come to the same decision about declining to accommodate her.

[252] Dr. Dunkley asked if she could access the 500 dollar conference funding to go to the dermatology conference with the other dermatology residents, and he said that she probably could not. She asked if she could continue going to the Academic Half Days without interpreters and he said that she could not because she was on leave from the program. Dr. Rungta explained that Dr. Dunkley would not receive academic credit for her work in Haiti with Dr. K because the clinical activity had not been sanctioned by the program.

February 2011

[253] February 2: The Associate Deans of Postgraduate Education, Faculty of Medicine, UBC wrote to Dr. Patrick O'Connor, Vice President Clinical Quality & Safety, VCHA, advising that Dr. Dunkley was placed on unpaid leave. The letter states:

> We write to confirm the outcome of our discussions regarding Dr. Dunkley's request for accommodation during her Residency training program in Dermatology. Following our joint assessment of the request and based on the projected costs of the interpreter services that Dr. Dunkley will require throughout her training we have concluded that the Office of Postgraduate Education is unable to provide the requested accommodation. We confirm that the Health Authority has also concluded that it does not have funds to support this request.
>
> As you know, the [ENT Specialist] has opined that interpreter services will be required by Dr. Dunkley for both clinical and educational activities. In the absence of funding for these services Dr. Dunkley is unable to proceed in the program. She has been placed on unpaid leave pending resolution of her claim that the University and the employer have failed to accommodate her disability.
>
> We do not believe any further steps need to be taken at this time.

February 2012

[254] The Vancouver Senate, Minutes of February 15, 2012 includes the topic "Changes to the Mandate and Structure of the College for Interdisciplinary Studies". The following motion was brought:

> That "medical resident or intern" be removed from the Classification of Students as laid out in the UBC Vancouver Academic Calendar.
>
> Dr. Harrison explained that medical residents were currently listed under the categories of student in the Calendar. The category was added in 1992 by the Senate. The Faculty has requested that student status be removed from residents as they are employees of the health authority and are not in the traditional sense students of UBC.
>
> In response to a question from the floor, Dr. Harrison confirmed that 3rd and 4th year medical students although informally called interns, would retain student status.
>
> Senator Burr asked how this would affect Pharmacy and Dentistry residents.
>
> Dr. Harrison replied that the faculties in question were still considering whether or not they had a need for a similar category. Further changes may be forthcoming as a result.
>
> With the permission of the Senate, a representative from the Faculty of Medicine explained how the College of Physicians and Surgeons requirements led to a need for registration with the University for Medicine residents.
>
> The Registrar confirmed that the University would continue to report the number of residents to the Province just as a different category.
>
> In response to a question from Senator Loewen, Dr. Harrison confirmed that Medicine residents were not AMS or GSS members presently and so this proposal would not affect their relationship with the student societies.
>
> Dr. Wendy Hall asked if Medical residents would lose a right to appeal standing decisions to the Senate with this change.
>
> Dr. Harrison replied that the proposal would restrict any appeals to within the residency program, but to date no appeal has ever been ruled upon by a senate committee. This change was prompted in part to clarify who was responsible for residency matters including any complaints or appeals.

[255] No documentation was entered to corroborate the discussions leading up to the decision of the Medical Faculty to bring the above noted motion before the Senate.

14. The Role of the A&D Office in Accommodating Dr. Dunkley's Disability

[256] As noted above, Ms. Mee was the Director of the A&D Office throughout Dr. Dunkley's experience with residency in 2010 and 2011. Dr. Warick who reported to Ms. Mee was initially responsible for Dr. Dunkley's file.

[257] Ms. Mee testified that Dr. Warwick was primarily responsible for dealing with students with hearing disabilities as this was her specialty. The A&D Office had negotiated a contract with STILL Interpreting Services who provided ASL interpreters for a rate of $40.00 per hour.

[258] Ms. Mee said that Dr. Dunkley had obtained services from the A&D Office as an undergraduate so she would have known that Dr. Warick was the correct person to contact if she was returning to the university. Dr. Warick continues to work at the A&D Office arranging for accommodation of Deaf students.

[259] Ms. Mee stated that the A&D Office already had the audiology information from when Dr. Dunkley was an undergraduate student. They did not request that she obtain an audiology report or ENT specialist report. If required they could ask for an update.

[260] After Dr. Dunkley was put on unpaid leave from her residency she was able to enrol in the UBC Master of Health Sciences Program in September 2011. Ms. Mee stated that the A&D Office provided Dr. Dunkley with ASL interpreting services. The Office was paying $57 an hour for an interpreter for Dr. Dunkley due to the complexity of the academic material and the resulting requirement for a qualified interpreter. The interpreter was Ms. Sedran, who testified for Dr. Dunkley. Ms. Sedran is employed by an agency who contracts with UBC. Ms. Sedran testified that she was working basically full-time for Dr. Dunkley during the 2011-2012 academic year. Evidence was entered that Ms. Sedran had earned around $96,000 in that year. The actual agency fees paid by UBC to the agency to engage Ms. Sedran for the above noted period were not entered as evidence.

[261] Although Ms. Mee testified that Dr. Warick consulted with her regularly and that she had fairly extensive knowledge of Dr. Dunkley's file, she admitted that she did not know which rotations Dr. Dunkley would not require interpreters for in her residency program. She admitted that she had never met Dr. Dunkley.

[262] Ms. Mee's evidence was that "at some point the A&D Office realized that Dr. Dunkley had returned to the university as a resident". She thought it was the summer of 2010. Ms. Mee acknowledged that in the summer of 2010 Ms. Moen advised Dr. Dunkley that the A&D Office would be taking the lead in assessing her accommodation requirements. Ms. Mee stated that "[She] believes that Ms. Moen did believe that".

[263] Ms. Mee testified that once she realized that Dr. Dunkley had returned to the university as a resident, she concluded that the A&D Office was not the appropriate source of funding and at that point she terminated the A&D Office relationship with Dr. Dunkley. Her reason was her understanding that residents did not meet the definition of "student" under the *University Act*.

[264] Ms. Mee admitted that she was not aware that the definition of student under the *University Act* included the provision that a student could also be "someone designated as a student by the senate".

[265] In cross-examination Ms. Mee clarified that the A&D Office terminated its relationship with Dr. Dunkley based on instruction from the Vice President, Students and legal counsel. She testified that "We don't make the determination ourselves." She further clarified that she was "advised that" Dr. Dunkley did not meet the definition of "student" under the *University Act*.

[266] In direct examination Ms. Mee was asked, "If Ms. Dunkley had been subject to your program, given your knowledge of the level of services she required, would you have been able to provide them?" She responded, "That wouldn't have been [her] decision. It would have been a decision that involved the Vice President, Students and likely legal counsel."

[267] She was asked whether there would have been a consequence for her program if a decision had been made to provide the funding. Ms. Mee testified that if there had been a decision to provide the funding to cover Dr. Dunkley's interpreters it would be hard to know if there would be any consequence for her program. It would depend on whether or not the university would have been prepared to increase the level of the Access Fund or whether they expected the A&D Office to maintain that base level of funding and provide this service in addition.

[268] In cross-examination Ms. Mee testified that, in the past and prior to her employment, UBC had employed a sign language interpreter in a full-time staff position. The interpreter was compensated as a CUPE staff member and paid a salary. The interpreter was paid in accordance with the collective agreement. There was no interpreter classification, but they were placed on the scale.

[269] Ms. Mee agreed that this was a very different sort of model than the "Still Interpreting" agency model that the A&D Office now employed. Ms. Mee explained that it was because it was a full-time staff member that they were interpreting for in the case of the employee interpreter position.

15. Dr. Dunkley's Evidence on Interpreter Costs

Dr. Russell

[270] The Tribunal found Dr. Russell qualified to give opinion evidence in the areas of the means by which Deaf people overcome barriers and access the services and benefits society offers, including models of interpretation services, their costs, the relationship of the models to the quality of services, and interpreter availability.

Sources of information

[271] At the outset of her report (the "Russell Report") Dr. Russell set out the material she had reviewed and the interviews she had conducted on which she based her opinion.

[272] She states that she was provided with and reviewed the following list of documents:

a. The Royal College of Physicians and Surgeons of Canada, "Speciality Training Requirements in Dermatology";
b. A description of the clinical environment for eight different rotations in the Program (CTU, General Surgery, ICU, OB/GYN, Pediatric Emergency, Pediatrics Outpatient, Psychiatry, and St. Paul's Emergency);
c. An email dated August 15, 2010 from Larry Warshawski to Kam Rungta and copies to others;
d. A letter dated Sept 21, 2010 from Larry Warshawski to Kam Rungta;
e. An email dated Sept 16, 2010 from Sandy Coughlin to Ann Harvey and Patrick O'Connor;
f. An email dated January 17, 2010 from Sandy Coughlin to Libby Posgate and copied to others;

g. An email exchange dated Sept. 17, 2010 between Sandy Coughlin and Kam Rungta.

[273] She then states that:

> In addition to the above mentioned documents, I conducted a literature review of published materials about the role of designated sign language interpreting services for the Deaf professionals. This is an emerging area of research, and I reviewed an edited research volume that I believe has significance for this report. The volume deals with the nature of designated interpreters working with Deaf professionals across a number of disciplines and the research encompasses several countries. While the majority of chapters are relevant for this report, in particular, I draw attention to four specific chapters, one of which addresses the concept and rationale of designated interpreters, a second chapter that specifically deals with Deaf doctors, a third chapter highlights Deaf academics dealing with academic expectations such as research, teaching, conference presentations and service, and a fourth chapter that address the nature of working with Deaf mental health professionals.

[274] The four chapters Dr. Russell refers to above are attached to her report.

[275] Dr. Russell notes that there have been just three Deaf students who have studied medicine in Canada, while there have been several Deaf medical students in the United States.

[276] She writes that based on correspondence with Liz Scully of the University of Ottawa, November 18, 2011, Dr. Dunkley was provided with two full-time interpreters of 37 hours per week each, plus another interpreter who provided part-time services. In cross-examination, Dr. Russell stated that Ms. Scully was one of Dr. Dunkley's interpreters when she was in medical school. Dr. Russell admitted that she spoke to Ms. Scully; they did not engage in written correspondence. She further stated that she had no reason to believe that Ms. Sully was providing her with inaccurate information.

[277] In her report Dr. Russell noted interviewing Dr. Moreland, a Deaf physician in the United States, and Todd Agan, Dr. Moreland's interpreter through his residency and now at his medical practice. She notes that she interviewed a member of Dr. Dunkley's interpreting team at the University of Ottawa. This person is not addressed by name in the Russell Report.

[278] Dr. Russell testified that she also interviewed:

- Yolaine Ruelle, the coordinator of Access Services at the University of Ottawa, who would have coordinated the interpreting services during Dr. Dunkley's medical school program;
- Cindy Koskie, coordinator of disability support services, University of Manitoba in Winnipeg;
- 10 Interpreters from the Association of Visual Language Interpreters of Canada ("AVLIC");
- Christina Smith respecting the "Boland Survey" used to determine salary grids for staff Interpreters [see 1.2 Russell Report];
- Interpreters who previously worked with Dr. Dunkley; and
- Two persons who had done designated interpreting in Ontario, a slightly different discipline but nevertheless a designated interpreting model.

[279] In cross-examination, Dr. Russell stated that the source of her information that a freelance interpreter who possesses national certification would earn between $47 and $55 per hour in Alberta was from Deaf and Hard of Hearing Services and her own experience from DLR Consulting. The source of information respecting her quote of $35 to $65 per hour in British Columbia is the fee that is published by Medical Interpreting Services in British Columbia.

Models for interpreting services and Dr. Russell's recommendation

[280] In her report Dr. Russell outlines the models available and applicable costs for hiring interpreters. The models are Freelance Interpreting, the Staff Interpreter Salary Grid and the Designated Interpreter Salary Grid. The Russell Report states as follows:

> The Designated Interpreter Salary Grid
>
> In several contexts, Deaf professionals work with what are classified as "designated interpreters". Examples of designated interpreter roles include working with Deaf doctors, university professors, lawyers, politicians, senior managers and artistic performers. ….There are interpreters in Canada that are in designated roles at this time, and they earn between $44,000 and $70,000 per year plus benefits. These interpreters become very familiar with the nature of the particular discipline, the language and interaction requirements of such settings, protocols governing the situations and so on. When applying this concept to a medical context, the use of designated interpreters increases patient safety in that the interpreters are well versed in the medical setting and specialized language, and their knowledge grows as they continue to work in

> that setting. As their contextual knowledge increases, so does their ability to consistently perform effective and accurate interpretation in these highly specialized areas. This makes a designated team of interpreters a more effective option than using freelance interpreters from an interpreter referral agency, where the hospital may have little input on the quality and consistency of interpreting services.

[281] The Russell Report recommends the "Designated Interpreter Model" for the following reasons:

> There are several models of professional service that could be offered, but the designated interpreter model is one that allows for feasibility of funds, so cost containment. It's one that arrives at the most consistent level of service that can be provided in that the designated interpreters work very closely with the deaf professional so they understand the protocol and strategies required in that particular professional setting. It's also the one that provides the most assurance in a particular discipline that the services are of a quality that is required by all members of that particular profession, whether it be a deaf academic or a deaf doctor or deaf psychotherapist.

[282] The Russell Report sets out the calculations as follows:

> The Costs of Interpreting over a 5 year Residency:
>
> Based on the research done on the topic of designated interpreters and my interviews with a designated medical interpreter and other interpreters who have worked in medical programs, I recommend a designated contract amount, this is the most cost-effective manner to allow for consistent interpreting provision. I interviewed ten AVLIC certified interpreters about contract conditions that would make such a position attractive, and all interpreters suggested that they would be drawn to a regularized contract that included a reasonable salary, plus benefits. The location of Vancouver was also seen as a draw, as was the chance to work in a specialized setting such as medicine.
>
> Based on the outlined residency program, the following are cost estimates for the interpreters required to meet the needs of the five year residency.
>
> Year One and Two: Basic Clinical Training
>
> This will require two full-time interpreters and a part-time interpreter. The suggested yearly salary range for a full time interpreter with the necessary expertise for this work is between $60,000 and $70,000, plus benefits. Benefit packages can be calculated between 13% and 18% of the overall salary. An interpreter earing $70,000 plus benefits costed at $12, 600 (calculated at 18%) would bring the total to $82, 600 per full-time interpreter per year.

A suggested yearly salary range for a part-time interpreter is between $30,000 and $35,000, plus benefits. Calculating benefits at 18%, this brings the benefits amount to $6300 for a total of $41,300 per year.

Full Time Interpreter 1 = $82,600
Full Time Interpreter 2 = $82,600
Part Time Interpreter 3 = $41,300

Total per year: $206,500 x 2 years = $413,000.00

It should be noted that these figures have been calculated at the highest end of the ranges for salary and benefit packages.

By using this model, services can be provided on a 24 hour rotation covering all regular and on-call requirements of residents, while ensuring accurate and effective interpreting services. The inclusion of a part-time interpreter allows for holiday coverage and/or illness related absences of the full-time interpreters. As well, this part-time position could be shared between two interpreters, thus creating greater capacity of interpreters who can work in the situation, and reduce the need to cover benefits.

When I consulted with Dr. Moreland's designated interpreter, Mr. Todd Agan, I learned that Dr. Moreland and Dr. Dunkley share the communication style of speaking for themselves, and are exceptional lipreaders in one-to-one interactions. As well, Dr. Dunkley has indicated to Dr. Warshawksi that she can use a telephone while on rounds and on call (letter dated Sept 21, 2010). During Dr. Moreland's first year of residency the interpreters worked between 60 and 70 hours per week, with some of the rounds requiring two interpreters to be present, and other rounds required one interpreter. What was effective, per Mr. Agan's experience, was that he and the other interpreter were responsible for their own scheduling done in collaboration with Dr. Moreland.

Based on the documents reviewed and the interviews conducted with the designated interpreter for Dr. Moreland, it seems likely that the interpreting requirements will decrease over the period of the five year residency. This was Dr. Moreland's experience, and based on the documents provided there is no reason to believe that Dr. Dunkley's residency will be different in this respect.

Year Three and Four: Hospital consultations, rotations through dermatological oncology, dermatological surgery and laser services.

It seems reasonable to predict that the interpreting needs for Years Three and Four could be covered by a team of two interpreters, given the emphasis on one-to-one consultations. Again, the suggested yearly salary range for a full time interpreter with the necessary expertise for this work is between $60,000 and $70,000 plus benefit package. Benefit packages can be calculated

between 13% and 18% of the overall salary. An interpreter earning $70,000 plus benefits costed at $12,600 (calculated at 18%) would bring the total to $82,600 per interpreter per year.

Full Time Interpreter 1 = $82,600
Full Time Interpreter 2 = $82,600

Total per year: $165,200 x 2 years = $330,400.00

It should be noted that these figures have been calculated at the highest end of the rangers for salary and benefit packages.

Depending on the interpreting needs, a part-time interpreter for a maximum of 15 hours per week could be used. There are several options that can be explored with a part time contract(s), in that the contract could be for a set number of hours per month, and the hours could be scheduled in a flexible manner depending on the needs of the program.

Year Five: Designed at the discretion of the program director and the resident to determine a program that meets the needs and goals of the resident.

During Year Five, when the program is tailored to the needs of the resident it may be possible to reduce the interpreting services to one full time interpreter, with reasonable back up provided by a part-time contractor. Using the suggested yearly salary range for a full time interpreter of $60,000 to $70,000 plus benefits (calculated at 18%) for a totally of $82,600.00, and an addition of $41,300 for a part-time interpreter, this brings the total salary commitment to $123,900 for Year Five.

Full Time Interpreter 1 = $82,600
Full Time Interpreter 2 = $41,300

Total per year: $123,900

In summary, over a five year period, the cost of accommodating the Deaf resident is estimated to be $867,300.00. Should a part-time interpreter be required for Year Three and Four, the cost of accommodation is estimated at $949,900.

Benefit Packages:

When I consulted with agencies that hire interpreters, such as Deaf and Hard of Hearing Society in Calgary, Alberta, they report that benefit packages which include medical, dental, and para-medical services can be estimated to cost between 13% to 18%, with an average benefit package calculated at 15%. The financial calculations in Section 5.0 of this report have been based on 18%, which is generous, and have also been calculated based on the

> assumption of providing benefits to part-time positions, which may not be required. (as written)

[283] Dr. Russell explained the significance of the comment in her report about the similarity of the communication styles of Dr. Moreland and Dr. Dunkley. She stated that interpreters providing service to both of those physicians provide what is known as English to ALS. The interpreters communicate from English into ASL. The Doctors speak for themselves. Therefore, the interpreters are not required to provide ALS to English interpretation which results in less cognitive fatigue for the interpreter compared to the interpreter that is required to interpret in both directions. She testified that:

> The impact or the significance of that is that there is less cognitive fatigue when interpreters are just doing one of the processes, English to ALS as opposed to ALS to English. That lessens the cognitive fatigue and it lessens the physical fatigue. That has an impact in terms of the kinds of service model that's constructed for Dr. Dunkley. For example, it may be that in some situations one interpreter will be sufficient in order to address the needs and other times it might be two. Because Dr. Dunkley and Dr. Moreland are such exceptional lip readers and exceptional communicators, in some one-to-one contexts they may not need interpreting services at all.

[284] In cross-examination, Dr. Russell was asked whether "anyone signed up" respecting Dr. Russell's testimony that interpreters she interviewed regarded the prospect of working as a designated interpreter an attractive model, she stated that both Ms. Sedran and Ms. Null were interested.

[285] In cross-examination, Dr. Russell agreed that although the Russell Report states that she first became aware of this matter based on a Globe and Mail article about Dr. Dunkley and was thereafter contacted by Dr. Dunkley, there was an e-mail exchange between them that pre-dated this. She admitted that she had corresponded with Dr. Dunkley in April 2010. She testified that she had forgotten that she had had a communication with Dr. Dunkley that preceded the September Globe and Mail article.

[286] The Globe and Mail article entered at the Hearing is dated September 22, 2010. In April of 2010, Dr. Russell e-mailed Dr. Dunkley. She identified herself as a former Douglas College ASL interpreter from 1998 – 2001 [Dr. Dunkley did one semester at the college during this time] and wondered if Dr. Dunkley would recall her. Now as a professor at the University of Alberta she told Dr. Dunkley that a group of medical

students were currently studying ASL. Dr. Russell asked if Dr. Dunkley could do a one hour video session with the medical students. Dr. Dunkley agreed but ultimately was unable to do so.

[287] On September 21, 2010, Dr. Dunkley e-mailed Dr. Russell saying, among other things, that the "hospital" had concerns about her deafness introducing risks of miscommunication in the medical setting. Dr. Dunkley stated that she was providing the hospital with a list of contact people so that they could inform themselves. She wished to include Dr. Russell. Dr. Russell responded that she was available to provide education about the Deaf. She provided her e-mail and telephone contact information and offered to do a video-session with them.

[288] On September 29, Dr. Dunkley e-mailed Dr. Russell to ask her if she would provide a letter to the hospital on her behalf about the Deaf as Dr. Dunkley was not sure whether the hospital has contacted the people on her list. Dr. Russell agreed did so in her letter of October 19, 2010.

[289] In cross-examination, Dr. Russell admitted that she had not included the cost of overtime. She stated that in her view, with appropriate scheduling two full-time and one part-time interpreter could probably cover the interpreter requirement.

[290] She admitted that she had not had a specific number of hours in mind when she did the cost calculation. She said that she had considered from 35 to 40 hours per week for each full-time interpreter and a part-time position. She stated that based on the designated interpreting model and depending on the scheduling there might not be a need for overtime coverage because you're working with a 2.5 team, for example, in year one and two. One of the features of the designated interpreter model was this opportunity for cost containment.

[291] In cross-examination, Dr. Russell agreed that there was no body of evidence that she could base her opinion on which is premised upon anybody actually having ever been a designated model interpreter for Postgraduate Medical Education in Canada. She explained that no such evidence as yet existed. She stated that she based her opinion on her experience as a university academic providing interpreting services in the university context and as a self-employed consulting company, the documents reviewed and the information provided in the research interviews.

[292] Dr. Russell admitted that she did not talk to anyone in the Postgraduate Medical Education program to get their view on the accuracy of her assessment of the hours a resident would be required to work. Dr. Russell stated that she relied on the documents provided by UBC respecting the schedules for the respective rotations which in her view, "were clear enough in terms of the requirements for residency."

[293] Dr. Russell admitted that her "modeling" did not reflect the 60 to 70 hours per week that Mr. Agan had indicated. She testified that when she interviewed Mr. Agan the residency schedule he described looked very similar to the documents she had reviewed concerning Dr. Dunkley's proposed rotations.

[294] Dr. Russell testified that she understood in her interview with Mr. Agan that while the interpreters worked 60 to 70 hours per week, in her view, had they scheduled themselves differently, they would have worked potentially a 40 hour week.

[295] Dr. Russell explained that the figures she used were calculated over a seven day period, not five days a week. The interpreting coverage was for 24 hours a day, seven days a week based on the model.

[296] In cross-examination, Dr. Russell admitted that she did not provide an "explicit" schedule showing the time Dr. Dunkley would be required to work and the number of interpreters required. Her evidence was that she relied on the documents from UBC setting out the scheduling requirements in each rotation.

[297] Dr. Russell admitted that she did not consider and did not provide for the cost of overtime. It was her evidence that with appropriate scheduling two full-time and one part-time interpreter could cover Dr. Dunkley's interpreter needs.

[298] Dr. Russell maintained that as set out in her report the UBC cost estimate of $2.5 to $3 million dollars in interpreter costs to cover Dr. Dunkley's five year residency was inflated. She testified that the UBC calculation was based on the "freelance" model of interpreter engagement.

Assessment of the Russell Report

[299] I have not found the consideration of the Russell Report necessary to my decision. To be clear, I would have rendered the decision with the same results without the Russell Report.

[300] The Respondents argue that I should give little or no weight to Dr. Russell's Report because she is partisan, she did not base her calculations on an actual schedule, she failed to take into account Mr. Agan's reliable evidence that during Dr. Moreland's residency the interpreters worked 70 hour per week, she failed to provide for overtime pay and she underestimated the cost of the benefit packages.

[301] I did not find the Russell Report partisan. The relationship between Dr. Russell and Dr. Dunkley that pre-dates the Globe and Mail item about Dr. Dunkley's circumstances on September 22, 2010 is one professional e-mail communication unrelated to this case. I find that Dr. Russell has a special interest in the provision of services to Deaf persons: indeed it is the subject of both her academic and work-related experience and the focus of her career.

[302] I noted Dr. Russell's October 19, 2010 letter of support for Dr. Dunkley. It referred to recent research and models of interpretation for the Deaf, acknowledged British Columbia as a leader in providing services for the Deaf, and described Dr. Dunkley as a role model for the Deaf.

[303] I find it reasonable to conclude that Dr. Russell is sympathetic to Dr. Dunkley in her goal to do her residency. However, I do not find that Dr. Russell's sympathy or background diminished her professionalism in authoring her expert opinion in the Russell Report.

[304] With respect to Dr. Russell's calculations, I note that in his testimony Mr. Agan provided greater detail about the hours he was required to work during Dr. Moreland's residency then that included by the Respondents. Among other qualifications, Mr. Agan testified that he worked from 40 to 70 hours per week depending on the rotation.

[305] However, I have not relied on the actual number stated in the Russell Report as the cost of meeting Dr. Dunkley's interpreter requirements over the five year residency. I agree that Dr. Russell did not adequately account for not including any amount for overtime pay for interpreters in a designated interpreter model for the first two years of the residency. There was a question raised about the percentage she had assigned for the cost of benefits. Further, the Report does not provide a schedule showing Dr. Dunkley's required rotations and predicted interpreter usage. This said, I note that Dr. Dunkley is the first Deaf dermatology resident in Canada and that the interpreter scheduling would be finally determined as Dr. Dunkley and the interpreters

became aware of what was necessary depending on the rotation. However, the absence of a draft schedule (or some other more detailed basis) to predict interpreter hours affects the reliability of the estimate of the costs of interpreter services for Dr. Dunkley.

[306] On the other hand, based on Dr. Russell's expertise and knowledge in the field of Deaf studies I have considered and given weight as set out to the following aspects of the Russell Report. In this regard, I note that the cost of interpreter services was but one area of expertise recognized by Member Geiger-Adams. He found Dr. Russell qualified as an expert to give opinion evidence in the areas of the means by which Deaf people overcome barriers and access the services and benefits society offers, including models of interpretation services, their costs, the relationship of the models to the quality of services, and interpreter availability.

[307] I have considered as informative contextual background Dr. Russell's inclusion of four chapters which she described as specifically relevant background to her report. They are from the edited research volume entitled *Deaf Professionals and Designated Interpreters: A New Paradigm*, Hauser, P., Finch, K., & Hauser, A. (Eds), Washington DC: Gallaudet University Press. I read the four chapters attached to the Russell Report and found them very informative on topics such as the role of the interpreter working with professionals and the designated interpreter model.

[308] I also found the Russell Report commentary on models of interpretation services, the quality of the services and their respective costing approaches informative contextual information.

[309] I found the investigative process engaged in to produce the report informative. It provided an example of the many sources of information available to seek information about Dr. Dunkley's interpreter requirements.

[310] Given Dr. Russell's expertise, the thoroughness of her investigation based on contacting persons with relevant information and consideration of relevant research, I have given significant weight to the Russell Report recommendation that the "designated interpreter" model was a suitable and probably cost efficient model to consider for the provision of interpreting services to a Deaf resident.

Mr. Agan

[311] Mr. Agan is a designated interpreter for Dr. Moreland, a deaf internal medicine physician, at the University of Texas Health Science Centre in San Antonio.

[312] Mr. Agan has been interpreting for Dr. Moreland since his first year in medical school. After medical school Dr. Moreland did a three year residency in Internal Medicine and then a two year Academic of Medicine Fellowship. During Dr. Moreland's residency Mr. Agan was a staff interpreter. He was paid by the University Health System. During Dr. Moreland's fellowship Mr. Agan was paid by the University of California Davis School of Medicine.

[313] Dr. Moreland currently works in private practice as an internal medicine physician for the University of Texas Health Science Centre. Mr. Agan interprets for him.

Becoming a designated interpreter

[314] Mr. Agan testified about his interpretation style and his learning trajectory as Dr. Moreland's designated interpreter.

[315] He testified that his communication style is a mix of traditional interpreting, traditional transliterating, as well as coding, which means that for certain words or concepts where there is no equivalent in sign language, a sign is developed to represent the meaning of that term, and that would be the sign used to express a particular concept.

[316] He testified that the majority of his foundation of knowledge came from his prior experience working as a traditional interpreter in a medical setting and additionally from caring for a terminally ill family member. He became "pretty well" versed in how medical terminology is used. When he became the interpreter for Dr. Moreland in medical school he had the opportunity to learn contextually and experientially. Mr. Agan stated that as Dr. Moreland learned how to become a physician and how to use the language, he learned how to be his interpreter using that language.

Mr. Agan's experience interpreting for Dr. Moreland in medical school and residency

[317] Mr. Agan testified that in his role as an interpreter respecting the transition from medical school to residency he saw them as "essentially the same"; he "wouldn't say there was much difference at all".

[318] During his residency Dr. Moreland had two full-time interpreters. He also had a pool of interpreters to draw from with a ten hour per month pre-authorization.

[319] Mr. Agan was one of the full-time interpreters. The other interpreter did not have any background in interpreting in the medical field. She had many years of experience as an interpreter working at another institution that dealt with highly technical scientific information.

[320] Mr. Agan stated that the number of hours a week he would generally work during Dr. Moreland's residency depended greatly on the rotation; for the out-patient/clinic rotations he generally worked 40 to 45 hours a week. For the in-patient rotations, because of the overnight call system he worked 70 to 75 hours a week.

[321] Mr. Agan testified that the first year of residency is always the busiest year for the resident and had the largest demand for interpreting services.

[322] Mr. Agan explained why Dr. Moreland's hours of work were particularly long when he was an "intern" [in Canada a first year resident]. Mr. Agan stated that with respect to Dr. Moreland, not only is a "first year resident's" schedule "predominantly busier than an upper level resident", but in addition as a first year resident Dr. Moreland had not as yet "opted to join the primary care tract" [out-patient care], and was thus still covering a lot more in-patient settings.

[323] Mr. Agan stated that when Dr. Moreland opted to pursue the primary care track, he had more clinics, which meant more time working in an out-patient setting, which meant in turn that there were more times when the interpreters' work weeks were closer to 40 or 45 hours a week, as opposed to 70 hours a week or more. However, they still had weeks where they were covering 70 hours of time.

[324] Mr. Agan stated that Dr. Moreland usually needed two interpreters during his residency because there were always conferences he was required to attend. The conferences were in the middle of the day, which would necessitate both interpreters being there to provide services. He further stated that respecting Dr. Moreland's work

at clinics and when he was required to attend mid-day conferences, having two interpreters was more for the convenience of the interpreter, not necessarily always based on Dr. Moreland's requirements. There were clinics where one interpreter would cover the morning and go home, and the second interpreter would come in and cover the afternoon clinic. With respect to in-patient rotations, schedules varied depending on whether or not there were call shifts. For a non-call shift, the interpreters would generally stagger their schedules, with one coming early, the second joining later, and the two interpreters working as long as required. If two interpreters were no longer required due to the nature of the work, they would then stagger their end of day with the second interpreter to arrive being the last to leave.

[325] Mr. Agan testified that on-call days were governed by the laws in the United States, which is 24 hours plus a six hour handoff time, in other words "roughly 30 hours in duration". Mr. Agan stated that made things a lot more difficult to figure out the best way to make sure that the entire 30 hour duration was covered. Their goal was to make sure that the interpreters were as fresh as they could possibly be, so they developed a system to cover that, which was complicated.

[326] Mr. Agan testified that during Dr. Moreland's fellowship both full-time interpreters had their positions reduced by 50% with a 20 hour per week guarantee. Mr. Agan supplemented his income during this period by accepting other University interpreter assignments.

[327] In an e-mail dated June 28, 2011 to Dr. Dunkley, Dr. Moreland estimated his average interpreter requirement during residency to be 17 hours per day, this probably being conservative. Mr. Agan agreed that this was a reasonable estimate, given two full-time interpreters working.

Mr. Agan's experience respecting different interpreting models

[328] Mr. Agan testified that as a staff interpreter he worked a 40 hour work week. When he worked greater than the 40 hours in a week he received overtime which was paid at time and one-half.

[329] He described the difference in the position of a staff interpreter and a contractor. He stated that the contractor rate is higher because there are no benefits. The interpreter is paid by the hour. In many cases an agency is involved which results in

an additional fee being paid to the agency. As a staff interpreter one receives a lower rate of pay but also gets benefits.

[330] Mr. Agan testified that he very much enjoyed interpreting for Dr. Moreland's residency and fellowship. He explained that it was a fantastic opportunity for an interpreter to work in a medical setting with professionals in the delivery of health care. It was intellectually interesting, challenging and fulfilling.

Ms. Sedran

[331] Ms. Sedran stated that she had been a staff interpreter with Medical Interpreting Services ("MIS") and at the University of Winnipeg. She testified that she earned $30,000 for working three days a week at MIS. Her salary for a full-time position at the University of Winnipeg was $50,000.

[332] Ms. Sedran testified that interpreting for Dr. Dunkley for her residency appealed to her. She explained:

> I've been interpreting for a long time and I like to choose my work now based on whether or not it's going to be a good fit for me, a good fit for the deaf and hearing people that I'm working for, and also something that's challenging, and I saw this as being all of those things. And the opportunity to work with a deaf professional in that capacity was very appealing to me.

[333] She testified that she thought that she would have been qualified to interpret for Dr. Dunkley's residency because she had lots of experience and was nationally certified. She described herself as a self-directed learner who incorporates new information quickly. She stated that she has a professional demeanor that she believed was well suited to that type of environment.

[334] Ms. Sedran admitted that she had never interpreted for a residency program. She stated that she had interpreted in other settings that have been new to her where she did not know the special terminology. For example, she interpreted PhD coursework and resulting dissertation defense in the educational psychology field all of which was new terminology for her. She testified that she often interprets at academic conferences, where papers are being given and the terminology is new. Because of her years of experience and her approach to the work she believed that she was well suited to working in a new challenging environment.

[335] Ms. Sedran testified that if she had a staff interpreter position for Dr. Dunkley's residency program, she would expect a salary of somewhere in between $60,000 and $70,000 a year because that was on par with what she was making at the time and was, in her view, fair for her experience and qualifications. She also said, "with that said, with all of my work that I do, salary and hourly rate is always negotiable".

[336] In cross-examination, Ms. Sedran said that her statement that she would be satisfied with a salary of $65,000 to $70,000 was based on an average of eight hours a day for five days a week or 40 hours. However she testified that she said that with the caveat that she understood that the expectations would be different than a normal 9:00 to 5:00 job.

[337] She stated that she believed that there would be a lot of flexibility required when interpreting for Dr. Dunkley's residency and that her hours would fluctuate. She stated that, as with any staff position that she had experienced before, if she worked extra hours one day, she would take time off in lieu of on another day when the time is slow. She agreed that she would expect to be paid overtime if she worked greater than 40 hours per week.

[338] Ms. Sedran was questioned about the standard of one hour of preparation for every three hours of lecture. She responded that the standard is applied to settings where the demands for interpreting are known. Although a residency is something that interpreters have not been involved with very often, Ms. Sedran was "sure there's information out there." She said her vision was that there are times when the interpreter is not interpreting within an eight hour day, and so their preparation time would be done during that downtime. She said that as a result she did not believe "you can apply the same standard to a different setting."

[339] When meeting Ms. Knowles at the coffee shop prior to the July 20 Meeting (discussed below), Ms. Sedran suggested that Ms. Knowles contact the national organization for the Deaf.

Dr. Dunkley

[340] Dr. Dunkley stated that it was her understanding that Dermatology as a five year program involved two years of general medicine followed by the last three years

of dermatology focused medicine. In PGY 1 residents are required to do core rotations that are very similar across all specialties.

[341] She testified that she was aware that in order to continue her medical education as a resident she would require the assistance of sign language interpreters. During her final two years of medical school she worked primarily in the hospital and she required interpreters in that type of environment. Her need for interpreters also varied with the location. Even in the hospital setting sometimes she needed interpreters, sometimes she did not. Dr. Dunkley testified that what she had found worked most efficiently and smoothly was when her interpreter, Ms. Null, a person who understood the medical setting and understood Dr. Dunkley's interpreter requirements co-ordinated the interpreter schedules.

[342] Dr. Dunkley acknowledged that a medical education was a continuum, moving from less to more responsibility throughout one's residency. She testified, however, that more responsibility did not equate with greater interpreter requirements. The two matters were unrelated. She required interpreters primarily in group circumstances. As she advanced through the dermatology program the focus would be more and more on one to one interactions. This would result in decreased interpreter requirements. She anticipated that her greatest interpreter service requirements would be during the first two years of her residency.

V ANALYSIS

1. Legislation

[343] Dr. Dunkley alleges that UBC discriminated against her under s. 8 of the *Code*. The relevant portion of s. 8 states:

> (1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the … physical disability … of that person or class of persons.

[344] In her submissions Dr. Dunkley also states that although not expressly plead she seeks a declaration that UBC violated s. 13 of the *Code* since its actions had implication for her employment: *Kelly v. UBC (No. 3)*, 2012 BCHRT 32. I decline to deal with this matter due to the lack of notice to the Respondents and because Dr. Dunkley does not nothing more to develop this point.

[345] Dr. Dunkley says, and UBC does not dispute, that the service involved, from UBC, was residency training (PGME), and that her disability is her deafness.

[346] Dr. Dunkley alleges that PHC discriminated against her under s. 13 of the *Code*. The relevant portion of s. 13 states:

> (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the … physical disability… of that person ...

[347] Dr. Dunkley says, and PHC does not dispute, that she was in an employment relationship with them and likewise that her disability is her deafness.

2. The Test for Discrimination

[348] The test for discrimination under the *Code* is as follows. First, the complainant bears the onus of proving a *prima facie* case of discrimination. If the complainant fails to do so the complaint is dismissed. If the complainant establishes a *prima facie* case, then the onus shifts to the respondent to prove a justification. If the respondent fails to do so the complaint is justified. If the respondent establishes a justification there is no discrimination and the complaint is dismissed.

3. *Prima Facie* Discrimination

[349] The Respondents for the most part rely on the same arguments respecting whether Dr. Dunkley proved a *prima facie* case, so I deal with their arguments on this issue together.

[350] UBC states that "it is important to have the issue of discrimination and what human rights legislation is intended to protect against in the forefront of the decision maker's mind". I agree. The broad purposes of the *Code* are set out in s. 3. They are:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this *Code*;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

[351] The *Code* is to be applied and interpreted in accordance with the Supreme Court of Canada's repeated direction that human rights legislation is fundamental or quasi-constitutional and, as such, must be given a broad, liberal and purposive interpretation: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, pp. 157-58, *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536, p. 547 ("*O'Malley*"), *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, p. 339.

[352] In *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, pp. 89-90, the Court stated that human rights legislation "must be so interpreted as to advance the broad policy considerations underlying it".

[353] In *Moore v. British Columbia (Education)* 2012 SCC 61, the Supreme Court of Canada stated:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. (para. 33)

[354] The *Code* prohibits discriminatory conduct whether through act or omission. Human rights legislation is focused on the effects of discriminatory conduct on the complainant rather than on the intention of the respondent.

[355] PHC accepts that *Moore* affirms the test for a *prima facie* case of discrimination.

[356] UBC submits that the "lesson" from the Supreme Court of Canada's decision in *Moore* is that when a service is being provided pursuant to a "statutory right or obligation", the service provider must provide meaningful access to that service to ensure that the provided benefit can actually be realized by individuals with a disability. UBC says that in *Moore* the right to the "service" was statutorily established in the *School Act*. Thus it argues that *Moore* "provides no guidance to this Tribunal in determining the question of *prima facie* discrimination in this case". I disagree. *Moore* does not tie the test for a *prima facie* case to statutory rights or obligations. The *Code* prohibits discrimination respecting services customarily available to the public based on the enumerated grounds.

[357] I apply the test set out in *Moore* for a *prima facie* case of discrimination. In order to establish a *prima facie* case of discrimination, Dr. Dunkley must show: (1) that she has a characteristic protected from discrimination under the *Code*; (2) that she experienced an adverse impact with respect to the service and her employment; and (3) that the protected characteristic was a factor in the adverse impact. If she does so, the burden shifts to the Respondents to justify their conduct.

[358] Dr. Dunkley says that she has established the elements of a *prima facie* case as follows:

- she is a member of a group possessing a characteristic protected under the *Code*, that is, she is Deaf and thus suffers from a "disability" protected under the *Code*;
- she was adversely treated when UBC denied her residency training (the service) and when PHC suspended and effectively dismissed from her employment; and
- the fact she is Deaf was a factor in the adverse treatment.

[359] PHC argues that Dr. Dunkley failed to prove that she suffered an adverse impact with respect to her employment.

[360] Both Respondents argue that Dr. Dunkley failed to prove the third element of the *prima facie* test: that her Deafness was a factor in her removal from the residency program or her suspension and effective dismissal from employment.

[361] In the alternative, the Respondents say that if Dr. Dunkley establishes a *prima facie* case then they have met the burden of justification and the complaint must be dismissed.

First element: Disability

[362] As noted, there is no dispute regarding the first element of the *prima facie* test: Dr. Dunkley is Deaf, a disability under the *Code*.

Second element: Adverse impact

[363] Regarding the second element, PHC argues that Dr. Dunkley did not receive adverse treatment from it. In its submissions, PHC states its view of Dr. Dunkley's allegations of adverse impact against it:

> Dr. Dunkley gave evidence that she was treated adversely … when PHC staff asked her questions about how she functioned in the hospital environment and how much accommodating her needs in the hospital might cost. Dr. Dunkley further stated that the very fact that PHC raised the issue of costs constitutes adverse treatment … Finally, Dr. Dunkley argues that PHC's decision that the cost of providing accommodation constituted undue hardship itself amounts to adverse treatment.

[364] PHC says this argument conflates the analysis and that Dr. Dunkley must prove that she received adverse treatment independently of PHC's accommodation efforts. However, Dr. Dunkley did not submit that that PHC's questions about accommodation and cost amounted to adverse treatment. Dr. Dunkley's agreement on cross-examination that she felt she was being adversely treated when she was questioned about interpreter costs does not amount to an allegation. In the context of cross-examination I take Dr. Dunkley to be responding to the plain meaning of "adverse", a dictionary meaning such as "contrary, hostile, hurtful, injurious" (Oxford English Dictionary).

[365] Rather, Dr. Dunkley submits that PHC's actions had an adverse effect on her employment, namely, that it suspended and effectively terminated her employment. PHC did not address Dr. Dunkley's position respecting the adverse impact.

[366] The evidence is that on January 20, 2011, Dr. Dunkley was invited to attend a meeting with the PGME Office Associate Deans, Dr. Rungta, a PAR-BC representative, an interpreter and a scribe at which time she was placed on unpaid leave. At this meeting, as set out in his letter of the same date, Dr. Rungta explained that he fully recognized the obligation of the UBC PGME Office to accommodate Dr. Dunkley's disability, but stated that the requirement to do so is only to the point of undue hardship. Given the cost of providing the interpreter services that Dr. Dunkley would require, UBC had concluded that this represented undue hardship as UBC could not provide the accommodation she had requested. Dr. Rungta further explained that Dr. Dunkley's request for accommodation had been discussed with the "Health Authority" and it was his understanding that they would not be able to fund the cost of interpreter services required.

[367] Dr. Dunkley testified that in response to the question of how he could put Dr. Dunkley on unpaid leave if he was not the employer Dr. Rungta said that he believed that the hospital had come to the same decision about declining to accommodate her.

[368] The February 2, 2011 letter from the Associate Deans of Postgraduate Education, Faculty of Medicine, UBC to Dr. Patrick O'Connor, Vice President Clinical Quality & Safety, VCHA advised that Dr. Dunkley was placed on unpaid leave. The letter is set out at paragraph 257.

[369] Dr. Corral provided evidence about the three hospital sites that provided PGY 1 programs. I accept her undisputed evidence that UBC made the decisions about the placement of residents in the PGY 1 program. However, PHC did not argue that it had no effective role in the suspension of Dr. Dunkley's residency and the effective termination of her employment. PHC provided no evidence and did not dispute that the decision to end Dr. Dunkley's residency was made in conjunction with UBC.

[370] Thus, I find that, while UBC took the lead on these matters, PHC was sufficiently involved in the suspension and effective dismissal of Dr. Dunkley from

employment to amount to adverse treatment of Dr. Dunkley by it in relation to her employment.

[371] UBC does not take issue with Dr. Dunkley's argument that she was denied residency training and thus adversely treated. I find that UBC denied Dr. Dunkley residency training and that this was adverse treatment in relation to the service. UBC's argument is that its treatment of Dr. Dunkley was not discriminatory because there was no nexus between Dr. Dunkley's deafness and the adverse treatment. I deal with its arguments under the third element of the *prima facie* test.

Third element: Was Dr. Dunkley's disability a factor in the adverse impact?

[372] I turn then to the third element of the test and whether Dr. Dunkley has established that her deafness was a factor in the adverse impact. UBC says that it accepted Dr. Dunkley into the program with knowledge of her deafness, and made no stereotypical or arbitrary assumptions related to her disability. It argues, primarily on the basis of the concurring minority judgment in *McGill University Health Care Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, that the third element requires proof of "some form of active behaviour by a respondent; behaviour which is inconsistent with the values which underlie the statutory protection against discrimination". It says that this minority opinion was subsequently adopted by the majority in *Honda Canada Inc. v. Keays*, 2008 SCC 39.

[373] PHC adopts this submission. It too maintains that it did not make any arbitrary or stereotypical distinction because of Dr. Dunkley's deafness. It states that PHC has always accepted that Dr. Dunkley, as a Deaf person, is fully capable of participating in the residency training that takes place in hospitals. PHC submits that all of its efforts sought to ensure Dr. Dunkley had the same opportunities as other residents.

[374] I do not agree, either that the judgment of the minority in *McGill* requires proof that a respondent engaged in active behaviour inconsistent with the values underlying the *Code*, or that the majority in *Honda* adopted any such requirement. The passing reference to *McGill* in *Honda*, para. 71, does not elevate the presence of "stereotyping or arbitrariness" to the position of an essential requirement in establishing a

connection between disability and adverse treatment. Nor does it require "active behaviour" on the part of a respondent to establish *prima facie* discrimination.

[375] Arguments similar to UBC's were considered at length, and rejected, by the Tribunal in *Goode v. Interior Health Authority*, 2010 BCHRT 95, paras. 67-94. I adopt the Tribunal's statement of the law in *Goode*. In particular, I adopt the Tribunal's conclusion that *McGill* did not create a new, or additional, or more stringent test for a complainant to meet in establishing the elements of a *prima facie* case. The Tribunal said:

> It is uncontroversial that an overriding purpose of human rights legislation is to alleviate the disadvantageous, stereotypical or arbitrary treatment of individuals or groups, when such treatment is because of a prohibited ground of discrimination. This is a well-entrenched concept and is not something new or novel. References to arbitrariness and stereotyping, and other descriptors of discrimination, did not suddenly emerge for the first time in *McGill*, but have always been a focus of human rights protection. (para. 80)

[376] UBC relies on *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 ("*Andrews*") and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 for the proposition that the Court's pivotal concern is the "response" or "attribution of distinctions based solely on association with a group". That is one concern which the Court said in *Andrews,* "will rarely escape the charge of discrimination." But it is not the only concern.

[377] The Court said in *Granovsky*, at para. 33, that s. 15 of the *Charter* can address the way the state "responds" to people with disabilities. Yet, one of the problematic state responses is "to fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied." A similar point was made in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, where the Court said:

> The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences . . . is the true

> essence of equality". This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons. (para. 66) [emphasis added]

[378] UBC also relies on *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*") and *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"). In particular, UBC says that the service-provider attributed functional limitations to Mr. Grismer, and that the employer in *Meiorin* attributed a male norm in the place of a gender-neutral job analysis. Here it could be said that the attributed norm is that of persons who can hear.

[379] Further, UBC says that *Meiorin* and *Grismer* eliminated the distinction between direct and indirect discrimination. What the Court did in those cases was eliminate the need to categorize the type of discrimination for the purpose of determining what defence was available upon proof of *prima facie* discrimination. There is now only one "unified" justification defence, regardless of how the link is proved between the adverse impact and the prohibited ground.

[380] PHC relies on *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357 ("*Gooding*"), where a majority of the Court found that a decision to terminate an employee for theft was not discriminatory. I understand PHC to be urging a reading of *Gooding* that would require as an element of discrimination that a disability must "play a role" in the decision to terminate, in the sense of the respondent acting directly on the fact of the disability. In my view, *Gooding* does not import such a requirement.

[381] First, Huddart J.A. said at para. 11 that the fact that alcohol dependent persons may have a greater temptation to steal alcohol does not permit an inference that the employer's conduct "was based on or influenced by his alcohol dependency." I understand this to mean that the evidence did not support a finding that disability was a factor in the termination. Second, Huddart J.A. said at para. 16, "The *Human Rights Code* was not designed to prevent employers from dismissing an employee who has

committed a crime *related* to his or her employment." In my view, *Gooding* must be understood in its particular factual context.

[382] Both Respondents reference the BC Court of Appeal decision in *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56. In that case, the Court said:

> The third step of the *prima facie* test is whether the protected ground or characteristic ... was a factor in the adverse treatment. This step results from the wording of s. 8(1) of the *Code* that the denial or discrimination in question must be "because of" one of the enumerated protected characteristics. The essence of the third step is that there must be a link or nexus between the protected ground or characteristic and the adverse treatment. (para. 24) [emphasis added]

[383] The Court commented on *Gooding* as an "example of the necessity of a link between the protected ground and the adverse treatment". (para. 26) The Court rejected the argument that there is a separate requirement to "show that the adverse treatment was based on arbitrariness or stereotypical presumptions" and said that "the goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the *prima facie* test." (para. 27) [emphasis added]

[384] My conclusion on the test for *prima facie* discrimination is reinforced by the fact that, in *Moore*, para. 33, the Court makes no reference to *McGill* in articulating the necessary elements of a *prima facie* case of discrimination. Rather, it says that the third element requires a complainant to show that, "the protected characteristic was a factor in the adverse impact", with no suggestion that a complainant must prove, as UBC would have it, and PHC infers, active behaviour by a respondent that is inconsistent with the values underlying the *Code*.

[385] The Respondents are correct in their contention that a *prima facie* case cannot be diminished to a two-step analysis of establishing only that the complainant is a member of a protected group and has suffered an adverse impact.

[386] I note, however, that the concept of adverse effect discrimination is not, as UBC suggests, captured merely by the fact of an adverse impact on a member of a protected group. As set out in *O'Malley*, it arises where a facially neutral standard applies to all but has a discriminatory effect on a prohibited ground of discrimination, "in that it imposes, because of some special characteristic of the employee or group, obligations,

penalties, or restrictive conditions not imposed on other members of the work force." (p. 551) [emphasis added]

[387] Further, both Respondents also argue that "there is no freestanding" duty to accommodate. I agree that the duty to accommodate would not arise in circumstances where there was no nexus between the protected ground and the adverse impact. A complainant must establish a nexus between the protected characteristic and the adverse impact. The fact that Dr. Dunkley has a disability and was treated adversely does not, on its own, automatically establish a nexus between the two. If, for example, Dr. Dunkley had been removed from the program or terminated from employment for academic deficiencies which had no connection to her deafness, her complaint would fail at the third step of proving a *prima facie* case.

[388] In my view, the Respondents' removal of Dr. Dunkley from her residency program and the effective end of her employment are inextricably linked to her disability. She required sign language interpreters, at a cost the Respondents judged to be too great, to access the residency training and employment offered, only because she is Deaf.

[389] Abella J. said in *McGill*, "The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly." While it is not necessary to specifically identify arbitrariness or stereotyping, the negative impact on Dr. Dunkley is arbitrary in that it results solely from a program designed only for a hearing population. While I accept that neither UBC nor PHC attributed stereotypical attributes to Dr. Dunkley because of her deafness, the norm of oral communication is oriented to persons who can hear and imposes a burden on persons who are Deaf that is not imposed on others.

[390] In *Howard v. University of British Columbia* [1993] B.C.C.H.R.D. No. 8, the former BC Council of Human Rights determined that the absence of sign language interpretation placed a burden on Deaf students at UBC which was not imposed on others, and that they were adversely affected by the absence of interpreters in the classroom. (para. 46)

[391] The Council set out the purpose of human rights legislation for people with disabilities as described in *Robinson v. Canada (Armed forces)* (1992), 15 C.H.R.R. D/95 at D/121 para. 94 (Can. Trib.):

> The purpose of such legislation is to guarantee, *inter alia*, to disabled persons that they will not be excluded by society and that they enjoy a real, and not simply hypothetical, right to equal opportunity with other individuals to make for themselves the lives that they are able and wish to have through their fullest possible integration into and participation in society. Isolation is probably the best ally of preconceived notions about a group or category of persons identified by a personal characteristic. It fosters ignorance, which lead to and nurtures prejudice and discrimination. It is to counter these very scourges that human rights legislation has been adopted. (para. 38)

[392] In *Andrews*, McIntyre J. said:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (pp. 174-175)

[393] Dr. Dunkley was offered a residency in dermatology at UBC because of her merits and capacities. As Dr. Warshawski wrote, "Dr. Dunkley was accepted into the program based on her outstanding CV". She was denied the benefit of the residency training and employment, based not her merits and capacities, but entirely on her disability. In short, because she is Deaf.

[394] The Respondents' position on the *prima facie* case is ultimately untenable in that it would prohibit discrimination on the basis of disability only where a respondent takes the disability into account in a discriminatory fashion. If, for example, Dr. Dunkley were an individual who required a wheelchair for mobility, and who, if she obtained access to an educational/training institution, would perform as well as any other student, but could not access the institution because the only entrance was a set of stairs, the Respondents' approach would result in no *prima facie* discrimination as long as they stood at the top of the stairs and invited her to enter. In other words, so

long as a service provider or employer says its reasons for declining to provide accommodation is not the disability *per se* but some other reason (e.g. cost), then there is no duty to accommodate and no corresponding scrutiny of whether any attempts at accommodation are sufficient to justify the exclusion.

[395] The approach advocated by the Respondents is inconsistent with the purposes of the *Code*, and in particular with the purposes of fostering a society "in which there are no impediments to full and free participation", and promoting "a climate of understanding and mutual respect where all are equal in dignity and rights". To deny Dr. Dunkley the opportunity to continue in her program, without considering whether she could be accommodated without undue hardship, would be to perpetuate the historical disadvantage that the Supreme Court of Canada, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 ("*Eldridge*"), paras. 54-57, recognized as one of the indicia of discrimination against people with disabilities in general, and against Deaf people in particular.

[396] I find that Dr. Dunkley has made out a *prima facie* case of discrimination on the basis of physical disability against both Respondents.

[397] I turn now to the Respondents' defence and in my view, the central issue in this case is whether UBC or PHC established a justification.

4. *Bona Fide* Reasonable Justification / Occupational Requirement

[398] Having found that Dr. Dunkley has established a *prima facie* case of discrimination based on physical disability, the burden shifts to the Respondents to show that they had a *bona fide* and reasonable justification in the case of provision of a service and a *bona fide* occupational requirement in the case of employment for their conduct.

[399] The Supreme Court of Canada set out the three-step analysis for determining whether a standard is a BFRJ or BFOR respectively in *Grismer* and *Meiorin*.

[400] In order to establish this justification, the respondent must prove that:

> 1. it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

> 2. it adopted the standard in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
>
> 3. the standard is reasonably necessary to accomplish its purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship. (*Grismer*, para. 20)

[401] Dr. Dunkley does not take issue with the first two steps of the analysis.

[402] Dr. Dunkley states that both UBC and PHC adopted the standard or requirement that residents must be able to communicate effectively in English with patients and other members of the medical team. Dr. Dunkley characterizes the Respondents' position as follows:

> 1. The general purpose of this impugned requirement is "patient safety";
>
> 2. The standard, the "ability to communicate effectively in English", was adopted in good faith with no discriminatory animus; and
>
> 3. This standard in its existing form is necessary to achieve the general purpose and changes to the standard (an accommodation involving ASL interpreters) are not possible without experiencing undue hardship i.e. prohibitive costs. Both UBC and PHC say the standard must prevail because the accommodation is too costly.

[403] PHC makes no comment as to the applicable standard.

[404] UBC says:

> The relevant standard … is that the participants in PGME meet the requirements of the relevant licensing body, in this case the Royal College of Physicians and Surgeons. The standard was adopted so that participants can write their speciality certification examination. Completion of the Resident Program is a prerequisite to writing the examination.

[405] I find that the Complainant's statement of the relevant standard more accurately reflects the basis for her exclusion from the residency program. UBC's ultimate goal or purpose was to ensure that the participants in PGME meet the requirements of the relevant licensing body, in this case the Royal College of Physicians and Surgeons. The goal of ensuring patient safety could well be another goal. In order to achieve either or both goals participants in PGME must communicate effectively in English.

The absence of ASL interpreters was a barrier to Dr. Dunkley meeting this standard because she is Deaf.

[406] The parties agree that the only issue I am required to determine is whether UBC and/or PHC have established on a balance of probabilities that they cannot accommodate Dr. Dunkley without incurring undue hardship due to the cost of the interpreter services she required.

[407] My approach in determining this issue will be to first set out jurisprudence relevant to the analysis of undue hardship and establishing cost as an undue hardship. I then turn to the evidence to determine whether the Respondents' conduct was justified.

5. Proving Undue Hardship

General Principles

[408] The Respondents must establish that that the standard is reasonably necessary to accomplish the purpose or goals of patient safety and ensuring that the participants in PGME meet the requirements of the relevant licensing body, in the sense that the Respondents cannot accommodate Dr. Dunkley without incurring undue hardship.

[409] This is a fact specific inquiry and will vary with the circumstances of each case: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, p. 984; *Meiorin*, para. 63.

[410] The Respondents are not required to prove that it is "impossible" to accommodate Dr. Dunkley, but the Respondents are required to prove undue hardship: *Hydro-Quebec v. Syndicat des Employees de Technique Professionels et de Bureau d'Hydro-Quebec* 2008 SCC 43, [2008] 2 S.C.R. 561 ("*Hydro-Quebec*").

[411] The accommodation process is a multi-party endeavour. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. Both the Respondents and Dr. Dunkley are required to participate in the search for an accommodation, which must be approached with common sense and flexibility. However, the primary responsibility lies with the Respondents to find and propose a solution that would accommodate Dr. Dunkley: *Renaud*, pp. 994-95.

[412] In *Moore*, the Supreme Court of Canada said:

> The next question is whether the District's conduct was justified. At this stage in the analysis, it must be shown that alternative approaches were investigated (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 65). The *prima facie* discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal (*Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, at p. 208; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984). In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Meiorin, at para. 38; Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 518-19; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, at para. 130).
>
> … It is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of "mere efficiency", since "[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier" (*VIA Rail*, at para. 125). (paras. 49-50)

[413] In *Eldridge*, the Supreme Court of Canada addressed the positive duty of service providers to provide actual equality of access. It held that:

> It is also a cornerstone of human rights jurisprudence ... that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy only extends to the point of "undue hardship". (para. 79)

[414] In *Meiorin* and *Grismer*, the Court unified the approach to human rights analysis so that the obligation for reasonable accommodation applies in all cases where *prima facie* discrimination is established. The Court said that employers must "build conceptions of equality into workplace standards" and, "The standard itself is required to provide for individual accommodation, if reasonably possible." (*Meiorin*, para. 68) The Court in *Meiorin* stated:

> When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J. who observed in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is

> to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. (para. 62)

[415] In *Hydro-Quebec* the Court found that the Quebec Court of Appeal had erred by stating the *Meiorin* test as whether it was impossible to accommodate the complainant's characteristics, noting that in *Meiorin* the Court related the word "impossible" to "undue hardship". (para. 12) Deschamps J., writing for the Court, said that the third prong does not require proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.

[416] In its argument respecting *Hydro-Quebec*, UBC submits:

> …Thus, the court eschewed once and for all those forms of argument whose inarticulate premise is that all things that are possible are reasonable or that if a respondent has the resources to do something, it must do it. Those forms of argument are simply nothing more than a reformatting of the now-discarded notion of "impossibility". The issue is whether it is reasonable or the impact undue. Those are comparative terms. They are not absolute. Indeed, the case law emphasizes that they are two ways of framing the same concern. They are not even separate concepts.

[417] I do not understand Dr. Dunkley to take a different position respecting the third prong of the test. Her argument is that UBC has failed to establish that an accommodation involving ASL interpreters amounts to undue hardship.

[418] In *Hydro-Quebec* the Court goes on to state respecting *Meiorin*:

> As these passages indicate, in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. L'Heureux-Dubé J. accurately described the objective of protecting handicapped persons in this context in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 36:
>
> > The purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms. With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.

> As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. (paras. 13-14)

[419] In order to discharge the burden placed on them by the third prong of the *Meiorin*/*Grismer* test the Respondents are required to prove that the cost of providing the interpreter services Dr. Dunkley required would result in UBC and/or PHC suffering undue hardship.

The Procedural and Substantive Components of the Analysis

[420] It is recognized that there is a procedural and a substantive component to the determination of undue hardship. In *Meiorin* the Court stated:

> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra. (para. 66)

[421] The procedural component relates to the procedure, if any, adopted to assess the issue of accommodation. For example, relevant considerations include the efforts the Respondents made, the options they explored and offers they made to accommodate Dr. Dunkley's deafness. The substantive component relates to the substantive content of either a more accommodating standard offered by the Respondents or their reasons for not offering any such standard. (*Meiorin*, para. 66) Both components are considered in determining whether the Respondents have proven that they could not otherwise accommodate Dr. Dunkley without experiencing undue hardship.

[422] In *Emergency Health and Services Commission v. Cassidy*, 2011 BCSC 1003, the BC Supreme Court found the Tribunal erred in interpreting *Meiorin* to require an employer to establish that it treated the employee "fairly, and with due respect for his or her dignity, throughout the accommodation process". (para. 37) The Court said that *Meiorin* did not create a separate duty that can be breached and, "The single question

remains of whether the employer could accommodate the employee without experiencing undue hardship." (para. 24)

[423] UBC argues that "if a respondent has made good faith and reasonable inquires which result in a conclusion of undue hardship, then the fact that there might be further inquiries which could be made is simply not relevant." To the extent that UBC argues that once it proves the three prongs of the test (including undue hardship), that is the end of the analysis, I agree. I also agree that just because something is "possible" does not mean it must be done. However, the question of further inquiries or possible solutions (in the sense of reasonable and practical steps) is relevant to the determination of the third prong of the test.

The Principles regarding Cost as Undue Hardship

[424] The Supreme Court of Canada has said that caution is called for when assessing whether the cost of providing an accommodation meets the test of undue hardship. In *Grismer* the Court stated:

> … While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve. Moreover, there may be ways to reduce costs….(para. 41)

[425] In *VIA Rail* the Supreme Court of Canada cited *Grismer* and again warned that tribunals must be wary of putting too low a value on accommodating persons with disabilities. (para. 128) The Court went on to say:

> Since the Governor in Council has not prescribed standards for assessing undue hardship as authorized by s. 15(3) of the *Canadian Human Rights Act*, assessing whether the estimated cost of remedying a discriminatory physical barrier will cause undue hardship falls to be determined on the facts of each case and the guiding principles that emerge from the jurisprudence. A service provider's refusal to spend a small proportion of the total funds available to it in order to remedy a barrier to access will tend to undermine a claim of undue

> hardship (*Eldridge*, at para. 87). The size of a service provider's enterprise and the economic conditions confronting it are relevant (*Chambly*, at p. 546). Substantial interference with a service provider's business enterprise may constitute undue hardship, but some interference is an acceptable price to be paid for the realization of human rights (*Central Okanagan School District No. 23*, at p. 984). A service provider's capacity to shift and recover costs throughout its operation will lessen the likelihood that undue hardship will be established: *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C.C.H.R.).
>
> Other relevant factors include the impact and availability of external funding, including tax deductions (*Brock v. Tarrant Film Factory Ltd.* (2000), 37 C.H.R.R. D/305 (Ont. Bd. Inq.)); the likelihood that bearing the net cost would threaten the survival of the enterprise or alter its essential character (*Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.)); and whether new barriers were erected when affordable, accessibility-enhancing alternatives were available (*Maine Human Rights Commission v. City of South Portland*, 508 A.2d 948 (Me. 1986), at pp. 956-57). (paras. 131-132)

[426] The Court went on to address the respondent's position that it could not provide the accommodation because of the [prohibitive] cost. It pointed out that the issue is not just cost but whether the cost amounts to undue hardship. In this context the respondent requires proof in the form of concrete evidence. This includes the respondent's financial information, information in the respondent's sole possession. If the respondent decides to not enter its financial information, the reasonable basis for refusing to fund the cost of an accommodation will be absent. (para. 226)

[427] Accordingly, relevant factors include the quality of the evidence regarding cost (is it concrete or impressionistic), whether there are ways of reducing costs, the size of the service-provider's enterprise and the economic conditions facing it, the proportion of the cost relative to the service-provider's total funds, the level of interference with the enterprise, the ability to shift and recover costs throughout the operation, and the impact and availability of external funding.

[428] I will first determine the Respondents' response to Dr. Dunkley's request for accommodation. This will include their efforts to investigate how to accommodate Dr. Dunkley, the options they explored, the timeliness of their response and any offers to accommodate made to Dr. Dunkley. I next set out the substantive outcome of the accommodation process and will also determine whether Dr. Dunkley impeded the

accommodation process, including whether she participated in achieving her accommodation, and whether she turned down offers that would have fulfilled the Respondents' duty to accommodate her disability. I then turn to a consideration of the evidence regarding the Respondents' financial resources and whether UBC and/or PHC has established that the cost of accommodation would have resulted in causing them undue hardship.

6. The Respondents' Response to Dr. Dunkley's Request for Accommodation

March through early May 2010

[429] On March 8, 2010 Dr. Dunkley was notified that her CaRMS match was a dermatology residency at UBC. She contacted the A&D Office the same day to arrange a meeting in Vancouver to start to put her accommodation in place for her residency.

[430] When it offered Dr. Dunkley a potential residency position through CaRMS, UBC knew that Dr. Dunkley was Deaf. The August 15, 2010 e-mail from Dr. Warshawski to Dr. Rungta states that Dr. Warshawski had a long interview with Dr. Dunkley before the CaRMS applications. He had understood from her that interpreters would not be an issue as she had a good interpreter(s). He states that he did not inquire about funding. He "wrongly assumed that there were other agencies involved." Nonetheless, at the time of the match, UBC would have known or ought reasonably to have known that Dr. Dunkley would require interpreters.

[431] On March 18, Dr. Dunkley met with her former disability advisor at the UBC A&D Office, Dr. Warick. As noted, when she was an undergraduate UBC had accommodated Dr. Dunkley with ALS interpreters, note takers, tutors, and real time captioning services for six years. Dr. Dunkley testified that after her meeting with Dr. Warick she understood that the A&D Office would be providing her with interpreter services.

[432] On March 19, Dr. Dunkley informed the PGME Office that she was starting her dermatology residency in July, that she was Deaf and that she had started the process of requesting accommodation services at the A&D Office. She told the PGME Office

that it needed to contact the A&D Office, as she understood it, so that the A&D Office could confirm that it was responsible for her ASL interpreters. Dr. Dunkley asked that her e-mail be given to the most appropriate person. She asked to be given a PGME Office contact person who she could communicate with on a continuous basis and she warned that it could take some time to secure her ASL interpreters. The documentary evidence shows that Ms. Moen, the PGME Office administrator responded to Dr. Dunkley and identified herself as the contact person.

[433] UBC argues that Dr. Dunkley's e-mail to PGME illustrates that she was made aware that there were issues about who might be responsible for the costs of having sign language interpreters. I am not sure what UBC's point is. Whether or not Dr. Dunkley was aware that UBC had concerns about who was responsible for the provision of the interpreters is of little import to the question of whether UBC establishes that those costs amounted to undue hardship. In addition, and to clarify my finding of facts, I accept Dr. Dunkley's evidence that she understood on March 18 that interpreting services would be provided to her. I find that, in the circumstances, it was reasonable from her first contact with UBC in March to early May for Dr. Dunkley to believe what UBC communicated to her; that is, she would be provided with the interpreter services she required to participate in her residency as of July 1.

[434] What follows is further documentary e-mail evidence showing the ongoing correspondence between Dr. Dunkley and Ms. Moen. Ms. Moen did not testify. The e-mails authored by Ms. Moen indicate that she told Dr. Dunkley that she was communicating with Dr. Rungta about Dr. Dunkley and her accommodation requirements. For instance, in an undated e-mail Ms. Moen stated that she had discussed Dr. Dunkley's March 25th request to be assigned to St. Paul's Hospital so that she could access Deaf related services with Dr. Rungta and the Dermatology Director. This accommodation was granted.

[435] On March 28, Dr. Dunkley suggested to Ms. Moen that the PGME Office contact Dr. Forgie, Faculty of Medicine, University of Ottawa as a resource. She explained that Dr. Forgie had already investigated the funding arrangements to pay for interpreters in the event that Dr. Dunkley ended up with a CaRMS match at the University of Ottawa. Ms. Moen responded that she would pass this information on to

the "PG Dean". She assured Dr. Dunkley that her interpreters would be in place for her residency start date.

[436] Generally, Ms. Moen continued to assure Dr. Dunkley that appropriate interpreter services would be in place for July 1. Dr. Dunkley told the PGME Office that she had advertised for interpreters on the Provincial and National Association website. She raised her concern that there were no local interpreters with appropriate training to interpret for her in a medical setting and the need to provide some training for her new interpreters. She suggested her former Ottawa interpreter or her partner (as a last resort) could do this training.

[437] Well over a month after being requested to do so, on April 23, Ms. Moen asked Dr. Dunkley who her disability advisor was at the A&D Office so that the PGME Office could send them confirmation that Dr. Dunkley is a resident. Ms. Moen wrote, "The UBC A&D office will be taking the lead in assessing your accommodation requirements at this point and you should discuss your interpreter requirements and your efforts to recruit one directly with them."

[438] On April 26, 2010, Ms. Moen notified Dr. Corral at the PGY 1 Office that Dr. Dunkley, a Deaf resident had been assigned to a dermatology residency at St. Paul's Hospital. Ms. Moen wrote:

> [Dr. Dunkley] is extremely organized and proactive and did her undergraduate degree at UBC, so she is familiar with the UBC A&D Office, which is helpful for us, because this is a first for Postgrad.

[439] Dr. Dunkley came to Vancouver to meet with prospective interpreters on May 6 and 7. Ms. Sedran was one of the interpreters who attended this meeting. Ms. Sedran was interested in working as an interpreter for Dr. Dunkley's residency.

[440] During this period I find that UBC was generally responsive to Dr. Dunkley's request for accommodation. However, there was unnecessary delay in the PGME Office informing the A&D Office that Dr. Dunkley was a resident and informing the PGY 1 Office that Dr. Dunkley was a Deaf resident who had been assigned to the dermatology program at St. Paul's Hospital. Dr. Dunkley was told to deal with the A&D Office and she continued to do so. I find that Dr. Dunkley was fully participating in arranging the successful accommodation of her disability.

From May 11 to June 21 when UBC advises Dr. Dunkley that she is not a student

[441] On May 11, Ms. Moen told Dr. Dunkley that the PGME Office was working with UBC counsel to determine who is responsible for the costs of her accommodation requirements. This e-mail appears to have been the harbinger of what was to follow.

[442] As May continued there was correspondence from Ms. Moen, most of which involves Ms. Moen acting as the communicator between the PGY 1 Office at St. Paul's Hospital and Dr. Dunkley. On May 23, in an e-mail to Dr. Corral, Ms. Moen notes that Dr. Dunkley is dealing directly with the A&D Office for her interpreter requirements. In a May 26 e-mail Ms. Moen told Dr. Corral that "it is still unknown who is paying for the interpreters."

[443] Near the end of May, Dr. Dunkley attended her medical school graduation at the University of Ottawa and moved house to Vancouver to attend her residency of choice at UBC. She informed UBC that she would be on a trip out of the country from May 24 to June 23 but was available to make e-mail contact from time to time.

[444] By letter dated June 1, Dr. Rungta, who testified that he had just been informed about Dr. Dunkley the week before, wrote to Dr. Dunkley that much more information was required from her so that UBC could determine the "scope of our duty to accommodate your disability". She was advised that "without additional detailed information we are unable to provide a definitive response to your request for accommodation". Dr. Dunkley was required to provide "medical documentation related to [her] condition that supports the requested accommodations", "details related to [her] requirements for an interpreter" and "estimates of the costs associated with employing an interpreter". Dr. Rungta wrote "you must understand that we are unable to proceed any further with regard to this particular request on the basis of the information provided to date".

[445] Dr. Rungta wrote "we have been engaged in ongoing discussions regarding your request for accommodations for the duration of your dermatology residency training which is commencing July 1st, 2010." And that "we have been copied on your correspondence to Ruth Warick in the Access and Diversity office". He notes that "we understand that the University of Ottawa paid the full costs of the particular

accommodation you requested during your undergraduate program. However, the same situation may not necessarily prevail in relation to your postgraduate training. In addition to the costs involved in engaging an interpreter there are potential insurance and liability issues related to your work in the clinical setting that require consideration."

[446] In a June 5 e-mail Dr. Dunkley responded. She explained her need for interpreters, advised that she had always had at least two full time interpreters so that they could take turns throughout the day. She stated that the number of interpreters also depends on the competence of the interpreters themselves and the nature of the rotation. She stated that she had never been responsible for negotiations for rates, salary or overtime. Agreements for interpreter services were made between the university and the interpreters, thus she was not in a position to comment on costing matters. Dr. Dunkley included her February 9, 2010, Audiology Report and April 8, 2010, Letter from her audiologist seeking accommodation for her Medical Exam Purposes.

[447] On June 7, Ms. Moen e-mailed the PGY 1 Office, stating, "It has been determined that it is our office [PGME Office] that will be responsible for coordinating [Dr. Dunkley's] accommodation, not Access and Diversity."

[448] On June 21, Dr. Rungta wrote to Dr. Dunkley, advising that they had not been able to resolve "all outstanding issues to accommodate her July 1, 2010 start date." She was advised that her interpreters would not be engaged by July 1, thus she would have to delay commencing her clinical duties for a short period.

[449] UBC's response to Ms. Dunkley changed in this period, as follows:

Alert that UBC may not put interpreters in place

[450] No explanation is given for why just a few weeks after the PGME Office assured Dr. Dunkley that the interpreters would be in place for her July 1st start date, it then told her something completely different. Dr. Rungta wrote in his June 1 letter, "we understand that the University of Ottawa paid the full costs of the particular accommodation you requested during your undergraduate program. However, the same situation may not necessarily prevail in relation to your postgraduate training."

[451] What had changed during this period was that the A&D Office would no longer be involved in Dr. Dunkley's accommodation. I deal with the evidence on this point below, as the result of this determination was more than procedural. It meant not only that UBC did not utilize the expertise of the A&D Office, but also that the Access Fund was not made available for the cost of interpreters for Dr. Dunkley's residency.

Request for medical documentation

[452] Prior to the June 1 letter, Dr. Dunkley was assured that interpreters would be in place for July 1. No mention was made that she needed to provide medical documentation to support her accommodation request for ASL interpreters.

[453] Ms. Mee testified that Dr. Dunkley had met with the appropriate person at the A&D Office, Dr. Warick, who specialized in assisting Deaf persons. She said that the A&D Office did not request that Dr. Dunkley obtain an audiology report or ENT specialist report as it already had the audiology information from when Dr. Dunkley was an undergraduate student. Dr. Dunkley testified that Dr. Warick had mentioned that her former documentation might be considered dated. However, Dr. Dunkley received the CaRMS match on March 8, she had attended at the A&D Office in March and she had had ongoing correspondence with her designated contact person at the PGME Office. No one had requested medical documentation about her deafness before June 1.

[454] Dr. Rungta's June 1 letter required Dr. Dunkley among other things to provide "medical documentation related to [her] condition that supports the requested accommodations" before UBC would proceed further. Dr. Dunkley responded to Dr. Rungta's request for medical information on June 5.

[455] If there is an issue regarding a person's disability, the first step in response to a request for the accommodation of a disability is for the service provider or employer to seek medical documentation. This serves the purpose of ensuring that an appropriate accommodation is provided and verifying that there is a medical basis to the request. A respondent is expected to conduct itself reasonably and with common sense. UBC is a sophisticated service-provider. While the PGME Office had not dealt with a request for accommodation from a Deaf resident, I do not find it reasonable that UBC did not

comprehend that Dr. Dunkley required sign language interpreter services to function in her residency.

[456] Dr. Dunkley does not have a recently acquired disability or a changing disability. The evidence is clear that she was born Deaf and since her first diagnosis has remained profoundly Deaf. She has required accommodation for her deafness in every educational institution she has ever attended. UBC provided her with ASL interpreters for her undergraduate years and UBC knew that she was accommodated with ALS interpreters by the University of Ottawa for four years of medical school.

[457] A timely request for medical documentation to support Dr. Dunkley's request for accommodation of a disability could have been made when UBC was first notified that it had a Deaf PGY 1 resident who had requested accommodation. A reasonable and practical alternative in the circumstances would have been to move ahead with the accommodation process while Dr. Dunkley updated the medical documentation about her deafness and accommodation requirements.

[458] I note that another three months passed from June 5 when Dr. Dunkley responded to the request for medical information before UBC was satisfied that Dr. Dunkley required the accommodation of ASL interpreters.

[459] In all of the circumstances, UBC's position in its June 1 and July 20 letters that it could not take further steps to accommodate Dr. Dunkley until she provided "medical documentation related to [her] condition that supports the requested accommodations" and later a report from an ENT specialist caused unnecessary and excessive delay.

Request for details of requirements and costs

[460] It was reasonable for the Respondents to make inquiries about Dr. Dunkley's interpreter requirements and to ask if she could provide any direction respecting where it could obtain cost related information. Dr. Dunkley testified that she very much wanted to be part of accommodation process. UBC starting this inquiry some three months after Dr. Dunkley was accepted into the program was late in the day. As noted, Dr. Dunkley had already provided Dr. Forgie as a resource on costs to the PGME Office as of March 28.

June 21 to September 7 when the Specialist's Report is obtained

[461] By late June the e-mail correspondence and testimony show that both Ms. Knowles and Ms. Coughlin were asked to assist with Dr. Dunkley's accommodation. Dr. Corral stated that, in her view, Sandy Coughlin and Rebecca Knowles were leading the accommodation process with respect to finances. Ms. Coughlin and Ms. Knowles, both VCHA employees working for Consolidated HR, testified about being assigned the task of calculating the cost of providing ASL interpreters for Dr. Dunkley's residency. Ms. Coughlin and Ms. Knowles testified that their immediate superiors asked them to work on Dr. Dunkley's accommodation file. Specific evidence about the relationship between and services provided by VCHA Consolidated HR employees and Dr. Dunkley as a PHC employee was not provided.

[462] Also in this period, the PGME Office repeatedly gave last minute notice to Dr. Corral at the PGY 1 Office to cancel Dr. Dunkley's rotations leaving the PGY 1 Office and Dr. Dunkley scrambling. For example:

- On June 29, the PGME Office notified Dr. Warshawski and Dr. Corral that Dr. Dunkley would not be commencing her program. Dr. Corral stated that she had to cancel Dr. Dunkley's psychiatry rotation and on-call schedule two days before its commencement.

- On June 30, Dr. Dunkley was informed that she could start her PGY 1 with a research rotation.

- Dr. Corral said that she was hoping to be able to schedule a family practice rotation or an ambulatory rotation which might not require interpreters for Dr. Dunkley's second four week rotation. But at that point the PGY 1 Office could not proceed without receiving further instruction from the PGME Office regarding the need for accommodations.

- On July 14, Dr. Corral told Dr. Warshawski that Dr. Dunkley was to start her four week ICU rotation on July 26th; however, her accommodations were not in place. Dr. Corral asked Dr. Warshawski what to do. She suggested that Dr. Dunkley could do another elective. Dr. Warshawski responded, "we are going to have to proceed according to the PG Dean's office directions."

- On July 23, the PGY 1 Office advised Dr. Dunkley that her family practice rotation scheduled to commence on Monday, July 26 had not been confirmed. On the same day Dr. Dunkley e-mailed a doctor, introduced herself saying that her rotations were re-arranged at the last minute and asking if she could start her rotation with him on Monday.

[463] As noted, in his letter of June 1 Dr. Rungta asked Dr. Dunkley to provide medical documentation about her condition to support her request for accommodation. On June 5, Dr. Dunkley provided the audiologist letter and audiogram. The first mention that this medical documentation was inadequate was made at the July 20 meeting, over one and a half months later.

[464] At the July 20 meeting the Respondents decided what information they required and tasks were assigned. Ms. Coughlin described it as "an initial exploratory meeting".

[465] In his July 21 summary of the meeting Dr. Rungta told Dr. Dunkley that "We" agreed to take certain steps, one of which was to expedite an appointment for her to meet with an ENT specialist for an assessment and recommendations regarding what accommodations would be necessary for her in the different learning environments that she would encounter during her residency training. In Dr. Corral's summary letter she confirmed that "we" would assist Dr. Dunkley in obtaining a family physician.

[466] Dr. Corral sent a summary of the tasks assigned at the July 20 meeting to those in attendance. She provided information about Dr. Dunkley's rotations within the week.

[467] Ms. Coughlin testified that upon being assigned the accommodation request for Dr. Dunkley, she examined the medical information. She found it fairly dated and quite illegible. I note that the audiogram was done in February 2010, the audiologist's letter April 2010. I also note that the simple cure to the problem with legibility was to ask the author to provide a typed version of their illegible writing.

[468] Ms. Coughlin testified that she contacted a consultant, an Occupational Health physician at VCHA to ask what she should do. By e-mail dated July 22, 2010 (that is, after the July 20 meeting), the consultant raised a number of issues and advised Ms. Coughlin to obtain updated medical information from an ENT.

[469] As of mid-August the Respondents had not arranged the appointments they required Dr. Dunkley to attend before they would address her accommodation request. Dr. Dunkley took matters into her own hands. I accept Dr. Dunkley's testimony and the contemporaneous e-mail corroboration. Her e-mail succinctly summarizes the situation. On August 13, Dr. Dunkley emailed, among others, Ms. Knowles, Dr. Corral, Ms. Coughlin, and Ms. Victory. She stated:

> For clarification, my appointment on Tuesday is at the ENT residents' clinic. I do not have an appointment with a staff physician yet. Since an appointment was not confirmed with a specialist as agreed at the July 20th meeting, I decided to take matters in my own hands and went to the ENT department at St. Paul's to request an appointment. The best option they gave me was to go to the residents' clinic on Tuesday.

[470] On August 13, Ms. Knowles e-mailed the group who attended the July 20 Meeting to say that she understood that Dr. Dunkley had an appointment with a specialist on August 17. She stated that once the specialist had completed his/her assessment "the Employer can begin to review the parameters of a reasonable accommodation".

[471] Following her August 17 appointment at the residents' clinic, the resident booked Dr. Dunkley an appointment with the ENT Specialist for the following week.

[472] On September 7, the ENT Specialist responded to Ms. Coughlin's inquiry of August 18 to review Dr. Dunkley's hearing impairment and its impact on her residency training by way of his Report.

[473] The Report confirmed that Dr. Dunkley is profoundly deaf and requires interpreter services for her residency. The ENT Specialist said in summary that Dr. Dunkley has had bilateral hearing impairment since birth. The testing that she participated in indicated that she has a "profound hearing loss". She is able to function well in a one to one situation, relying on a hearing aid and lip reading. His opinion was that "it would not be possible for Dr. Dunkley to complete her residency training without liberal access to a sign language interpreter".

[474] Dr. Rungta testified that after receiving the Report "we at that point began to look at exactly what would be required and what it would cost." The Report as noted

is dated September 7, 2010, some six months after Dr. Dunkley was matched for a UBC residency.

[475] During this period of time Dr. Dunkley did a partial research rotation; a one week outpatient rotation at a rheumatology clinic (elective) and a family rotation without ALS interpreters.

Mid-September to early October

[476] In mid-September Dr. Dunkley responded to the concern that she was a safety risk in a medical setting by providing her List to PHC, PGME Office and VCHA. On October 7, PAR-BC emailed, among others, Ms. Coughlin (copied to among others Dr. Rungta), noting that to date no accommodation had been provided to Dr. Dunkley since July 1, 2010 and again providing a copy of the List. Ms. Coughlin e-mailed Dr. Dunkley. She stated that she had spoken to her colleagues who had decided that they did not need to speak to the people on the contact list "to answer [their] questions". Ms. Coughlin's e-mail noted that "this was a very complex issue".

[477] Dr. Rungta testified that he did not contact any of the persons on the List nor did he believe that anyone else had.

Summary of the Accommodation Process

[478] After its initial response, UBC's approach to the accommodation process changed. I find that UBC's effort to investigate Dr. Dunkley's accommodation requirement was not timely, it was not reasonably responsive to her request, and it showed no consideration for the commencement of her residency on July 1.

[479] UBC was entitled to request that Dr. Dunkley provide medical documentation in support of her accommodation request. However, it should be aware of its own accommodation processes and should act accordingly and responsively. Asking for medical documentation for the first time on June 1 was not adequately responsive. Failing to inform Dr. Dunkley for some six or seven weeks that the documentation she provided was inadequate caused unacceptable delay in the accommodation process. Failing to promptly assist Dr. Dunkley in getting a family physician and the specialist

appointment it had committed to do was inadequate and caused further delay. (I find both Respondents bear responsibility for this failure.)

[480] It took about three months for UBC to make its determination that Dr. Dunkley's status as a resident prevented her from accessing services at the A&D Office. It took about six months for UBC to confirm that Dr. Dunkley was profoundly Deaf and required liberal access to interpreter services for her residency. When it placed Dr. Dunkley on unpaid leave three months after her residency commenced, UBC had provided interpretation for some Academic Half Days, while Dr. Dunkley had begun two blocks of rotation without interpreters.

[481] UBC appears to criticize Dr. Dunkley for assuming that UBC would provide the interpreter services required for her residency. I take note of Dr. Rungta's written notes about what he said to Dr. Dunkley at their August 31 meeting. He wrote that he explained that each university and health authority have their own disability access policies and processes. [Postgrad] is not the same "landscape" as undergraduate education in medicine. He told Dr. Dunkley that "It was the prospective resident's responsibility to get this info prior to ranking in CaRMs."

[482] While it is true that the duty to accommodate extends only to the point of undue hardship, UBC's approach reflects an attitude which did not fully accept its responsibility to reasonably accommodate Dr. Dunkley in the program it offers. In my view, the excessive delay in its accommodation process, and the requirement that a Deaf resident only be allowed to participate in rotations where she did not require ASL services while UBC took six months to determine that Dr. Dunkley was profoundly Deaf and required ASL interpreters does not accord with a good faith effort to accommodate.

[483] I find differently with respect to the efforts to accommodate made by PHC in its role as the employer of Dr. Dunkley.

[484] It was the end of April before the PGY 1 program was informed by the PGME Office that one of the residents assigned to it was Deaf and would require ASL interpreters. This resulted in the PGY 1 Office having less time to communicate with Dr. Dunkley in preparation for her residency. The PGY 1 Office was assured that

interpreters would be provided for Dr. Dunkley up to June 7. It was then left repeatedly scrambling to re-organize rotations for Dr. Dunkley due to last minute information by the PGME Office. I find based on testimony and documentation that the PGY 1 Office, that is Dr. Corral and her assistant, made a good faith effort to accommodate Dr. Dunkley's deafness within their limited authority.

[485] I find there was some effort, albeit by VCHA employees, to work on the accommodation of Dr. Dunkley. As will be evident in a later section of this decision, I find that the assignment of estimating the cost for ASL interpreter services was outside the scope of the regular duties of both Ms. Knowles and Ms. Coughlin.

[486] The List potentially provided a wealth of information. Given, the admitted lack of knowledge or experience of Dr. Rungta, Ms. Coughlin and Ms. Knowles in providing interpreter services to a Deaf resident, I do not find it reasonable that they treated the List as essentially irrelevant to the task of assessing whether UBC and PHC could reasonably accommodate Dr. Dunkely's need for interpreter services. The List included persons and organizations who could have assisted in providing reliable information about the accommodation requirements of Deaf people, in particular in a medical setting and specifically about Dr. Dunkley's requirements in her last two years of medical school.

[487] I find that considering their lack of experience or knowledge in accommodating Deaf persons, Ms. Knowles and Ms. Coughlin failed to properly inform themselves about the provision of interpreting services to a medical professional. In fact, they appeared to make little to no effort. This evidence is set out below.

[488] I note that Dr. O'Connor responded to the information about the estimated cost for the interpreter services for Dr. Dunkley requires by saying: "We certainly should be splitting any costs (I hope yet to be determined and made as efficient as possible) as at this cost level all sorts of impacts will be felt both at UBC and VCH/PCH." This e-mail was sent to Dan Chittock [VA]; Dr. Carere [PH]; and copied to Harvey Lui [VA], Anne Harvey [CORP]; Stuart Gavin [VA], Clay Adams [CORP].

[489] The evidence respecting PHC's response to Dr. Dunkley's request for accommodation reveals that the efforts ranged from timely and reasonable given the circumstances (for instance, Dr. Corral's efforts to organize rotations or Dr. O'Connor's first suggestion that the Respondents and VCHA split costs) to weak and ineffective (for instance, Consolidated HR staff, Ms. Knowles and Ms. Coughlin's efforts to gather information about accommodating a Deaf resident). There are gaps in the evidence respecting the relationship between PHC and VCHA and the role of the Consolidated HR initiative. I note that no person with authority to make decisions about Dr. Dunkley's accommodation request was called to testify on behalf of PHC. On the whole of the evidence I did not find bad faith on the part of PHC. For the most part I found PHC was hampered by UBC's approach to the accommodation process.

7. Substantive Outcome of the Accommodation Process

October 12, 2010

[490] On October 12, 2010, Dr. Dunkley was put on paid leave. Dr. Dunkley testified that Dr. Rungta read from a script. As set out at paragraph 237, he wrote to Dr. Dunkley summarizing the October 12 meeting, including that the accommodation process and issues were "considerably more complex" in PGME than in undergraduate studies, making her request challenging and requiring cooperation with PHC. In summary, Dr. Rungta said:

a) they had to identify a source for funding the accommodation, as the PGME Office did not have a budget for it, this could be a "serious barrier" to proceeding, and the duty to accommodate was limited to the point of undue hardship.

b) they did not have experience in providing accommodations of this nature and it has taken time to understand the exact requirements and whether what is needed can be provided while meeting the training program goals, Royal College standards, and patient safety. Due to uncertainties, accommodations would be assessed and may require adaptation, including changes to the program sanctioned by the Royal College. They could not guarantee a solution that would not interfere with meeting training goals and satisfying Royal

College requirements, but committed to avoiding such an outcome if at all possible.

c) they had determined the provision of interpreters was essential to Dr. Dunkley being able to complete the program; they understood Dr. Dunkley assessed her needs as equivalent to 3 full time interpreters, which may represent a prohibitive cost; they continued to have discussions around the costing issues and were working with VCHA regarding other issues such as availability.

d) they would be working with the College regarding considerations of patient safety and other training concerns, and while Dr. Dunkley had indicated reluctance to modify the program, this was a possibility but only if they were unable to find a feasible reasonable alternative.

January 20, 2011

[491] On January 20, 2011, Dr. Dunkley was put on unpaid leave. She was not allowed to attend Academic Half Days, her employment by PHC was effectively terminated, and she lost resident funding to attend academic conferences. She was invited to attend a meeting with the postgraduate associate deans. Attending the meeting were Dr. Rungta, Dr. Webber, Dr. Kernahan, Dr. Dunkley, a Union representative, an interpreter and a scribe. Afterward, as set out at paragraph 253, UBC provided Dr. Dunkley a summary of the meeting, which I outline as follows:

a) The estimated costs of providing interpreter services necessary to accommodate Dr. Dunkley was at least $500,000 per year, for a total of 2.5 million dollars over five years. UBC had concluded this represents undue hardship.

b) The request was discussed with the Health Authority and Dr. Rungta understood they would not be able to fund the cost of interpreter services required. The PGME Office was open to considering any response or suggestions that Dr. Dunkley might bring forward, but Dr. Rungta believed that all reasonable options have been considered.

c) Dr. Dunkley would be placed on unpaid leave, effective January 20, 2011 and could not undertake any residency training including clinical work and academic activities such as attendance at Academic Half Days while on leave. Dr. Dunkley's recent request to be credited for clinical work she undertook while on paid leave was not granted.

d) Dr. Rungta and Dr. Corral would discuss whether Dr. Dunkley would have access to postgraduate funds for the American Academy of Dermatology Conference (for which Dr. Dunkley had registered and made travel and other arrangements following discussions with Dr. Warshawski), though Dr. Rungta's view was funds were not available for residents on leave.

8. Did Dr. Dunkley impede the Accommodation Process?

[492] Both Respondents argue that Dr. Dunkley impeded the accommodation process. I deal with these arguments together.

[493] Based on the Supreme Court of Canada in *Renaud*, UBC submits that if there is to be any content to the notion that the duty to accommodate embraces a multi-party inquiry, if it is to be given more than lip service, it cannot be the case that a complainant is entitled to be less than forthcoming about evidence in their possession or control which would be relevant to a respondent's inquiries. UBC says, "It hardly lies in a complainant's mouth to be critical of the respondent's efforts to accommodate to the point of undue hardship or to be critical of a respondent's findings related to undue hardship in such circumstances."

[494] UBC is critical of Dr. Dunkley because of the delay resulting when Dr. Forgie responded to UBC's e-mail by simply forwarding to Ms. Moen in May, her earlier response to PAR-BC. Dr. Forgie's e-mail originally sent in March and offering to be of assistance stated that Dr. Dunkley completed medical school with two interpreters and would require at least this during residency if not more due to on call duties. It is not clear how Dr. Dunkley is responsible for the delay. I find that UBC was informed of Dr. Forgie as a resource respecting interpreter costs by Dr. Dunkley on March 28, 2010. I also find that UBC failed to pursue this relevant resource on a timely basis.

[495] UBC criticises Dr. Dunkley for not providing PGME with the information she provided at her information session for prospective interpreters in May 2010 regarding her expected hours of work and what would be required of the interpreters. It was UBC who had ready access to accurate information about a resident's hours of work and, as discussed below, could have sought out information about ASL interpretation.

[496] PHC says that Dr. Dunkley withheld information from PHC that she knew would facilitate its search for accommodation for her. It identifies the information from Mr. Agan about the number of hours of interpreting services required by a medical resident in the U.S. This was information obtained by Dr. Dunkley long after she was removed from the residency program. It is also information that was available to the Respondents who could have obtained it by their own effort. Dr. Moreland's name was on the List. Mr. Agan was his interpreter. While both Respondents explain why they did not follow up with anyone on the List the fact remains that the information PHC said could facilitate the search was available to them had they made their own inquiries.

[497] In *Renaud*, the Supreme Court of Canada stated that the search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. I do not find that the Respondents established that Dr. Dunkley did not assist. To the contrary, I find that Dr. Dunkley took initiative, for instance, in immediately contacting the A&D Office upon notification of her CaRMS match, in providing Dr. Forgie as a resource, in advertising for interpreters, in holding an information session for interpreters, and in getting an appointment for herself with the ENT Specialist. Dr. Dunkley promptly responded to the Respondents' inquiries about her accommodation requirements. I find that she suggested resources such as the List and repeatedly asked to be included and involved in the accommodation process. In addition, Dr. Rungta's e-mails and testimony only compliment Dr. Dunkley on her efforts. In response to Dr. Dunkley provision of the List, Dr. Rungta testified that "[He] was happy that … Dr. Dunkley was doing everything in her power to provide us with helpful information".

[498] As outlined above, I find the criticisms of Dr. Dunkley unfounded.

[499] PHC submits that it and UBC offered to modify the program so that it contained a reduced number of rotations wherein Dr. Dunkley would require an interpreter to comply with the requirements of the Royal College. Specifically, PHC says that physicians involved in the accommodation process mid-September noted that the Royal College only "recommends" an emergency rotation for dermatology residents and an ER rotation could be modified so the resident was not required to do every aspect of it. It was also noted that the Royal College standards for dermatology do not require rotations in general surgery, obstetrics or psychiatry the first two years. PHC says that it and UBC offered to modify Dr. Dunkley's program by removing these rotations. It says Dr. Dunkley refused this offer without discussion or explanation, saying she wanted "no special treatment".

[500] PHC cites as its evidence in support of "it and UBC's offer to modify Dr. Dunkley's program by removing these rotations", the January 6 letter to the Ministry from the PGME Office that says "we have considered alternatives, including other specialty programs". This comment, made in relation to interpreter costs being prohibitive, does not establish that the Respondents offered an accommodation in which modifications were made to the program.

[501] Otherwise PHC's evidence in support of an offer having been made to modify Dr. Dunkley's program is a general reference to the direct testimony of Dr. Corral and Dr. Rungta. The Respondents did not enter documentary or oral evidence that they provided Dr. Dunkley with a proposed program alteration that would have enabled her to fulfill the residency requirements of her dermatology residency.

[502] Dr. Dunkley testified that the idea of changing her program came up in the discussion at the July 20 meeting. Dr. Rungta's follow-up letter from that meeting stated that UBC and PHC would gather more information about the dermatology training program from Dr. Corral and Dr. Warshawski, to review if there were any potential changes to the program. Dr. Dunkley agreed that she didn't want special treatment. She did not want changes to her program. The cross-examination on this point is as follows:

> Q: You mentioned earlier that you didn't like the idea of modifying any part of your program when it was suggested, correct?

A: Yeah.

Q: You took that to be a reflection on your abilities?

A: No. I didn't want to get special treatment.

Q: Okay. So you didn't want a special deal to qualify even if it might have saved some money?

A: I -- I -- the -- the issue around money was never in my mind when I thought about that. I felt that I should deserve equal access to different rotations just like every other resident.

[503] The July 20 meetings was the first meeting attended by Dr. Dunkley, UBC, PHC, VCHA and a PAR-BC member. No ASL interpreter was provided at this meeting. Several matters were discussed. The matter of changing Dr. Dunkley's program was raised. Dr. Dunkley indicated that she did not want special treatment. She did not want changes to be made to her program. I take it that she did not want changes to her program because she was keen to learn and was confident that she could fulfill her program requirements as long as she was accommodated with ASL interpreters. She wanted access to the same rotations as others.

[504] As set out above, the Court in *Renaud* said a complainant has a duty to facilitate the implementation of a reasonable proposal initiated by the employer, which would if implemented fulfil the duty to accommodate. If the Complainant does not take reasonable steps and causes the proposal to founder, the complaint will be dismissed. This is because the Complainant has a duty to accept a reasonable (not perfect) accommodation.

[505] I am unable to conclude on the evidence that PHC and/or UBC proposed a reasonable accommodation involving the modification of Dr. Dunkley's program. At most it can be said that the idea of modifications was raised and that Dr. Dunkley expressed her disagreement with the idea. This is a far different matter than an actual proposal put to Dr. Dunkley in which the Respondents agreed to provide residency training approved by the Royal College on the basis that the modifications were reasonably necessary to enable the Respondents to accommodate her.

9. The Calculation of the Cost of Interpretation

[506] In proving that the cost of an accommodation would cause a service provider or employer undue hardship the respondent bears the onus of proving the "cost". Here I consider the quality of the Respondents' evidence regarding cost (is it concrete or impressionistic) and whether the Respondents considered reasonable and practical ways of reducing costs.

[507] There were three calculations made by Dr. Rungta, Ms. Knowles and Ms. Coughlin.

Dr. Rungta's Calculation

[508] Dr. Rungta testified that he thought that "the only way for us to have known the true costs was to really have proceeded with the training and accounted for what went on because it looked to us like different things were required in different environments".

[509] Dr. Rungta explained that the reason he did not allow Dr. Dunkley to start her residency and provide her with the necessary accommodation was because "[his] sense is that [he] could not do that because there were significant costs that were going to be involved here, which we did not have funding arrangements for. That would have been highly irresponsible on my part. That would have been highly irresponsible in terms of carrying out my duties".

[510] At the July 20 meeting the agreement was that Dr. Corral would provide information about Dr. Dunkley's rotations. She did so by late July. UBC agreed to query Dr. Warshawski about the dermatology program requirements. Dr. Rungta testified that he asked Dr. Warshawski "to provide [him] with information regarding the potential environments, training environments that Dr. Dunkley would have to be trained in to understand how those environments work with respect to the accommodation required, or would work".

[511] On August 15, Dr. Warshawski responded that he did not think Dr. Dunkley's deafness would prove to be a major problem during her 3rd to 5th core dermatology years because most patient contact is one on one. In his view, it was the first two years

of residency which would be the difficult ones as Dr. Dunkley would be involved in less controlled situations. He stated her rotations and electives could be tailored to help avoid situations where she may run into more challenging circumstances. In general, he assured Dr. Rungta that he thought that Dr. Dunkley's residency would work out and that Dr. Dunkley would be an "outstanding practitioner". He stated that he would be delighted to join any meetings where plans for Dr. Dunkley's training are being formulated.

[512] On August 30, Dr. Rungta e-mailed Dr. Dunkley advising that he had just returned from his holiday and had received a call from the Globe and Mail to discuss her situation with him. He wished to have a face to face meeting with her the following day if she was available on such short notice. They met on August 31, 2010.

[513] Dr. Rungta testified that the first time he was able to do a "crude calculation" of the cost of providing interpreters to accommodate Dr. Dunkley was August 31, 2010 "because that was the first time Dr. Dunkley was able to provide [him] with information, specific information that [he] could then use to calculate what [he] did".

[514] Dr. Rungta calculated that the cost of providing interpreters for Dr. Dunkley would be $259,200 per year. He testified that Dr. Dunkley told him that she anticipated that, as for her undergraduate accommodation, she would require the services of two interpreters and a list of others to fill in as necessary. She estimated it would take an average of one and a half interpreters throughout her training. Dr. Rungta said that Dr. Dunkley told him that interpreters cost anywhere from $40 to $65 an hour.

[515] Thus Dr. Rungta's calculation was 1.5 x 60 hrs x $65 x 48 weeks / year = $259,200 per year.

[516] Dr. Dunkley testified that in addition to feeling hurt when Dr. Rungta turned away from her when talking and then laughed when she reminded him that she needed to look at his face so that she could lip read, she felt that he was "really persistent to get answers from [her] that [she] was not comfortable commenting on because it wasn't [her] area of expertise to discuss costs". She said that she found his

questioning leading. She explained that the reason for her discomfort was that Dr. Rungta was insisting that she answer questions when she was not the right person to ask. She told him that she did not have the expertise to answer his questions. She had never "costed" the provision of interpreter services. I note that it is also in the context of this meeting that Dr. Dunkley said that she needs an interpreter from here on. I will deal with this below.

[517] On September 17, Ms. Coughlin e-mailed Dr. Rungta and Dr. Webber, noting that the cost of providing interpreter services to Dr. Dunkley would be three million dollars. She stated that Ms. Knowles had calculated that the cost of providing interpreter services to Dr. Dunkley for her five year dermatology program would cost 2.5 to 3 million dollars.

[518] Dr. Rungta said that his understanding at this time was that Ms. Knowles was still actively engaged or "working on" a determination of the cost of the interpreters. He further understood, as written by Ms. Coughlin, that Ms. Knowles "[was] going to gather some costs" and that Ms. Knowles would be contacting someone on Dr. Dunkley's list to get some sort of estimate. He agreed that Ms. Knowles' estimate and his estimate "were somewhat tentative because there was more work to do in terms of assessing what this thing was really going to cost." Dr. Rungta did not contact either Ms. Coughlin or Ms. Knowles to see if more work was done to determine the cost of the interpreters.

[519] He admitted that he was not aware that Ms. Coughlin had informed the Ministry that the yearly cost would be roughly $665,280. He said that he heard about this for the first time at the hearing. He agreed that the costs being put forward of $500,000 and $665,280 were being considered "worst case scenarios".

[520] I find that Dr. Rungta's August 31, 2010 note was UBC's first effort to estimate the cost of accommodating Dr. Dunkley's need for ASL interpreters. Dr. Rungta's calculation was based on the information he gleaned from Dr. Dunkley during their August 31 meeting and his general understanding that residents probably worked 60 hour per week throughout their residency program. Dr. Rungta's calculation did not incorporate Dr. Warshawski's information that years 3 to 5 of the dermatology program were primarily one to one work, a situation where Dr. Dunkley would not

require interpreter services in the normal course. I find that Dr. Dunkley told Dr. Rungta that she had no expertise in costing interpreters and had never done so. All educational institutions she had attended had been responsible for the provision and payment of interpreters for her.

Ms. Knowles' Calculation

[521] Ms. Knowles testified that she first became "involved" with Dr. Dunkley's accommodation request in late June 2010 when her "promotion manager" who had been dealing with the file asked her to take it over because Ms. Knowles was stationed at PHC. Thus Dr. Dunkley's accommodation request file was transferred to her. At this time Ms. Knowles was an employee of VCHA working within Consolidated HR.

[522] With respect to Dr. Dunkley's file, Ms. Knowles "was asked to cost and to find out what the nature of the accommodation was from an LR [labour relations] perspective". Ms. Knowles had conduct of Dr. Dunkley's file from late June to November 2010.

[523] Ms. Knowles testified that she had never had to cost the expense of providing interpreter services before nor did she have any knowledge about the availability of ASL interpreters in British Columbia. She testified that the only information she was given was the information provided by Dr. Dunkley that was forwarded to her by her promotion manager. The information was that Dr. Dunkley required at least two ASL interpreters of a high calibre. She testified that she had access to the May 23, 2010 e-mail from Ms. Moen to Dr. Dunkley. She understood that Dr. Dunkley had been interviewing prospective interpreters.

[524] Ms. Knowles testified that she had an acquaintance, Ms. Denise Sedran (a witness for the Complainant), who was an interpreter. She arranged to meet Ms. Sedran at a coffee shop sometime between the end of June and the July 20 Meeting. Ms. Knowles told Ms. Sedran that she needed to know about the costs required to engage an ASL interpreter. Ms. Sedran disclosed that she knew who Ms. Knowles was referring to, as she had already been hired to interpret for Dr. Dunkley for an orientation session and had attended Dr. Dunkley's information and application session in early May.

[525] In cross-examination, Ms. Knowles admitted that she spoke with no other interpreter but Ms. Sedran and that the conversation held at a coffee shop lasted the length of time it took her to have a cup of tea. She did not specifically ask Ms. Sedran what she would charge to be one of Dr. Dunkley's interpreters. She admitted that she did not use or contemplate a range for the rate of pay for an interpreter.

[526] Based on this meeting Ms. Knowles said that she learned that there were certified interpreters and there were interprets who weren't certified. Dr. Dunkley's original request for accommodation had stipulated more than one interpreter. Ms. Sedran explained that it was apparently standard to work in 20 minutes on, 20 minute off rotations because of the challenges involved with the duties. Ms. Knowles testified that Ms. Sedran said that for a certified interpreter like herself, she would charge $65 an hour.

[527] In response to the question put to her in direct examination, "And what other sources of information did you gather", Ms. Knowles responded:

> That was the main part of it was what Dr. Dunkley had requested and the information that [indiscernible]. I also prior to this I had looked internally to VCH to find out if we had any in scope classifications for interpreters and did inquire with Compensation & Classification. I found out that there were existing interpreter job descriptions but one was for a cultural interpreter and the other two were for, I guess for foreign language interpreters. They did not fit with what Dr. Dunkley required.

[528] Ms. Knowles explained the basis of her calculation. She said the need for two interpreters was based on Dr. Dunkley saying that she needed more than one interpreter and that their services were required for all group interactions.

[529] The number of hours Ms. Knowles relied on was based on the Collective Agreement of 12 - 16 hour shifts five days a week and being on call which she estimated "roughly could be" a 60 hour a week, depending on the hours on call and other things. The amount of $65 per hour was based on Ms. Sedran's information. The number of weeks per year that she used was 38, based on her understanding that Dr. Dunkley would have at least four weeks of holidays and would not always require interpreting services.

[530] She testified that her estimate of $300,000 to $500,000 was "just intended to be a ballpark so we would have a rough idea of what we were looking at". She explained that what she meant as a "rough estimate" was that it was a five year program, she did not have all of the rotations and "obviously all the rotations weren't prepped". She said there could have been changes and all the rotations may not have been at St. Paul's Hospital.

[531] She did not include an amount for benefits or overtime as she anticipated that for a contract of employment the $65.00 per hour included an allocation for benefits. She did not include a cost for bringing an interpreter out from Ontario. She did not include a cost for the extra bed space for the interpreters covering Dr. Dunkley's on call.

[532] Ms. Knowles attended the July 20 meeting. The same day she sent an e-mail updating her executive director, Wayne Balshin and copied Ms. Coughlin. Ms. Knowles, among other things, set out that Dr. Dunkley was aware of and agreed that the potential cost to UBC and PHC could be $300,000-500,000 per year. (I note that Dr. Dunkley rejects Ms. Knowles' assertion that she agreed with the estimate of interpreter costs. Dr. Dunkley's evidence was she was listening; that is, lip reading as an interpreter was not provided.) In response, Mr. Balshin e-mailed Ms. Knowles on July 24 asking how they arrived at this figure.

[533] Ms. Knowles responded:

> The $300,000 – 500,000 / year is a rough estimate based on Dr. Dunkley's original parameters for accommodation;
>
> 2 interpreters available (working in 20 minute rotations)
>
> Interpreters to be utilized or readily available for all group interactions
>
> 12- 16 hour shifts plus additional call
>
> 4-5 days /week; 38 weeks / year
>
> $65/ hr (standard cost for certified interpreter; VPD pays up to $100/hour with 4 hour minimum shift)
>
> With Dr. Dunkley's recent revision of her accommodation request (ie. No accommodation request for certain rotations) the above estimate will be lower. If an effective means of electronic interpretation is available, the potential cost shall be reduced again. (as written)

[534] In cross-examination, Ms. Knowles did not directly answer the question of whether she had considered a salaried model wherein PHC might hire an interpreter. Rather, she said that she worked on the information she had regarding costing of interpreter services. She stated that "interpreters that we have, the job descriptions we had …were not a fit." She could not quote the hourly rate "off the top of her head" but it was far less than $65.00 an hour. No documentary evidence in support was entered.

[535] Ms. Knowles testified that she was not involved in any other estimate or any further revisions to this estimate. She left this portfolio in November 2010. She testified that she had no involvement in the estimate later authored by Ms. Coughlin on January 17, 2011. She admitted that between her meeting with Ms. Sedran (before July 20, 2010) and September 16th, 2010, she didn't do anything to gather more costs related information.

[536] Ms. Knowles stated that she had not seen the September 16, 2010 e-mail from Dr. O'Connor to a number of people including her boss. She acknowledged that the e-mail stated "Rebecca will gather those costs." In cross-examination Ms. Knowles admitted that on September 16, 2010 she still had responsibilities in her HR job; but, she testified, she had already provided her cost estimate. The evidence is that Ms. Knowles provide one cost estimate; that is her rough estimate of 300,000 to 500,000 per year and as explained in her e-mail to Mr. Bashin.

[537] In cross-examination, Ms. Knowles was directed to consider a communication from Ms. Coughlin also dated September 16, 2010 to Ms. Knowles' boss and Dr. O'Connor which states: "[Dr. Dunkley] is requesting that the interpreter that she worked with in Ontario be brought out to B.C. She has provided me with the name of one of those folks, so Rebecca will be contacting her to get some sort of estimate. We need three interpreters." Ms. Knowles testified that she "was never tasked with that".

[538] Ms. Knowles explained that Ms. Coughlin and she reported to different executive directors. It would not be Ms. Coughlin's place to assign her tasks to complete.

[539] Ms. Knowles testified that it was her understanding that Ms. Coughlin was looking into other things. She testified that although she was aware that Dr. Dunkley

had provided contact names, that task did not fall to her. She did not contact anyone on the List. She testified that although it looked like Ms. Coughlin was apparently expecting her "to gather costs" she did not believe that she was expected to gather more information on September 16th, 2010. Ms. Knowles admitted that she was one of the recipients of the e-mail from Ms. Dunkley's Union representative dated October 7, 2010 inquiring whether the Respondents had contacted persons on Dr. Dunkley's List. Again, Ms. Knowles stated that she was not tasked with that. Ms. Knowles admitted in cross-examination that, although she made reference to the possibility that an effective means of electronic interpretation might reduce costs that was not something she was pursuing. She stated, "I won't pretend to understand any of that. That was something that [Ms. Coughlin] was pursuing."

[540] Ms. Knowles testified that she was not tasked with finding a source of funding and that that aspect was not her portfolio at all.

[541] The parties take issue with whether, as Ms. Knowles stated in her letter, Dr. Dunkley agreed with the potential interpreter cost. I find that little turns on whether Dr. Dunkley agreed or did not agree about potential costs. First, the Respondents were responsible for the costing. Second, even if they understood Dr. Dunkley agreed the potential costs could be in the $300,000 to $500,000 range, that information would not have meant they could abandon efforts to obtain better information and, indeed, they said they were continuing to seek information. In this regard, Dr. Dunkley had told PGME in her June 5 e-mail that she had not been responsible for costing matters and was not in a position to comment on them; she reiterated this when she met with Dr. Rungta on August 31, when he was doing his first rough calculation.

Ms. Coughlin's Calculation

[542] Ms. Coughlin testified that the calculation of the cost of providing interpreters for Dr. Dunkley was not within the scope of her role. She stated that in her role in Disability Management they do not normally gather costs. They interpret the "medical" and determine whether or not an accommodation is necessary. She admitted that this accommodation request was brand new to her. It was uncharted territory.

[543] The documentary evidence shows that on September 17, Ms. Coughlin sent two e-mails to the associate deans of the PGME Office, one of whom was Dr. Rungta. The first asks him the cost of training a various types of doctors. The e-mail states "what I want to do is figure out how many of each of those types of physicians we could train for the cost of providing sign language interpreters for Jessica's five years (we are likely looking at about $3,000,000.)."

[544] The second states:

> The cost of her interpreters is much higher than was thought as there are none in the Lower Mainland - Jessica has already done her research on this. They would likely have to be brought from Ontario. Jessica has given us a contact name and number for one of the interpreters she has in Ontario who is willing to negotiate a relocation, apparently. If we look at a cost of approximately $500,000/ year (she needs more than 1.5- she had two full-time interpreters in Ontario, plus an on call list), they don't get paid a cut rate for when a resident is on call so we have to pay overtime for two of them, at least, and the type of hours that a resident works, particularly for on-call. We also have to take into account any specialized equipment that may be required for other staff to interact with Jessica (see-through masks as one small example), the fact that Jessica will not be left on her own at any time as would happen later in a resident's training, and the costs add up quite quickly.
>
> The difference between a medical student and a medical resident, I am learning, is quite significant. I had heard that the University of Ottawa had paid over $1,000,000 for her training and we have to provide more than they did.
>
> In order to prove undue hardship, we have to ensure that we cover all costs, not so much on the conservative side, but on a worst case scenario. The same goes for assessing patient risk – not the times when Jessica has a senior physician with her, but those times when multiple traumas arrive at the same time. My understanding is that the senior physician takes the worst trauma, but the resident is expected to take the next one- this may be a rare occurrence, but it does happen. I also worry about the psychiatric rotation where so many of the nuances are through tone of voice, the types of communication (ie. Rhyming, nonsensical word choices), which would have to be interpreted by a non-professional. I'm just not sure how that would work. I suspect these are the types of issues that have resulted in having only one hearing impaired physician in Canada and so few in the U.S. as well.
>
> I have also asked Larry [Warshawski] to confirm that there is another way for Jessica to become a dermatologist through the re-entry programme. This may take her longer, but would give her the goal she is seeking and is one of the options we will look at for an accommodation.

[545] Dr. Rungta testified that the intention of UBC's January 6, 2011 letter to the Ministry was to have the Ministry pay the full amount for Dr. Dunkley's estimated interpreter services of $500,000 or more per year for five years. The letter states in part:

> The costs for training interpreters and providing these services are estimated in the range of $500,000 per year for each year of her five year Programs. This is an estimate only as the known costs could be higher and there could be unanticipated costs particularly if Dr. Dunkley is unable to complete her training within five years

[546] Ms. Coughlin testified that the initial request to do the costing estimate came from Libby Posgate from the Ministry of Health. She was required to do it on very short notice as Ms. Posgate sent her an e-mail on Thursday, January 13, 2011 in the late afternoon and asked her provide the estimate by Monday at the latest. Ms. Coughlin testified that she did not know how Ms. Posgate was involved or the nature of her role. The e-mail chain indicates that Ms. Posgate was the executive director of Health Human Resources Planning. There is no other documentation from Ms. Posgate. Ms. Coughlin said she was given "just an overall 'here's what you need to look at.'" She continued, "And when I put this estimate together, I was given very little time to do it and very little information; I just went with what I had at that time."

[547] Ms. Coughlin estimated that the cost of providing interpreter services to Dr. Dunkley was approximately $665,000 per year. Over a five year period that amounted to roughly 2.5 to 3 million assuming that Dr. Dunkley completed her residency in five years.

[548] Ms. Coughlin provided the following letter by e-mail to Ms. Posgate on Monday, January 17, 2011. It reads:

> Good afternoon,
>
> One of the difficulties in doing a cost estimate for Dr. Dunkley is that we are unsure of just when she would need an interpreter, although she has indicated she needs them through all her rotations. There would be a minimum of 2 interpreters required as they can only work for 15-20 minutes at a time. There was another individual in HR who was responsible for putting the costs together and she is no longer with the organization, but I feel I have enough information to give you an idea of what this duty to accommodate would cost, at least, for the interpreter services.

> Hourly rate for an interpreter = $60.00 for first 7.5 then $90 for next 4 hours, then $120 for anything over that.
>
> Regular 12 hour day: $1,620 ($ 810/interpreter)
>
> On-call days (24 hrs): $4,500 ($2,250/interpreter)
>
> Weekly rate: $13, 860 (2 days on – call and 3 days regular)
>
> Yearly rate: $665, 280 (based on 48 weeks)
>
> It is important to note that there are currently no interpreters in B.C. who are qualified to give this level of service, so it is likely that Dr. Dunkley's senior interpreter would need to come out from Ontario in order to provide training. According to Dr. Dunkley, this could take 3 – 4 months to properly train an interpreter, so her flight, accommodation, meals and salary, as well as the salaries for any interpreters being trained would need to be covered in the dta.
>
> I also wanted to point out that we have not yet conducted a thorough risk assessment of having a hearing impaired medical resident, which would have to be done should this be moving forward.
>
> I realize these are rough numbers, Libby, and there are some unknown factors, but I feel we need to look at a worst case scenario.
>
> Should you have any questions, please do not hesitate to contact me. (as written)

[549] Ms. Coughlin explained how she arrived at her estimate of the interpreter cost. She stated:

> Well, I really just did the simple math on this one. We had an hourly rate of $60 an hour, and I also spoke with Dr. Corral and got the information on the program itself, how many hours were involved in a regular week, and what was the on call schedule. Then I just took those hours and the number of interpreters required and that's how I did the estimate.

[550] Ms. Coughlin testified that she obtained the number of interpreters required and how long they could work from Ms. Knowles who had said that ASL interpreters could only work a very short time before they would have to spell each other off and that is why two would be required at any given time. In addition, other interpreters would be required to cover sick time and vacation time for the main interpreters.

[551] She obtained the information that "there are currently no interpreters in B.C. qualified to give this level of service" from Dr. Dunkley's information.

[552] In cross-examination, Ms. Coughlin admitted that Dr. Dunkley had said that there may be some rotations she wouldn't need "full interpreters for". Ms. Coughlin did not consult with Dr. Dunkley respecting the estimate of hours or types of rotations.

[553] Ms. Coughlin agreed that there could be other options for retaining interpreters such as in an employee position at the Hospital. However, she said that "was not her field of expertise." She did not have any information on what that amount might be.

[554] Ms. Coughlin testified that she did not make the decision about whether or not the organization could fund this accommodation. When asked who made the decision she did not provide a name. She said "that would have been much higher than I." After providing her estimation of the cost she had nothing further to do with Dr. Dunkley`s accommodation file.

[555] Ms. Coughlin agreed that in her e-mail of September 16, 2010 to Anne Harvey, Vice President of Human Resources and Dr. O'Connor, she references Ms. Knowles' rough estimate of costs. Ms. Coughlin agreed that at that time Ms. Knowles had still not gathered the costs. Ms. Coughlin testified that Ms. Knowles had said $300,000 to 500,000 per year, but "Ms. Coughlin did not have any further explanations" from Ms. Knowles.

[556] Ms. Coughlin denied ever doing any "cost gathering". All of the investigation respecting the cost of providing interpreter services to Dr. Dunkley was done by Ms. Knowles. In response to the question, "Wouldn't you naturally want to get as much information and assistance as possible?" Ms. Coughlin said, "The other issues were surmountable. That was what we got from our internal experts. It came down to me having to do a cost estimate on this".

Analysis of Cost Calculations

The cost calculations made by Dr. Rungta, Ms. Knowles and Ms. Coughlin

[557] I give little weight to the cost calculations made by Dr. Rungta, Ms. Knowles or Ms. Coughlin for the following reasons.

[558] Dr. Rungta based his calculation on the information Dr. Dunkley provided in response to his questions at the August 31 meeting and his understanding that in general residents worked an average of 60 hour per weeks. Ms. Knowles based her

calculation on a brief conversation with one interpreter and the hours allowed under the Collective Agreement. Ms. Coughlin produced her calculation in response to a requirement that she do so in rushed circumstances and the limited information she had available to her at the time.

[559] None of the three had any experience in calculating the cost of providing ASL interpreters. Ms. Coughlin testified that calculating accommodation costs was not within the scope of her job. Only Ms. Knowles made an effort, although minimal, to get some information from a person who had actual knowledge about the provision of interpreter services based on personal experience. However, the "cup of tea" conversation with one interpreter in my view did not amount to sufficient investigation or the best resource for information.

[560] Ms. Knowles and Ms. Coughlin admitted that they were not informed about what Dr. Dunkley's interpreter requirements would be in a particular rotation. Both admitted that they had been informed that Dr. Dunkley did not require interpreters for all rotations. Although Dr. Rungta may have been in a better position to know the nature of the dermatology program rotations, the evidence indicates that he put questions of that nature to Dr. Warshawski and then did not take them into account in his calculation or provide Dr. Warshawski's information to Ms. Knowles or Ms. Coughlin.

[561] All three described their calculations as rough estimates.

[562] In these circumstances, I cannot give more weight to the calculations then the authors do themselves. The estimates were rough and not reliable. I give them little weight. However, they did not need to be so as I will set out.

Accessing relevant information resources

[563] The Respondents had obvious and appropriate resources available to them that could have provided relevant, timely information about the cost of engaging interpreters for Dr. Dunkley's residency. On March 28, Dr. Dunkley suggested that the PG Office contact Dr. Forgie. She explained that Dr. Forgie had already investigated the funding arrangements to pay for interpreters in the event that Dr. Dunkley had ended up with a CaRMS match at the University of Ottawa. Ms. Moen responded that

she would pass this information on to the "PG Dean". Dr. Rungta acknowledged in direct examination that he was aware of Dr. Dunkley's March 28 e-mail. He did not contact Dr. Forgie nor did he explain why he had not done so.

[564] Dr. Rungta testified that representatives from PGME and PHC were in contact with Dr. Forgie. He said that in response to an inquiry from Ms. Moen, Dr. Forgie forwarded her the e-mail string between her and PAR-BC in which Dr. Forgie wrote that Dr. Dunkley used two interpreters in her undergraduate program and would require at least this if not more during residency given on call hours. The exhibit filed in support of this testimony is an email forward directly from Dr. Forgie to Ms. Moen. The entirety of the message from Dr. Forgie is "FYI…as discussed". There was no evidence about the "discussion" or what information Ms. Moen sought. Ms. Moen did not testify; nor was any documentary evidence filed showing that Ms. Moen followed up or responded to Dr. Forgie's May 12 e-mail.

[565] Dr. Rungta testified that he was informed in or about September about the cost of providing interpreters for Dr. Dunkley to attend medical school. He recalled it was a million dollars incurred throughout the program, but primarily in the clinical years (the last two years of medical school), which would most closely resemble PGME program. Dr. Rungta testified that at the October 12 meeting, Dr. Dunkley agreed to provide authorization for the University of Ottawa to release information about her disability accommodation arrangements, and that they did get this information. He said it confirmed the need for significant interpreter services. I note that the release of information was requested some three months after the program has commenced and over six months since the CaRMS notification.

[566] Dr. Dunkley testified that Dr. Forgie had estimated interpreter costs for her residency in the event that she was matched with the University of Ottawa. This evidence was not challenged by the Respondents. Although the Respondents lead vague evidence about contacting Dr. Forgie, there is no evidence regarding Dr. Forgie's interpreter cost estimate for Dr. Dunkley's residency or whether Dr. Dunkley was mistaken about Dr. Forgie having done these preparations. Dr. Dunkley provided what, on its face, was an excellent resource to UBC in March 2010. In my view, UBC needed to account for why they did not obtain the relevant information.

[567] In addition, Dr. Dunkley suggested on more than one occasion that the Respondents contact her former interpreter from medical school to inform itself about the interpreter services she required. They did not do so.

[568] UBC did not look to its obvious, internal expert respecting services for the Deaf, Dr. Warick. Dr. Warick is not only specialized in the accommodation of the Deaf but had also been the disability advisor for Dr. Dunkley.

[569] Early on Dr. Dunkley mentioned organizations for the Deaf that she had advertised with to seek interpreters. By letter dated October 7 she provided her List of Deaf experts, interpreters and organizations in response to concerns being raised about whether her deafness introduced a safety risk. Both Respondents say that they did not contact any one on the List because they determined that it was not necessary in relation to any safety risk posed by Dr. Dunkley's deafness. However, the List set out Deaf professionals and persons with expertise in functioning as a Deaf doctor and providing services to the Deaf. No evidence was entered that either of the parties asked Dr. Dunkley about the people or organizations on the List.

[570] I also note that Dr. Russell is a recognized expert in the field of the Deaf. At the time of the hearing she held the David Peikoff Chair of Deaf Studies at the University of Alberta, one of two endowed chairs in the world. She was the director of the Western Canadian Centre for Deaf Studies, and among other things she served as a contract faculty member for UBC in the Faculty of Education, Department of Special Education. Her resume notes that her contract position with UBC was from 2003 to the present, thus at least to the date of her August 2012, Russell Report.

[571] Dr. Russell wrote to UBC on October 19, 2010 on behalf of Dr. Dunkley. Dr. Dunkley had asked Dr. Russell to do so after Dr. Dunkley had surmised, correctly, that the Respondents had not informed themselves about the Deaf by contacting anyone or organization on her List. Dr. Russell was named on the List. In her letter to UBC Dr. Russell provided general information about the Deaf, addressed the issue of safety and provided information about the research on the accuracy and effectiveness of models of interpreting. Dr. Russell stated that she would be pleased to speak to the Respondents and their colleagues about current realities of working with professional

ASL-English interpreters. She provided her phone number. UBC did not contact Dr. Russell for further information.

[572] In my view, it is a reasonable expectation when the service provider or employer does not have experience in the provision of accommodation for a particular disability that they do some basic research and look to the obvious experts.

[573] Given the lack of experience or knowledge admitted to by Ms. Knowles, Ms. Coughlin and Dr. Rungta respecting the requirements of Deaf professionals, common sense would have dictated that those responsible seek reliable information on which to proceed, particularly where such information was so easily accessible.

[574] I find that the Respondents' repeated failure to take obvious first steps to educate themselves about accommodating Deaf medical professionals weighs against a conclusion that they made all reasonable and practical efforts to accommodate Dr. Dunkley.

Whether interpreter services would be required for all rotations

[575] To the extent that the calculations assumed that Dr. Dunkley required an interpreter in all rotations, this was not reasonable. Only Ms. Knowles' calculation assumed that interpreter services were not required for all rotations. She used 38 weeks, instead of the 48 that Dr. Rungta and Ms. Coughlin used.

[576] UBC and PHC argue that Dr. Dunkley informed them, on or about the completion of her first family rotation, that she required interpreters for the remainder of her residency. The Respondents both say they relied on this information in calculating the interpreter costs.

[577] Dr. Rungta stated that during his meeting with Dr. Dunkley on August 31, she said that she would require interpreter services in all further rotations. He said Dr. Dunkley never advised him at any time anything to the contrary.

[578] The other evidence about the August 31 meeting is that it was arranged by Dr. Rungta because the Globe and Mail was contacting him as it was doing a story about Dr. Dunkley, Dr. Rungta questioned Dr. Dunkley about interpreter costs, told Dr. Dunkley that it was the responsibility of medical students to inform themselves about which residencies had funds for the accommodation of the disabled before they did

their CaRMS application, and made Dr. Dunkley feel very uncomfortable when he responded to her request that he face her when he spoke so that she could lip read. Evidence about this meeting can be found at paragraphs 207 to 210.

[579] Dr. Corral testified that she met with Dr. Dunkley on September 27 to discuss concerns Dr. K had raised about her respecting her family rotation. She stated that Dr. Dunkley informed her that she felt that the rotation with Dr. K was challenging and that she concluded that she would require an interpreter for subsequent outpatient rotations. Based on this, Dr. Corral understood that all future rotations would require interpreter services. She also said she understood that that the ENT Specialists' Report meant that interpreters would be required for all rotations.

[580] Dr. Dunkley was cross-examined about whether she had said that she required interpreter services for the remainder of her residency.

[581] The transcript states as follows:

> Q Now, once you did your rotation without an interpreter, do you recall having a discussion with Dr. Corral and Rungta saying you wouldn't do that again, that it was too difficult?
>
> A That time was a very stressful and difficult time because I felt like my career was in jeopardy, I felt pressured, I felt anxious. All of those things affected me during that time. I didn't want to have to go through that, not knowing what was going to happen next.
>
> Q But you did tell Dr. Corral and Dr. Rungta that you would not do it again, you would not go through a rotation without an interpreter again?
>
> A I don't remember. I could. I don't remember.
>
> Q Did you not say it was because as a learner you felt it difficult to concentrate on the lip reading and as well as absorb the information you needed to absorb as a learner?
>
> A The fact that Dr. K*** had a very strong accent made it harder than usual, yes, but that was compounded with so many things that were happening during that year. That was, like, after five, six months of wondering if I would ever be a doctor and then compounded with people questioning whether I was going to be continuing residency and many other things, so ... And going to several meetings, being asked questions after questions after questions that had never been asked of me in medical school.

[582] I find that Dr. Dunkley made a comment to the effect that she wanted to have interpreter services in future rotations. I find that the conduct of the parties after Dr. Dunkley made this statement reveals the actual import UBC, PHC and Dr. Dunkley gave it. No discussion occurred about Dr. Dunkley's requirement to have interpreter services for her second Family Practice rotation and no interpreter was provided for that rotation which commenced September 20 and concluded October 17. Dr. Dunkley was in that rotation without an interpreter when UBC referenced her comment in the October 12 meeting. Her comment was made at a time she describes as a very stressful when she felt her dream of being a physician was being destroyed. In contrast, the Respondents were aware that Dr. Dunkley had frequently stated that in the normal course she did not require interpreters for one to one communication. The ENT Specialist's Report confirmed this. In addition, Dr. Warshawski had given his view that the last three years of the dermatology residency was primarily one on one communication, circumstances he understood Dr. Dunkley did not require interpreters.

[583] I also accept Dr. Dunkley's evidence that she generally requires interpreter services for group interactions and generally she does not require interpreter services for one on one interaction.

[584] In light of this information I find that Dr. Dunkley's comment was not a reasonable basis for the Respondents to include the same cost for interpreter services for every future rotation in her five year program.

The number of interpreter hours required

[585] The calculations are each based on the number of interpreter hours required in any given week. Only Dr. Rungta did not assume two interpreters were required at all times. He assumed Dr. Dunkley would work on average 60 hours per week, based on his own knowledge, and that she would require an average of 1.5 interpreters, based on his August 31 discussion with Dr. Dunkley. This equals 90 hours of interpreter services per week.

[586] Ms. Knowles' range assumes, at the low end, an average work week of 60 hours with two interpreters at all times (120 hours x $65 x 38 weeks = $296,400), and at the high end an average work week of 100 hours with two interpreters at all times (200 hours x $65 x 38 weeks = $494,000).

[587] Ms. Coughlin's calculation assumes an average work week of 84 hours with two interpreters at all times (based on the assumption that every week includes 3 regular days:12 hours per day and 2 call days: 24 hours per day) per week x two interpreters, thus a total of 168 hours of interpreter hours for 38 weeks)

[588] For comparison, I calculate that Dr. Russell assumed a need for 92.5 interpreter hours per week (37 + 37 + 18.5) in the first two years of the program.

[589] Mr. Agan said that Dr. Moreland's estimate of an average interpreter requirement of 17 hours per day was reasonable, given 2 full-time interpreters. Assuming a five day work week, this would be 85 hours. (I note that this estimate may be somewhat low given Mr. Agan's work week ranged from 40 to 70 hours in the early years of Dr. Moreland's residency albeit in a different specialty.) Mr. Agan's evidence was that the number of interpreters varied. Sometimes both interpreters worked at the same time (e.g. for rounds and conferences), while for some clinics and for overnight shifts there was only on interpreter at a time.

[590] Dr. Dunkley testified that her need for interpreters would not be identical to the number of hours she is at the hospital, and that for call, this would depend on the rotation, as she did not need interpreters on call for some rotations.

[591] While the actual number of interpreter hours required cannot be definitively determined, the evidence establishes that the 168 hour per week interpreter services requirement in Ms. Coughlin's calculation and the 200 hour per week interpreter services requirement at the high end of Ms. Knowles' calculation are unreasonably high.

Interpreter availability and overtime

[592] Similarly, the amount of overtime that might be required cannot be determined on the evidence. However, the only effort the Respondents made to calculate this cost resulted in an unreasonably high estimate, in part because of Ms. Coughlin's assumption about the number of interpreter hours needed per week, but also because she assumed only two interpreters would cover all of the hours (i.e. each interpreter would work 84 hours per week each week for 48 weeks for 5 years). Each interpreter would work 4 hours overtime 3 days per week and 16 hours overtime 2 days per week.

(This calculation, fails to take into consideration Dr. Corral's evidence that not all rotations include an on call duty, and on call is limited to once every 4 days under the CA.)

[593] Overtime costs could be minimized by having a third interpreter (or a backup pool of interpreters) to draw on. The evidence established it would take some time to get a qualified pool of interpreters available, but that it was reasonable to expect this would occur. Ms. Coughlin's calculation failed to consider that two interpreters were not required all of the time, that no interpreter was required in some circumstances and that the interpreter requirement would be greatly reduced in the last three years of the program. Ms. Coughlin's calculation failed to incorporate the concept that ASL interpreters working for a professional expect to work when required, as opposed to a traditional 8 hour work day. Her uninformed erroneous assumptions added unreasonable and significant costs to her calculation.

[594] The Respondents also note that the calculations did not take into account such matters as training and preparation time. However, they did not themselves attempt to calculate these costs and the evidence does not establish that such costs would have added significantly to the cost calculations.

Calculating the cost of the worst case scenario

[595] I do not find it reasonable to approach an accommodation request to determine only the "worst case scenario", as set out in Ms. Coughlin's September 17 e-mail to the associate deans of the PGME Office, where she stated "In order to prove undue hardship, we have to ensure that we cover all costs, not so much on the conservative side, but on a worst case scenario". Dr. Rungta also agreed that Ms. Knowles's estimate was a worst case scenario. While it may be reasonable to calculate the "worst case scenario", if it appears it would result in undue hardship, then it becomes necessary to assess alternatives. Further, exploration of reasonable methods of reducing the costs would permit a more accurate assessment of the worst case scenario and its likelihood. Given the lack of experience and failure to access relevant information from knowledgeable sources, the goal of calculating the cost of the "worst case scenario" was being done in a knowledge vacuum.

Failure to investigate other models of providing interpreter services

[596] I find that the Respondents did not adequately investigate other options for service delivery. The cost of a staff position was not explored even though there is evidence that both UBC and PHC had employed staff ASL interpreters in the past.

[597] Ms. Sedran testified about having worked as a staff interpreter in the past and indicated a willingness to work in that capacity for the prospect of the interesting work interpreting for a medical professional like Dr. Dunkley. Mr. Agan also worked in a staff position.

[598] The Russell Report provides relevant evidence with respect to engaging interpreter services for Dr. Dunkley based on the designated interpreter model and recommends it as the most cost efficient.

[599] Dunkley testified that the model adopted in her fourth year of medicine where Janet Null coordinated with other interpreters to determine the schedule was successful, because one interpreter who understood the system could best coordinate the hours and work involved allowing good coordination of hours.

[600] In cross-examination Ms. Mee testified that in the past UBC had employed a sign language interpreter in a full-time staff position. The interpreter was compensated as a CUPE staff member and paid a salary. The interpreter was paid in accordance with the collective agreement. There was no interpreter classification, but they were placed on the scale. Ms. Mee agreed that this was a very different sort of model than the Still Interpreting model that the A&D Office now employed. Ms. Mee explained that the employee interpreter position was implemented because the service was required by a full-time Deaf staff member.

[601] In their calculations the Respondents only used contract interpreting, which the evidence suggests pays the highest per hour rate and includes an agency fee. I find that there were other options for providing interpreter services for Dr. Dunkley. It was a reasonable expectation for the Respondents to have explored them. There is a reasonable possibility that a staff designated interpreter model may have been more cost effective than contract interpreters. The Respondents failed to explore this option and therein failed to establish that they "could not have done anything else reasonable or practical to avoid the negative impact on the individual".

The difference between medical school and residency

[602] Both Respondents led evidence that there was a difference between medical school and residency. This was acknowledged by all witnesses who addressed this matter.

[603] The Respondents submitted, as stated in a number of Dr. Rungta's letters, that "there is a world of a difference between medical school and residency". This was used by the Respondents to argue that interpreter costs of first year residency and the further four years would be far in excess of that of a fourth year medical student.

[604] All witnesses who addressed this matter agreed the learning to become a practicing doctor is a continuum. The testimony of Dr. Rungta and Dr. Corral was that the major difference between medical school and residency is the amount of responsibility borne. A third year medical school student is at the beginning of their clinical learning experience. A fifth year resident is on the cusp of being licenced to practice in his/her specialty.

[605] In cross-examination Dr. Dunkley agreed that as the years progress through residency her degree of responsibility would increase. However, she explained that an increase in responsibility did not correlate with an increased demand for interpreting services.

[606] I find that Mr. Agan, as the only witness who had the personal experience of interpreting for a Deaf medical student and resident, was in the best position to provide evidence about the experience. Mr. Agan testified that in his role as an interpreter respecting the transition from medical school to residency he saw them as "essentially the same"; he "wouldn't say there was much difference at all".

[607] I accept the evidence of Dr. Corral, Dr. Dunkley, and Mr. Agan that residency involves more hours of work than fourth year medicine due to its on-call requirements. That said, not all rotations include on call requirements, not all on call duties require attending at the hospital or spending the entire night at the hospital, and on call is scheduled once every four days. It is reasonable to conclude as a general statement that those parts of residency with call requirements would have greater interpreter requirements than fourth year medical school. The number of hours on call duties would add to Dr. Dunkley's residency was not extrapolated. The evidence did not

establish that this increase in interpreter cost would amount to "a world of a difference between medical school and residency".

[608] In addition, the Respondents made the assumption that Dr. Dunkley's needs would remain static over the five years of residency. The evidence establishes that this is not a reasonable assumption.

[609] UBC asked Dr. Warshawski for information about a dermatology residency. The documentary evidence provides that Dr. Warshawski stated that Dr. Dunkley's interpreter requirement would greatly diminish for her program for years three to five because they would primarily involve one on one contact.

[610] Similarly, Mr. Agan testified that the first year of residency is always the busiest year for the resident and had the largest demand for interpreting services. He stated that an intern's (first year resident) schedule was busier than an upper level resident.

[611] Dr. Dunkley's view was also that her need for interpreters would be greatest in her first two years of residency. She referred to Dr. Bressler, a Deaf family physician from McMaster, who told her that he started residency with interpreters and eventually did not need them anymore. Dr. Dunkley testified that with respect to her need for interpreters the final three years of dermatology would be similar to family medicine because it is one-on-one clinic based.

[612] I find that the Respondents did not establish their claim that the cost of interpreter services for each year of Dr. Dunkley's residency would be far in excess of that incurred to for interpreting services for a Deaf fourth year medical student.

10. UBC's Funding Sources

[613] The Respondents argue that they could not provide Dr. Dunkley with the interpreter services she required due to cost. The issue the Respondents are required to address is not just cost, it is whether the cost constitutes undue hardship: (*VIA Rail*, para. 226). I turn now to a consideration of the other relevant factors regarding whether cost constitutes undue hardship, including the size of the service-provider's enterprise and the economic conditions facing it, the proportion of the cost relative to the service-provider's total funds, the level of interference with the enterprise, the

ability to shift and recover costs throughout the operation, and the impact and availability of external funding.

[614] Here I review UBC's evidence.

UBC Residents' Access to the A&D Office

[615] Ms. Mee's testimony was uncontroverted that the A&D Office provides disability accommodation services for UBC faculty, staff and students. Dr. Dunkley testified that the A&D Office provided her with ASL interpreter services to attend UBC events when she was a resident. No documentation was filed about UBC policies that address the services provided by the A&D Office but for the provision of services to "students" under the Accommodation Policy.

[616] The Accommodation Policy which applied only to disabled students states its general purpose as:

> 1.1 The University of British Columbia recognizes its moral and legal duty to provide academic accommodation. The University must remove barriers and provide opportunities to students with a disability, enabling them to access University services, programs and facilities and to be welcomed as participating members of the University community. The University's goal is to ensure fair and consistent treatment of all students, including students with a disability, in accordance with their distinct needs and in a manner consistent with academic principles.
>
> 1.2 The University will provide academic accommodation to students with disabilities in accordance with the Human Rights Code (BC) and the Canadian Charter of Rights and Freedom. Provision of academic accommodation shall not lower the academic standards of the University. Academic accommodation shall not remove the need for evaluation and the need to meet essential learning outcomes.

[617] Section 2.1.1 defines "student" as follows:

> A student is a person who:
>
> is registered in full-time or part-time credit or non-credit courses offered by the University; or
>
> has formally applied to the University as a prospective student.

[618] Section 2.3.1 defines an "academic accommodation" as a change in the allocation of University resources, or in teaching or evaluation procedures, which is designed to meet the particular needs of a student with a disability.

[619] Section 3.1.3 provides that UBC's courses or programs are accessible to students with disabilities in accordance with the *Human Rights Code* (BC) and the *Canadian Charter of Rights and Freedoms*.

[620] Dr. Dunkley contacted the A&D Office on March 8, 2010, the day she was informed of her CaRMS match with the dermatology residency at UBC. UBC directed her to deal with the A&D Office to arrange her accommodation for her residency.

[621] The A&D Office is staffed by disability advisors, including Dr. Warick, a specialist in accommodating the Deaf. It has an operating budget that covers the staff and other expenses, and an Access Fund, which covers the extraordinary cost of accommodation for people with disabilities. At the time of the hearing the Access Fund was $750,000 per fiscal year. The funding comes from the base budget of UBC. The A&D Office also receives a small subsidy from the provincial government to cover some of the costs of accommodation. The A&D Office administers its own budget. Its budget is subject to approval by UBC executive and then the Board of Governors.

[622] In response to the question "If Ms. Dunkley had been subject to your program, given her knowledge of the level of services she required, would the [A&D Office] have been able to provide them?", Ms. Mee said this "wouldn't have been [her] decision. It would have been a decision that involved the Vice President, Students and likely legal counsel." She was asked whether there would have been a consequence for the A&D Office if a decision had been made to provide the funding. Ms. Mee testified that if there had been a decision to provide the funding to cover Dr. Dunkley's interpreters it would be hard to know if there would be any consequence for her program. It would depend on whether or not the university would have been prepared to increase the level of the Access Fund or whether they expected the A&D Office to maintain that base level of funding and provide this service in addition.

[623] On June 7, 2010, UBC informed the PGY 1 Office that the A&D Office was not responsible for Dr. Dunkley's accommodation. By letter dated, June 21, Dr. Rungta told Dr. Dunkley that "things had not resolved" and that her residency would not commence on July 1. The letter informed Dr. Dunkley that PGME, the PGY 1 Office and PAR-BC would work together to respond to her request for accommodation.

[624] UBC takes the position that Dr. Dunkley was not a student within the definition of student under the *University Act* and was therefore not entitled to access accommodation services from the A&D Office. UBC's evidence in support of this position is the testimony of Ms. Mee.

[625] Ms. Mee testified that once she realized that Dr. Dunkley had returned to UBC as a resident, she concluded that the A&D Office was not the appropriate source of funding and at that point she terminated the A&D Office relationship with Dr. Dunkley. Her reason was that it was her understanding that residents did not meet the definition of "student" under the *University Act*. In cross-examination Ms. Mee clarified that the A&D Office terminated its relationship with Dr. Dunkley based on instruction from the Vice President, Students and legal counsel. She testified, "We don't make the determination ourselves." She further clarified she was advised that Dr. Dunkley did not meet the definition of "student" under the *University Act*.

[626] "Student" is defined in s. 1 of the *University Act* as follows:

> "student" means a person who is presently enrolled at a university in a credit course or who is designated by resolution of the senate as a student;

[627] The *Act* empowers Universities' to grant degrees. Section 2 reads, "Each university has in its own right and name the power to grant degrees established in accordance with this Act".

[628] The *Act* contemplates that students are either people enrolled in credit courses at the university or designated by resolution of the senate to be a student.

[629] Ms. Mee admitted that she was not aware that the definition of student under the *University Act* included "or someone designated as a student by the senate".

[630] UBC submits that the A&D Office was not responsible for Dr. Dunkley's accommodations in accordance with the Accommodation Policy. UBC's submits:

> By early June, it had been determined that PGME, not UBC A&D would be responsible for the Complainant's accommodations. This was in accordance with UBC policy on "Academic Accommodation for Students with Disabilities" in which the definition of "student" identifies those entitled to the benefits of the policy as being persons registered in full-time or part-time courses offered by the University. The evidence from Dr. Rungta was clear that PGME is not a course offered by the University, nor are University credits received for it.

[631] Dr. Dunkley disputes that a resident is not a student. Dr. Dunkley showed that for other purposes residents at UBC are considered students. Residents have a student number, pay a registration fee to the registrar of UBC, and had the status of students for the purpose of the UBC calendar in 2010 and 2011.

[632] On the latter point, Dr. Rungta agreed in cross-examination that on February 15, 2012 a motion was brought before the Vancouver Senate as follows:

> That "medical resident or intern" be removed from the Classification of Students as laid out in the UBC Vancouver Academic Calendar.
>
> Dr. Harrison explained that medical residents were currently listed under the categories of student in the Calendar. The category was added in 1992 by the Senate. The Faculty has requested that student status be removed from residents as they are employees of the health authority and are not in the traditional sense students of UBC.
>
> In response to a question from the floor, Dr. Harrison confirmed that 3rd and 4th year medical students although informally called interns, would retain student status.
>
> Senator Burr asked how this would affect Pharmacy and Dentistry residents.
>
> Dr. Harrison replied that the faculties in question were still considering whether or not they had a need for a similar category. Further changes may be forth coming as a result.

[633] First, whether or not a resident is a "student" under the *University Act* has no bearing on whether UBC has a duty to accommodate under the *Code*. UBC is the service provider. Dr. Dunkley has made out a *prima facie* case of discrimination. UBC has a duty to accommodate Dr. Dunkley's disability.

[634] Second, I find based on the testimony of Ms. Mee that the A&D Office provides accommodation services to UBC faculty, staff, students, prospective students and members of the public who participate in UBC events.

[635] Third, I find that, at the time relevant, a resident was considered a student by UBC for certain purposes; that is a resident had a student number, paid a registration fee to the registrar of UBC, was a student for the purpose of the UBC calendar in 2010 and 2011, and that Senate approval was required to remove the classification of residents as students in February 2012. Based on the Senate Minutes, it appears that pharmacy and dentistry residents continued to be classified as students in February 2010.

[636] Fourth, as to UBC's submission that the Accommodation Policy defines those entitled to the benefits of the policy as persons registered in full-time or part-time courses offered by the University I have a few comments. First, the definition of a "student" under the Accommodation Policy actually is a person who is "registered in full-time or part-time credit or non-credit courses offered by the University; or has formally applied to the University as a prospective student". Second, the Accommodation Policy definition of a "student" is far broader then that applicable to the *University Act*, which for its purpose defines a "student" as "a person who is presently enrolled at a university in a credit course or who is designated by resolution of the senate as a student". The broader definition of student in the Policy is inconsistent with UBC's position that Dr. Dunkley was not entitled to access services from the A&D Office because she was not a student under the *University Act.* Rather, it appears that UBC controls the definition of student for the purpose of access to the A&D Office. I further note that accepting the UBC position in this case would disentitle persons with disabilities who currently have access to the A&D Office to participate in educational opportunities offered by UBC who are not "students" under the *University Act*.

[637] Fifth, the *University Act*, which on its face is about empowering universities to award degrees, provides that a student means a person who is presently enrolled at a university in a credit course or *who is designated by resolution of the senate as a student.* [emphasis added] UBC is required to show "that it could not have done

anything else reasonable or practical to avoid the negative impact on the individual". It is not clear to me, nor am I persuaded, that the definition of student under the *University Act* forecloses residents from being considered students for the purpose of receiving services from the A&D Office. Dr. Dunkley showed that for other purposes residents at UBC are considered students. Dr. Dunkley also testified that the A&D Office provided her with interpreters to attend UBC public lectures while she was a resident.

[638] At the time relevant to this case UBC faculty, staff, students, prospective students and persons attending public lectures at UBC all had access to the A&D Office resources. UBC did not explain why, even if a resident is not a "student", it could not have established an accommodation policy for residents or otherwise provided residents with access to the A&D Office and its resources.

[639] If UBC is correct in its interpretation of "student" under the *University Act* functioning as a bar to residents accessing service at the A&D Office under the Accommodation Policy, I find UBC's failure to seek the obvious cure of applying to the Senate under the *Act* to have Dr. Dunkley designated a student for the purpose of accessing such services was unreasonable. It amounts to a failure to prove that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

[640] In my view, this failure to seek an obvious cure to the problem of providing accommodation resources and funding for the interpreters Dr. Dunkley required to participate in her program precludes UBC in and of itself from making out "undue hardship".

Funds Provided by UBC to Provide Interpreter Services to Dr. Dunkley

[641] Dr. Rungta testified that as of August 30, 2010 the PGME Office had paid for interpreting costs for Dr. Dunkley to attend PGME orientation and for Academic Half Days. The funds were from the PGME Office. Dr. Rungta explained:

> Well, you know, we – it's a multimillion dollar budget, so, you know, we have room within the thousands of dollars to accommodate requests to a certain level. But, you know, for instance, we have accommodated requests in the past but not of this magnitude. So there is a little bit of money that we

> can use to accommodate these requests and we felt that within our budget we had the monies to provide interpreter services for Academic Half Days on a very limited -- like, we couldn't provide this on an ongoing basis, but we felt that -- I always was under the impression that this matter would resolve quickly and it did take more time than certainly we would have hoped for or wanted.

[642] Dr. Rungta's reference to "a little bit of money" out of a multimillion dollar budget gives no clear indication of what amount might reasonably have been provided to fund Dr. Dunkley's accommodation from the PGME Office budget. I address the parties' arguments regarding available funds below.

Available Funds

[643] UBC argues that the PGME program is a training program with a designated, segregated budget funded by the provincial government. The PGME is not responsible to UBC's Senate or Board of Governors. The program presents a unique context within education. Residency training is not a "credit course".

[644] UBC says that the only funding available and relevant to a determination of this complaint is that provided under the MOU. It says that apart from the MOU funds, its only funding source was to have the Ministry provide additional funding to cover the entire cost of the interpretation service required by Dr. Dunkley for her five year residency program as set out in its January 6, 2011 letter.

[645] Dr. Dunkley submits that the Faculty of Medicine oversees the residency program and that PGME occupies a place within that Faculty. The Faculty is in turn a Faculty of the University. Residents pay a fee to the Registrar of the University. The University Senate has the authority to define and describe the status of residents within the University community and exercised that authority in February, 2012. Dr. Dunkley submits that residency is not an island unto itself. PGME is part of the medical education in the Faculty of Medicine and the University community generally.

[646] She submits that the narrow view taken by UBC toward the accommodation process was not justified. This narrow view served to impede the accommodation process because it ended the involvement of the A&D Office and precluded any assessment of costs in relation to the overall budget of UBC.

[647] With respect to UBC's financial resources I first look at the MOU, then the Faculty of Medicine and UBC as a whole, and finally any other attempts UBC made to seek other sources of funding.

The MOU

[648] Dr. Rungta testified that the Ministry is responsible for funding the PGME program. He stated that the funding was provided by way of the MOU between UBC and the Ministry and was operationalized through an annual funding letter. He first testified that the PGME program did not receive any funds from UBC. He then clarified that the PGME program "funds do go to the university and then are parcelled out to us, so in a way it comes to us from the university but the source is the Ministry of Health".

[649] In cross-examination, Dr. Rungta would not admit that the MOU was between the Ministry and the Faculty of Medicine and not the PGME Office, saying he was not sure he fully understood the legality of it. Dr. Rungta testified that UBC "sponsors" the PGME program and that responsibility lies with the Colleges, "which really govern the program," and with the Ministry, which is responsible for funding the program. In light of the documentary evidence to the contrary, I found this portion of Dr. Rungta's testimony unhelpful and less than sincere.

[650] Dr. Rungta also testified about the difference between the PGME program and all other UBC programs. He said: "So any programs that the university, in terms of undergraduate or other graduate training, they are bound by the principles of the laws of the Senate, this program is not. It's a contractual sponsored arrangement and it doesn't have credit courses, for instance, the appeals process is different." Dr. Rungta testified about the appeal route open to residents under the Resident Evaluation and Appeals Policy.

[651] First, in light of UBC's persistent reliance on Dr. Rungta maintaining that residency does not have "credit courses" I refer to the Resident Evaluation and Appeals Policy entered by UBC at section 14 for the purpose of demonstrating that there is evaluation, a pass or fail element and some sort of "credit" or acknowledgement upon the successful completion of residency. Section 14 states:

> Upon the completion of a post graduate medical program a Resident will receive a Final In Training Evaluation (FITER) for the purpose of credentialing with either the RCPSC or CFPC.

[652] Second, and in any event, a review of the Policy and the relevant testimony does not indicate that UBC is not able to provide funds to fulfill a duty to accommodate a resident. In other words, even if residency is distinguishable from other programs offered by UBC by such matters as "credit courses" or the appeals process, this does not adequately explain UBC's position that it was somehow limited to the MOU funds.

[653] The MOU is between the Ministry and the UBC Faculty of Medicine. This is clear on the face of the document. The operational letter is to the Faculty of Medicine. The agreement is not with the PGME Office. There is no evidence that the PGME program had the capacity to independently contract with the Ministry.

[654] The preamble of the MOU states that the Province provides funding to the "Faculty of the Residency Program" and "the Faculty will utilize that funding as outlined in this Agreement." The MOU sets out obligations of the Faculty, including that it "will operate and manage the Academic Component in a manner consistent with the Postgraduate Medical Education – Overall Statement" which provides:

> Postgraduate education at the University of British Columbia is dedicated to providing the highest standard of resident training in Family Medicine and Royal College specialties and sub-specialities. The programs are devised to include all of the elements listed in the college of Family Physicians of Canada Residency Program Accreditation and Certification, and in the Royal College Guidelines, Requirements, and Objectives for training.

[655] The preamble identifies the two components of the postgraduate residency program (including for CaRMS postgraduates) – academic and employment:

a) the academic component of the program known as the Postgraduate Medical Education program (the "Academic Component"), which is provided by the Faculty; and
b) the employment of Postgraduates by third party health care agencies to enable Postgraduates to obtain specialized clinical training in a clinical setting. (the "Employment Component")

[656] The MOU itself provides the number and type of residencies that will be provided by UBC and a formula for the payment of salary and benefits to the residents and the operational budget.

[657] Dr. Rungta testified that the MOU entered was in force in the 2010/11 year. Each year under the ongoing MOU there was a new funding letter and agreement reached. Dr. Rungta identified a letter dated December 24, 2010 from the Ministry to the Faculty of Medicine as the funding letter for the 2010/11. This letter states that the Ministry has approved funding for 1031 postgraduate residency positions in 2010/11, based on the Postgraduate Residency Education Program Funding Formula. It goes on to state that the operating grant for Postgraduate Residency Education is $97,490,635 and that a summary of this funding is provided in Attachment 1.

[658] Attachment 1 sets out the funding which included resident salary, benefits and stipends ($71,413 per resident, 1016 residents: resulting in a total of $72,555,608), amounts for resident activity ($1,800 per resident, 1016 residents: resulting in a total in $1,828,800), amounts for clinical teaching, program directors, site directors, and assessments, (totalling $19,106,227). In addition there was a payment of four million dollars provided in this academic year for support for the Faculty of Medicine.

[659] Dr. Rungta testified that his budget is not subject to oversight or control like other university budgets by the Board of Governors. (For example, Ms. Mee testified the A&D Office budget comes from the base budget of the university.) Dr. Rungta said that the accountability under the MOU is to the Ministry. It is clear on the face of the MOU that the Faculty of Medicine is obligated to spend the MOU funds in accordance with that agreement. It does so and, in that sense, the PGME has a designated budget. Nonetheless, as Dr. Rungta acknowledged, PGME exists within the Faculty of Medicine. While the Faculty of Medicine may be precluded from spending the MOU funds on anything other than for postgraduate residency training, this does not mean UBC is similarly precluded from spending funds to accommodate Dr. Dunkley's disability while she engages in her residency training, a program it offers.

[660] UBC submitted that in order to pay for Dr. Dunkley's accommodation the PGME Office gave consideration to decreasing the number of residencies offered, perhaps cancel residencies already offered. This is not supported by the evidence. In

his direct evidence, Dr. Rungta agreed that the Ministry did not approve of the proposition that it reduce the number of residencies available at UBC in order to fund Dr. Dunkley's accommodation requirements. However, Dr. Rungta admitted that the PGME Office at no time contemplated training one less resident in order to fund Dr. Dunkley's interpreter costs nor was this matter ever broached with the Ministry.

[661] I accept that the dual role of a resident raised issues in the accommodation process respecting responsibilities. However, the evidence did not establish that the dual role required UBC to limit its accommodation efforts to the MOU funds and/or Ministry. The MOU strictly addressed the number and nature of the residencies approved by the Ministry and a formula for the payment of residents and the provision of the academic component of the residency program. It did not address provision for the duty to accommodate residents. I am not persuaded that the MOU prevented UBC from otherwise addressing the duty to accommodate that arises in the context of the services it customarily makes available to the public in the form of the PGME program.

The Faculty of Medicine

[662] Dr. Rungta admitted that at no point in the accommodation process did he or the PGME Office make "any effort, any proposal to share costs with the Faculty of Medicine". He agreed no proposal was ever made to the Faculty of Medicine respecting the funding of Dr. Dunkley's accommodation.

[663] Dr. Rungta testified about a "firewall" between the funds available to the Faculty of Medicine and the funds available under the MOU. His testimony in its entirety on this point was:

> Q: Now, at any point in the process, the accommodation process, was there any effort, any proposal to share costs with the Faculty of Medicine?
>
> A: No. Are we -- we're talking about its budget from the ministry through the university, the alternate budget we just mentioned, are we not?
>
> Q: That's right.
>
> A: No, there were no discussions to draw funds from that. I -- I think there's a firewall between those funds and ours.
>
> Q: But no proposal was made?

A: No proposal was made.

[664] No documentary evidence was entered related to a "firewall" between funds. While the MOU sets out the purpose of those funds, there is no reliable information showing why UBC could not access funds from the Faculty of Medicine. The explanation that "I think there's a firewall" is insufficient to find that in fact UBC was limited to the MOU funds, or to otherwise explain why it did not discuss sharing costs with the Faculty.

UBC Overall Budget

[665] Dr. Dunkley argues that UBC did not consider its overall budget or the budget of the Faculty of Medicine in assessing whether it could accommodate Dr. Dunkley without undue hardship. UBC did not provide financial evidence respecting the budget of the Faculty of Medicine or the budget of UBC. Dr. Rungta, when asked about the overall budget in cross-examination, did not know dollar amounts. Dr. Rungta admitted that the PGME Office did not ask the Board of Governors of the UBC for any assistance to fund Dr. Dunkley's accommodation. I find that UBC did not seek funds from outside the PGME Office budget. Again, the evidence did not demonstrate that UBC could not access any funds outside the MOU funds, or that it even considered the possibility of accessing other funds within the overall UBC budget.

UBC seeks Funding from the Ministry

[666] Dr. Rungta testified that there were discussions with the Ministry made in an effort to obtain funding for Dr. Dunkley's accommodation. No particulars or documentary evidence was provided but for the following. On January 6, 2011, the Associate Deans of the PGME Office wrote to Libby Posgate, Executive Director Health HR Planning. Dr. Rungta testified that the intention of the letter was to have Ministry pay the full amount for Dr. Dunkley's estimated interpreter services of $500,000 or more per year for five years, an estimate I have found was unreasonably inflated. The letter states in part:

> The costs for training interpreters and providing these services are estimated in the range of $500,000 per year for each year of her five year Programs. This is an estimate only as the known costs could be higher and there could be unanticipated costs particularly if Dr. Dunkley is unable to complete her

> training within five years. We have considered alternatives including other specialty programs but, with the exception of Family Practice Residency Training which is a two year program, the costs will be comparable. However, even this cost of providing these services for a two year period is prohibitive.
>
> If the Program is not able to obtain additional funding from the Ministry for the duration of Dr. Dunkley's training to support the requested accommodation, Dr. Dunkley will be required to withdraw from the Program.
>
> There is some urgency to obtain a final response to our request for financial assistance from the Ministry. Dr. Dunkley began her first rotation in July 2010. She has completed as many rotations as possible without fulltime interpreter services and has been placed on leave pending a final determination regarding her request. She has filed a complaint with the British Columbia Human Rights Tribunal against the University and the Health Authority. A settlement conference is scheduled in March 2011.
>
> Please advise whether the Ministry is prepared to commit to funding the interpreter services that Dr. Dunkley will require throughout her Dermatology Residency training. We would be pleased to provide any additional information or to discuss this matter with you further at your convenience.

[667] Dr. Rungta testified that the Ministry refused to provide the funding requested. No documentary evidence was provided.

[668] UBC does not explain why Libby Posgate from the Ministry of Health asked Ms. Coughlin to do a cost estimate of Dr. Dunkley's interpreter requirements on January 13, 2011. Ms. Coughlin testified that she was required to provide this estimate to Ms. Posgate on very short notice. On January 17, 2011 Ms. Coughlin provided her cost estimate of approximately $665,000 per year. Over a 5 year period that amounted to over three million dollars assuming that Dr. Dunkley completed her residency in five years. Ms. Coughlin testified that she did not know how Ms. Posgate was involved or the nature of her role. Neither do I, as neither that evidence nor the Ministry's response to Ms. Coughlin's January 17, 2011 letter was provided.

Other Sources of Funding

[669] Dr. Rungta admitted that no consideration was ever given to approaching the Ministry of Advanced Education for funding assistance. He responded: "No, because

we have never dealt with the Ministry of Advanced Education… for the running of this program."

[670] Dr. Rungta admitted that in his August 3 Notes he made reference to the Indigenous Physicians Association of Canada ("IPAC") possibly being able to provide some funding. Dr. Rungta admitted that it was a member of IPAC who had originally called him to complain about how Dr. Dunkley was being treated. That person said they might be able to get financial help if that was necessary. Dr. Rungta said that he had dealt with the IPAC in the past on another matter. He did not contact them again respecting Dr. Dunkley's accommodation although he provided the contact information to Ms. Coughlin. She testified that she contacted the IPAC but did not get a response. There was no evidence that Ms. Coughlin followed up on this contact, or that Dr. Rungta followed up with Ms. Coughlin. Dr. Rungta testified only that it did not come to fruition.

[671] In her October 12, 2010 meeting notes, Dr. Corral wrote about contacting the Ministry of Native Affairs and other Aboriginal organizations for funding. There is no evidence of follow-up.

Cost Sharing

[672] Dr. Dunkley argues that UBC gave no serious consideration to cost sharing with the Ministry of Health, PHC, VCHA, or any other entity.

[673] Dr. Rungta admitted that he was aware that Dr. Patrick O'Connor suggested splitting of costs between PHC, possibly the VCHA, and the university. In response to the question of whether the PGME Office had discussions with VCHA, Dr. Rungta said that the "[PGME Office] had several discussions with the health authorities regarding responsibilities and how we could provide the resources for the accommodation requested." He stated that those discussions also included Ministry of Health Services.

[674] He admitted that there was no formal proposal made by the PGME Office to share costs. He said that "there were discussions to figure out who was responsible for what. Dollars were mentioned in terms of what was required and who was responsible for funding what component of those accommodations requested".

[675] In response to the question of what the PGME Offices's share was in those discussions, he said "one of the things we were prepared to look at was providing interpreter services for the Academic Half Days, as we did initially." When asked what VCHA was prepared to pay, he said the funds all come from the same pot, so the issue was to try to see if the Ministry of Health Services was willing to provide both the employer and university with additional funding.

[676] One of the results of the failure to pursue this option is that the various agencies considered undue hardship in terms of the entire cost estimate. This was not a reasonable approach. While the money may all come from one pot, the impact would have been spread, possibly over multiple agencies, including VCHA and the Ministry in addition to UBC and PHC.

11. Did UBC establish the third element of the BFRJ?

[677] I agree with UBC's submission that the concept of what is reasonable in the circumstances is to be approached from the common sense, pragmatic perspective and that, while some cases list relevant factors, factors relevant in one circumstance may not be relevant in another: *Commission Scolaire Regionale de Chambly v. Bergevin* [1994] 2 S.C.R. 525, pg. 546.

[678] UBC submits that the Complainant's case is that UBC had an obligation to go out and create a body of interpreters to work with her and to provide those services to her in such a manner that permitted her to succeed. UBC argues that, in essence, Dr. Dunkley asserts that UBC was obliged to hire others to augment the existing manner in which they deliver the service. UBC says that, paraphrasing *Hydro-Quebec*, that is a fundamental change not required by the duty to accommodate.

[679] Characterization of a complainant's case is not necessary or of assistance with respect to the issue before me. The matter I am required to determine is whether, as the Court said in *Moore*, UBC took all reasonable and practical steps to ensure that Dr. Dunkley had meaningful access to her residency program. The issue is not whether UBC did what Dr. Dunkley asked of it. That said, and as addressed above, the conduct of both parties in their efforts to achieve a reasonable accommodaion or action that frustrated a reasonable accommodation is relevant.

[680] Nor is the bare assertion that Dr. Dunkley sought a fundamental change to the services offered helpful. First, I do not accept that Dr. Dunkley sought any change to the services offered. She sought ASL interpretation so that she could have meaningful access to the services offered, which are designed for persons without a hearing disability. Second, a finding on the facts of this case does not have "wide-ranging ramifications for all service providers and employers." The principles underlying the third prong of the justification defence are well-established. A finding in this case is only about whether UBC and/or PHC have established their claim that the cost of providing the accommodation amounted to undue hardship.

[681] The position of both UBC and PHC through their witnesses and documentary evidence was that, but for the cost of the funding the interpreters, all other concerns they may have had about a Deaf resident could have been resolved or were not insurmountable.

[682] UBC addressed the issue of undue hardship in its letter to Dr. Dunkley summarizing the January 20, 2011 meeting. It stated in part:

> …It had been estimated that the costs involved in providing interpreter services necessary to accommodate Dr. Dunkley's training requirements in the program would be at least $500,000/ year for a total cost of 2.5 million dollars for the five year program. Dr. Rungta explained that he fully recognized the obligation of UBC Postgraduate Medical Education to accommodate Dr. Dunkley's disability, but stated that the requirement to do so is only to the point of undue hardship. Given the cost of providing the interpreter services that Dr. Dunkley will require, UBC has concluded that this represents undue hardship as UBC cannot provide the accommodation she has requested.

[683] In its January 6, 2011 letter to the Ministry and in its submissions UBC described the cost of providing Dr. Dunkley with interpreter services as "prohibitive". For the reasons that follow, I find that UBC has not supported this conclusion with concrete evidence and has not established that the cost of interpreter services would have resulted in undue hardship.

[684] I have found that UBC did not reasonably assess the cost of the accommodation. I found the calculations it relied on unreliable and inflated for the reasons set out

above. It did not undertake reasonable steps to assess alternatives that might reduce costs while providing meaningful access to the program in terms of program goals.

[685] With respect to funding sources, UBC only provided the MOU and December 24, 2010 operational letter. The MOU did not contemplate funds for accommodating residents.

[686] UBC did not provide evidence of the size of its enterprise, its overall financial resources, or the economic conditions facing it. Rather, it relied first on the fact that Dr. Dunkley was not a "student" under the *University Act* and as a result, unlike students, faculty and staff, she had no access to the A&D Office and the Access Fund. It relied second on the notion of a "firewall" that meant it could not access funds in the Faculty of Medicine or from UBC overall to support the accommodation. As outlined above, the evidence did not establish either that UBC could not give residents access to the A&D Office or that UBC was precluded from using its base budget for the cost of accommodation.

[687] In *Howard*, the Council found that UBC had taken steps to accommodate the complainant, including efforts to help him find funds to pay for an interpreter and an emergency grant; however, the efforts were not sufficient to enable the complainant to benefit from his classes – he required an interpreter which he estimated would cost about $40,000 per year (an estimate not disputed by the respondent). The Council said the main hurdle to the accommodation is the cost and its impact on the university and its students. In that case, UBC did lead evidence about its budget, and the extent to which its budget was made up of discretionary funds. The Council said:

> The Respondent did not adduce any evidence to suggest that the operations of the University would be seriously affected if it provided the Complainant with an interpreter. There is no evidence to suggest the nature of its operation would fundamentally change or that it would cease to operate. Indeed, beyond Dr. Srivistava's speculations, there was no evidence at all about the potential economic impact of the requested accommodation. It is obvious, however, that making the accommodation would have some impact on the University's resources.

[688] In my view, that is similar to the situation here. UBC was at liberty to not provide evidence of its financial resources. However, by not doing so it has put itself

in a position of not being able to prove that it would suffer undue hardship due to the impact of the cost of fulfilling a duty to accommodate.

[689] UBC's evidence regarding its efforts to secure other funding was also problematic. The evidence did not support a conclusion that it made reasonable efforts to follow up regarding IPAC, for example. Its efforts to secure funding from the Ministry was in the form of a letter asking the Ministry to fund the entirety of the inflated cost estimate, and Dr. Rungta's evidence that the Ministry refused. The evidence established that sharing costs between UBC, PHC, VCHA and the Ministry was a reasonable avenue to pursue to address the impact of the cost of the accommodation, and that UBC did not reasonably pursue it.

[690] In this regard, UBC's response is similar to the response of the School District in *Moore*:

> … The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were. (para. 52)

[691] Similarly here, the failure to consider alternatives, including the A&D Office, the overall UBC budget, and sharing costs, undermines UBC's argument that it was justified in effectively removing Dunkley from the program because of the cost of the accommodation.

[692] From about June 1 on, I have found that Dr. Dunkley was correct in her view that UBC was not making good faith efforts to reasonably accommodate her. As noted above, UBC's approach reflects an attitude which did not fully accept its responsibility to reasonably accommodate Dr. Dunkley. Some of the evidence, including that of Dr. Rungta (and Ms. Knowles for PHC), suggested an attempt to prove undue hardship rather than an attempt to determine if accommodation could be proved, short of undue hardship.

[693] UBC has not established that the cost of accommodation, either in its entirety or some share of it, would have resulted in substantial interference with its larger enterprise or its ability to provide the PGME program. It has not established that the

cost of accommodation would result in undue hardship. I find Dr. Dunkley's complaint of discrimination against UBC is justified.

12. Did PHC establish the third element of a BFOR?

[694] In summary, PHC argues that it made a good faith effort to accommodate Dr. Dunkley's disability. It arranged interim accommodation while it informed itself about Dr. Dunkley's disability, disability related requirements and workplace impact. It estimated the cost of Dr. Dunkley's interpreter service requirements. It determined that the PHC budget could not cover the interpreter costs as all funding was allocated, there was no ability to increase its funding and it was required to have a balanced budget. It says that none of the resident-related or interpreter services-related funding came even close to covering the estimated cost of Dr. Dunkley's accommodation. Thus, the only options open to it were to seek funding from the Ministry, which it did and was refused, or to terminate some mid-level employees in order to pay for the interpreter services. In these circumstances, PHC argues that the cost of the required accommodation would require the employer to change working condition in a fundamental way and thus cause undue hardship.

[695] PHC also submits that it was not the party with primary responsibility to search for accommodation for Dr. Dunkley. UBC had primary responsibility for and control over Dr. Dunkley's residency program and therefore primary responsibility to search for accommodation for Dr. Dunkley. Because PHC's relationship with Dr. Dunkley was governed by UBC's decisions with respect to her residency, any obligation of PHC to accommodate Dr. Dunkley flowed from UBC's search for accommodation for her. Dr. Dunkley became an "employee" of PHC, not because of any decision on the part of PHC, but because of a decision of PGME to grant her request to start her residency at St. Paul's Hospital. This is a very non-traditional "employment" relationship in which PHC does not pay residents and does not have payroll numbers for them. She is an employee simply for the purpose of achieving her goal of training in the program.

[696] There is no dispute that it is UBC who assigns residents to their clinical placement. PHC could not have anticipated or planned for Dr. Dunkley's

accommodation until it was informed by the PGME Office of the accommodation requirement.

[697] While, PHC had a duty to accommodate Dr. Dunkley once it became her employer, it seems reasonable that its duty to accommodate be considered in the unique circumstances in which residents are placed for training at sites like PHC, St. Paul's. In this regard, I would have expected that the purpose and goals and the respective rights and responsibilities between UBC and its clinical partners would be set out formally by agreement. It is sensible that such an agreement would have anticipated and set out the terms of cost sharing to fulfill a duty to accommodate respecting residents. However, no such agreement between UBC and PHC respecting the training program for residents was entered as evidence at the hearing.

[698] I confirm that I found that PHC sought to accommodate Dr. Dunkley in good faith albeit with some weakness in its process which I have previously set out, and despite there being some indication in the evidence of a focus on establishing undue hardship.

[699] PHC submits that its conclusion that it could not fund the requested accommodation without incurring undue hardship was reached for four reasons. First, PHC has little to no ability to increase its operating budget by generating additional revenue. Second, PHC has little to no ability to re-allocate costs in its existing budget. Third, PHC's forecasted finances do not anticipate a surplus. Fourth, the cost of the accommodation is "hugely disproportionate" to its allocated budget for the program, for individual residents and for interpreting services.

[700] PHC says it estimated the cost of the requested accommodation as being between $300,000 and $500,000 per year, not accounting for a number of other costs (e.g. overtime), based on Ms. Knowles' evidence.

[701] PHC argues that PHC and VCHA are separate legal entities, with distinct governing boards, programs and budgets and for that reason it would be wholly inappropriate for the Tribunal to examine PHC's claim of undue hardship in light of VCHA's budget. PHC points out that in *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)* 2012 BCCA 313, and upheld: *McCormick v.*

Fasken Martineau DuMoulin LLP, 2014 SCC 39, the BC Court of Appeal rejected the complainant's argument that a partner of a law firm was an employee of the partnership and characterized the respondent's position as "legalistic and technical". The Court stated:

> The legal consequences of the relationship of partnership are not a "label" that is different from the fact and substance of the relationship. They reflect the true nature of the relationship – that among persons carrying on business, operating under an agreement by which certain responsibilities have been delegated to some of the partners, elected by other partners for periods of time.
>
> …
>
> … There is no distinction between "commercial reality" and the legal nature of a partnership. The interpretation of the *Code*, like all statutes, is a legal exercise, where well-established fundamental principles of law apply. If the result of that exercise is that there are gaps in the legislation, it is the task of the legislature to remedy them. (paras. 57 and 59)

[702] Dr. Dunkley argues that PHC's claim that the cost of the proposed accommodation is prohibitive must be examined in light of the VCHA's overall budget. She says it is clear on the evidence that PHC only considered the cost estimates in relation to its own budget. It took an inappropriately narrow view of the matter.

[703] Dr. Dunkley submits that, in her evidence, Mary Proctor said that the annual budget for PHC is $730 million. In cross examination, she told the Tribunal that this was about 22% of the overall VCHA budget. Consequently, the overall budget of VCHA is about $3.3 billion. Dr. Dunkley says that no attempt was made to examine estimated costs in light of that fairly staggering number, or request the funds from VCHA or cost share with VCHA.

[704] As an affiliate of VCHA with resources available from VCHA for the accommodation process, Dr. Dunkley submits that it is appropriate to examine PHC's claim in light of the overall VCHA budget.

[705] Although PHC may be correct with respect to the significance of PHC being a legal entity, this submission does not provide a full and accurate reflection of the circumstances of this case, as revealed by the evidence.

[706] Again I note the lack of relevant documentation and witnesses provided by PHC. However, I have sufficient evidence to make the following factual findings.

[707] Ms. Proctor's testimony and responses in cross-examination were straightforward, knowledgeable and in my view reliable. Ms. Proctor had nothing to do with Dr. Dunkley's accommodation request. I accept as fact her testimony that requests respecting the provision or costing of an accommodation were handled by HR. She stated that the required funds would be within the program's budget that the employee was being accommodated into and the HR budget.

[708] Based on the testimony of Ms. Coughlin, Consolidated HR had a mandate to provide HR services, including accommodation services, to PHC, VHCA and Provincial Health Services at the relevant time. That is why Dr. Dunkley's accommodation request was handled by Ms. Knowles and Ms. Coughlin, employees of VHCA working for Consolidated HR.

[709] On June 7, Dr. Corral was notified by the PGME Office that the UBC A&D Office was not going to provide Dr. Dunkley's interpreters. She immediately e-mailed Dr. Carere [PH], the VP of Medical Affairs, Silma Harji, [PH] the Director of Medical Affairs and Camille Ciarnielllo [PH], copy to Annie Leung [PH] to let them know that Dr. Dunkley had been matched to St. Paul's, she had a hearing impairment, and the PGY 1 Office had been working with the PGME Office to clarify the need for accommodation.

[710] Dr. Corral testified that because the PGY1 Office did not have a budget to cover Dr. Dunkley's accommodation requirement for interpreters she "would have to involve the Vice President of Medical Affairs and various individuals at Providence, and they in turn would have to involve individuals at Vancouver Coastal Health to work out the details." In response to her notification of Dr. Dunkley's placement PHC responded that "they would work together with the university and the health authorities as well as with the individuals at senior leadership to further understand the needs".

[711] In cross-examination Dr. Corral confirmed that, in her view, the Vice President of Medical Affairs would have to involve individuals from VCHA. The

communications she received revealed that Dr. Patrick O'Connor was involved and aware of the issue. She was aware that negotiations would necessarily involve the health authority, the university, and the Ministry.

[712] The evidence is that the VCHA was continually in the e-mail loop respecting the accommodation of Dr. Dunkley. Of all of the evidence, what has struck me most meaningfully was Dr. O'Connor's early response to the cost issue that the interested parties (that is all of those interested in UBC residents) should share the expense.

[713] While PHC may be a separate legal entity with its own budget, I find that the financial resources of Consolidated HR and the VCHA budget were relevant to PHC's reasonable accommodation efforts. Ms. Proctor testified that the HR budget was a source of required funds. Consolidated HR employees were assigned to assist with the accommodation process. Dr. O'Connor expressed willingness to share the accommodation costs. Yet, PHC did not provide evidence regarding VCHA's budget, the financial resources potentially available to PHC through VCHA, or any effort PHC made to pursue with VCHA the cost-sharing option raised.

[714] Similarly, there was little to no evidence of any efforts made to share the costs among multiple organizations to reduce the impact on each. Ms. Proctor's testimony about the potential impact on PHC covering the entirety of the cost does not reveal any consideration being given at the relevant time to the clearly reasonable alternative of cost-sharing with VCHA, UBC and/or the Ministry.

[715] Furthermore, as with UBC, the cost estimate relied on by PHC to assess the impact of the cost of interpreter services was not reliable or reasonable. Nor did PHC show that other reasonable models of service where explored or costed.

[716] Given the nature of the evidence regarding costs and the lack of evidence regarding the resources available through VCHA or the reasonable alternative of sharing the costs, it is not possible to prove that the cost of interpreter services constituted undue hardship to PHC. PHC's evidence regarding its budget and forecasted finances cannot, in these circumstances, substantiate its claim of undue hardship.

[717] Finally, PHC argued that the cost of the accommodation was "hugely disproportionate" to its allocated budget for the program. This argument views the issue through a very narrow prism. Dr. Dunkley was not simply an employee. The circumstances of this case required cooperation between the organizations involved to not only reasonably assess the costs involved but to also reasonably assess how those costs may be funded across organizations so as to avoid undue hardship, if reasonably practicable. On the evidence, this did not happen. PHC has failed to establish a BFOR. The complaint is justified against it.

VI REMEDY

1. Section 37 of the *Code*

[718] Having found a breach of the *Code*, I turn to consideration of the appropriate remedial orders. The remedial powers of the Tribunal are contained in s. 37 of the *Code*, which provides, in part:

> (2) If the member or panel determines that the complaint is justified, the member or panel
>
> (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
>
> (c) may order the person that contravened this Code to do one or both of the following:
>
> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or

panel, the person was denied contrary to this Code;

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self-respect or to any of them.

…

2. Order to Cease and Refrain

[719] An order under s. 37(2)(a) is mandatory when a complaint of discrimination is found to be justified. Accordingly, I order that the Respondents cease the contravention and to refrain from committing the same or similar contravention.

3. The Discretionary Remedies

[720] The award of other remedies under s. 37(2) of the *Code* is discretionary.

[721] I have reviewed and listened to the submissions of the parties on remedy. Some of the Respondents' submissions are premised on an assumption that there was no discrimination and/or a version of the facts that does not accord with what I have found. I will set this out as it arises. I have found that UBC and PHC discriminated against Dr. Dunkley.

[722] The remedial provision of the *Code* is interpreted in light of the *Code*'s purposes, including to provide a means of redress for those persons who are discriminated against contrary to the *Code*. The principle underlying the remedies available to address the impact on the complainant is that the remedy should restore the complainant, to the extent possible, to the position he or she would have been in had the discrimination not occurred. See: *Bellefleur v. Campbell River (District) Fire Department*, 2005 BCHRT 541 at para. 85 (s. 37(1)(d)(i)); *Gichuru v. Law Society of British Columbia*, 2011 BCHRT 185 at para. 300; upheld on review 2013 BCSC 1325; 2014 BCCA 396 (s. 37(2)(d)(ii)); *Senyk v. WFG Agency Network (B.C.) Inc.*, 2008 BCHRT 376 at para. 448 (s. 37(2)(d)(iii)).

[723] In making my order for an appropriate remedy I am guided by this general principle.

4. Declaratory Order

[724] Dr. Dunkley seeks a declaration that the conduct she complained of in this complaint is discrimination contrary to the *Code*. Dr. Dunkley argues that a declaratory order is appropriate where it is important to the complainant and the public to clearly identify that the respondent's conduct was a breach of the complaint's human rights: ***Pardy v. Earle and others (No. 4)***, 2011 BCHRT 101. Dr. Dunkley argues that her case attracted media attention and that she was expressly told by Dr. Corral that the Respondents' conduct was not discrimination. Dr. Dunkley says these circumstances require a declaration that the Respondents' conduct was discrimination.

[725] UBC and PHC take no position, but for PHC arguing that Dr. Corral's comment must be understood in context, including Dr. Corral's efforts to be supportive.

[726] In *Pardy*, Mr. Earle an employee of Zesty Food Services Inc. made homophobic and sexual insults against Ms. Pardy, who is lesbian, while she was a patron and he was the host of a comedy show. The Tribunal found for the complainant and held that a declaratory order was required because:

> …in the circumstances disclosed by the reliable evidence in this case, it is important both to Ms. Pardy and to the public to clearly identify that the conduct engaged in by Mr. Earle, in particular, was a breach of Ms. Pardy's human rights under the *Code*. Accordingly, I make a declaratory order that his words and actions in relation to Ms. Pardy, both on and off the stage, on May 22, 2007, constituted discrimination contrary to the *Code*.(para. 486)

[727] I find that the circumstances of Dr. Dunkley's complaint also support a declaratory order on the basis that it provides an opportunity to clarify discriminatory conduct. Dr. Dunkley's treatment by UBC was in the public eye due to a Globe and Mail story. Dr. Dunkley testified that the Deaf community took great interest in her circumstances and went to the media. It is reasonable for me to conclude that the determination of Dr. Dunkley's complaint will be of particular interest to Deaf medical professionals and Deaf people seeking to work in the medical field. In order

to access university services, including residency positions, persons who are Deaf will in many cases require ASL interpreting services. These services, as we have seen in this decision, are expensive. UBC works in conjunction with others, in this case, PHC, to provide a medical residency program. I found that UBC and PHC have a duty to reasonably accommodate its residents to avoid an adverse impact because of disability. In this case UBC and PHC, for the reasons set out above, failed to do so.

[728] I make the Declaratory Order that the Respondents' conduct, as set out in this decision, constitutes discrimination.

5. Ameliorate the Effects of Discrimination

[729] Pursuant to s. 37(2)(c) Dr. Dunkley seeks an order that the Respondents implement a program designed to ameliorate the effects of disadvantage on those residents who have disabilities and are left without support, recourse or assistance from UBC's A&D Office or from PHC due to the manner in which the UBC and PHC have structured the PGME program and their relationship with each other.

[730] UBC argues that there is no evidentiary basis for this order. It argues that there is no basis for such an order against UBC because "UBC is not responsible for the structuring of the PGME programs, PGME is funded by the Provincial Government and the strictures on the use of the budget which do not provide for accommodative measures as part of the funding formula from the provincial government are not requirements of UBC. UBC has a contractual relationship with the government and it is the government that provides the funds pursuant to that contractual relationship."

[731] PHC argues that there "is absolutely no evidence of any pattern or practice that contravenes the *Code* that would justify the order sought by Dr. Dunkley". Dr. Corral testified that she had provided accommodation to residents in the past, such as maternity leave, or leave for mental health issues among others. PHC already has a "Duty to Accommodate Policy".

[732] Both Respondents have a duty to accommodate Dr. Dunkley. UBC took the position that Dr. Dunkley was excluded from receiving services from the A&D Office because she was a "resident" and not a student under the *University Act*. I have dealt

with this in detail. UBC's position results in far reaching disentitlement to access accommodation services for all medical residents.

[733] UBC and PHC took the position that there were no allocated funds for the accommodation of residents. Neither UBC nor PHC considered the full scope of financial resources available to them or meaningfully addressed their joint responsibilities and possibilities for cost-sharing.

[734] Dr. Dunkley was accepted into the program in March 2010. She immediately notified the UBC A&D Office of her accommodation requirement for ASL interpreters. The evidence indicates that UBC and PHC and VCHA had ongoing discussions about who would fund Dr. Dunkley's accommodation. They did not enter evidence of a reasonable cost sharing proposal. They did not enter evidence of any agreement between UBC and PHC in relation to the residency program. UBC and PHC either have not entered relevant evidence or have nothing in place to address accommodation requirements of residents that require funding. This, in my view, is a matter that requires attention before another resident has their career put on hold or destroyed while the parties sort out the complexities.

[735] However, as argued by PHC, I am not persuaded that the evidence in this case established a discriminatory pattern or practice. This was the first case of its kind for UBC and PHC. I am also satisfied that the mandatory cease and refrain order will require the parties to adopt a different approach to similar issues in the future.

6. Make Available to the Person Discriminated Against the Opportunity the Person was Denied Contrary to the *Code*

[736] Dr. Dunkley seeks an order pursuant to s. 37(2)(d)(i) that she be reinstated into UBC's dermatology residency program.

[737] The Respondents take no position. UBC states that Dr. Dunkley is on leave from her dermatology residency.

[738] On the basis of the evidence and submissions, I am persuaded that reinstatement is an appropriate remedy.

[739] The difficulty is that much time has passed since the parties' submissions on this issue. I am not aware of Dr. Dunkley's current work status or geographic location. However, this should not disentitle Dr. Dunkley to this remedy. While there may be issues surrounding reinstatement, I am of the view that she should be able to move forward with her program if she wishes. I will remain seized of this portion of the remedy until it is confirmed that Dr. Dunkley is re-instated in the dermatology program or has declined to do so. I therefore order UBC, at Dr. Dunkley's option, to reinstate Dr. Dunkley to the program. I further direct Dr. Dunkley to notify UBC of her decision within two months of this decision being rendered.

7. Compensation for Lost Wages or Expenses Incurred by the Contravention

[740] Pursuant to s. 37(2)(d)(ii) Dr. Dunkley seeks that the Respondents compensate her for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention.

[741] The parties agree that should the Tribunal decide that compensation is payable for expenses incurred the parties will endeavour to agree amongst themselves on the quantum of any such damages and, if unable to do so, the Tribunal would remain seized for the purpose of hearing further argument. There is no agreement among the parties respecting wage loss.

[742] I have reviewed all of the submissions. I list my orders or decision to decline to make order and provide my reasons in relation to each of Dr. Dunkley's claims.

Wage loss as a post-grad year ("PGY") 1, PGY2, PGY3, PGY4, and PGY5, including the delay resulting in loss of higher levels of salary available to post-PGY1 residents

[743] In seeking wage loss Dr. Dunkley must prove the wage loss. In *Gichuru v. Law Society of British Columbia*, 2011 BCHRT 185 at para. 370 (upheld on review 2013 BCSC 1325; 2014 BCCA 396), the Tribunal said:

> In exercising its discretion to award all or a part of wages lost under s. 37(2)(d) of the *Code*, the Tribunal will consider whether the complainant has made reasonable efforts to mitigate his or her loss. In *Vanton v. B.C. Council of Human Rights* (1994) 25 Admin L.R. (2d) 253, para. 81, the B.C. Supreme Court described this as the duty to take "such steps which a reasonable person in the dismissed employee's position would take, based on his or her own

> interest in maintaining a position and level of income in his or her trade or profession". The burden of establishing a failure to mitigate lies with the respondent.

[744] The Respondents object to an award for wage loss generally on the basis that Dr. Dunkley cannot seek both reinstatement and wage loss. It would amount to double dipping. She may seek one or the other.

[745] I find that Dr. Dunkley was employed as a resident commencing July 1, 2010. I have found that the Respondents discriminated when they put Dr. Dunkley on unpaid leave on January 20, 2011. Her loss of wages was the result of the discrimination. Dr. Dunkley applied and was accepted into a Master's of Health Science program commencing September 6, 2011. I find this effort on Dr. Dunkley's part to be a reasonable mitigation response. In my view, an appropriate award for wage loss is from January 20, 2011 to the commencement of Dr. Dunkley's Master's program on September 6, 2011. At that point, understandably, Dr. Dunkley adopted a new path, and I am not persuaded that an order for wage loss beyond that point is made out on the evidence.

[746] The PGY 1 salary and benefits was entered in evidence in the cover letter to the MOU dated December 24, 2010. I expect that the parties can determine the rate of pay and benefits Dr. Dunkley would have received for PGY 2 from July 1, 2011 to September 6, 2011, and can agree on the calculation for the period in which wage loss is ordered. I will remain seized to address any issue in this regard. I direct the parties to notify the Tribunal within two months of this decision if there is an issue regarding the calculation,

[747] The Respondents are ordered to pay Dr. Dunkley wage loss from January 20, 2011 to September 1, 2011.

Wage loss for the delay in qualifying as a dermatologist, including receiving a full salary as a dermatologist

[748] The Respondents oppose this claim. In particular they argue that the onus was on Dr. Dunkley to enter evidence and to prove her alleged future wage loss. She did not do so. I agree with the Respondents. An order for future wage loss needs a foundation in fact. I decline to make this order.

Expenses incurred as a result of attending a New Orleans dermatology conference in February 2011, without access to the $500 conference bursary available to all residents

[749] I find that but for the discrimination Dr. Dunkley would have received the $500 contribution to attend the dermatology conference as did all other PGY 1 residents. The loss flowed directly from the discriminatory conduct. I note that Dr. Warshawski's January 20 letter confirmed that "we" did approve her request to attend the conference. However, this was on the assumption that she was fully enrolled as a resident. The Respondents are ordered to pay to Dr. Dunkley $500 to reimburse her for expenses incurred to attend the Dermatology Conference.

Expenses incurred in paying University fees as a PGY 1 and not completing the first year

[750] UBC opposes this claim on the basis that Dr. Dunkley may not have to pay this fee again if she is re-instated in the program. This misses the point. This is an expense that flowed from the discrimination. I trust the parties can determine the amount if necessary.

[751] UBC is ordered to pay to Dr. Dunkley the expense she incurred in paying University fees as a PGY 1.

Expenses incurred in applying to both the Masters of Health Science ("MHSc") program and the Masters of Public Health program

[752] I find that but for the discrimination Dr. Dunkley would not have incurred this expense as she sought to mitigate the damage she had suffered. The Respondents are ordered to reimburse Dr. Dunkley her application fees for the Masters of Health Science program and the Masters of Public Health program.

Expenses incurred in attending the MHSc program (tuition, fees, books and supplies etc.)

[753] In my view, this is not an expense incurred by the contravention. These expenses were incurred once Dr. Dunkley had put in place her new direction.

Expenses incurred in re-acquiring her physiotherapy licence and insurance

[754] As a dermatology resident there was no reason for Dr. Dunkley to have maintained her physiotherapy licence and insurance. She took this action in mitigation of the damage she suffered when she was placed on leave without pay. I find it appropriately considered an expense incurred.

[755] The Respondents are ordered to reimburse Dr. Dunkley the cost she incurred to re-acquire her physiotherapy licence and insurance.

8. Injury to Dignity, Feelings and Self-Respect

[756] Dr. Dunkley seeks an award of $35,000 pursuant to s. 37(2)(d)(iii) for injury to her dignity, feelings and self-respect.

[757] She characterizes the injuries she suffered as:

- The psychological trauma of the discrimination;
- The delay in ability to start a family due to uncertainty related to career and income;
- The educational trauma faced when reinstated because of several years of being absent from practising medicine, including, but not limited to regaining confidence in the practice of medicine.

[758] Dr. Dunkley does not make submissions under each category she has set out. Rather, she submits that in ordering a remedy the Tribunal should take a broad and purposive approach focused on making the complainant whole. The key factor being the impact of the discrimination on the complainant.

[759] The factors Dr. Dunkley asks me to consider are: the size and sophistication of UBC and PHC; that she was at a very vulnerable stage in her career where UBC and PHC had control over her ability to practice her chosen profession; had the Respondents not put her on leave from her program she would have completed her five year dermatology residency in 2016; medical practice, in particular dermatology was what Dr. Dunkley wished to devote her life to, it was her "calling"; as a result of being put on leave Dr. Dunkley's career was delayed if not derailed, this includes the

loss of career years and if not career end; her reputation was damaged, she suffered a loss of confidence and she felt devalued, dehumanized and objectified throughout the accommodation process.

[760] UBC submits that there is no evidence of "psychological trauma" or "educational trauma" or with regard to any decision to delay starting a family. UBC argues that although there is a statutory right to claim damages for injury to dignity, feeling and self-respect, Dr. Dunkley's claims "are specifically related to certain forms of trauma and decisions of which there is no evidence."

[761] PHC states that it does not oppose an award of compensation to Dr. Dunkley under s. 37(2)(d)(iii) however it submits that the amount claimed by Dr. Dunkley is unrealistically high. PHC contends that an examination of the factors generally relied to determine quantum are not in evidence. These are set out in *Gichuru v. Law Society of British Columbia,* 2011 BCHRT 185, paras. 256 and 260, namely:

- The nature of the discrimination found;
- The time period and frequency of the discrimination;
- The vulnerability of the complainant;
- The impact of the discrimination on the complainant; and
- The totality of the relationship between the parties.

[762] PHC further argues that "educational trauma" is not a known head of damage and no evidence was filed in support of this claim. Further, delay in family planning is too speculative a claim.

[763] I have reviewed the parties written submissions and listened to the submission recordings. I have considered Dr. Dunkley's testimony and any relevant documentary evidence. I will employ the *Gichuru* factors in my consideration of an appropriate award for injury to Dr. Dunkley's dignity, feelings and sense of self-respect. I note that to some extent the factors overlap.

The nature of the discrimination found

[764] I found that the nature of the discrimination serious in that it robbed Dr. Dunkley of her first year of residency and it left her in a constant state of uncertainty, not only about her next rotation, but about her career aspirations as a whole.

[765] The Respondents' failure to provide Dr. Dunkley with ASL interpreters delayed, changed and prevented her from fully participating in her residency.

[766] The nature of the discriminatory conduct, removing Dr. Dunkley from her program and her employment, derailed her residency and deprived her of her work and her income. The discrimination risked the derailment of her career. At the time of the hearing Dr. Dunkley had again made a CaRMs application for a residency. She had not received a match.

[767] The evidence of Dr. Dunkley, Dr. Rungta and Dr. Warshawski confirms that Dr. Dunkley was dedicated and passionate about becoming a practicing doctor. It was not just a job, it was her life's work, her "calling". I agree with Dr. Dunkley's submission that circumstances like this merit a greater award due to the injury to one's sense of identity and the sense of worth of what one has to contribute to society.

The time period and frequency of the discrimination

[768] On June 1 Dr. Rungta advised that no further steps could be taken to arrange Dr. Dunkley's accommodation until she, among other things, provided medical documentation to support her accommodation request. At this point, about three months had passed and UBC had done little to put Dr. Dunkley's accommodation in place but assure her that it would be arranged in time for the start of her residency. In my view, the discrimination continued for the duration of the relationship between the parties.

The vulnerability of the complainant and the relationship between the parties

[769] In order to practice medicine in Canada doctors must successfully completed a residency in an accredited program. The CaRMS program matches graduating doctors and residency programs based on the prioritization of the student and the residency program. Graduating doctors must accept the match they are offered. Thus, when Dr.

Dunkley was matched with UBC that was the only residency open to her. ASL interpreters were essential to Dr. Dunkley's participation in her residency program. I find that Dr. Dunkley was in a very vulnerable position. When the Respondents did not accommodate her deafness and did not allow her to continue with her program she was rendered powerless with regard to achieving her career goals.

The impact of the discrimination on the complainant

[770] In May 2010, the Complainant was granted her medical degree by the University of Ottawa. She became Dr. Dunkley, on all accounts, one of the first Deaf doctors in Canada and the first Metis, Deaf doctor. On March 8, she had been matched with her residency of choice, a five year residency in dermatology at UBC. She was selected because of her outstanding CV. Dr. Dunkley was the recipient of many awards, in particular she was very proud to have received the "Extraordinary Woman" award at the University of Ottawa. She was a role model for the National Aboriginal Health Organization.

[771] She came to UBC a confident, successful and honoured woman to take the next step in her career. She expected that UBC would accommodate her disability. As a profoundly Deaf person she required interpretation to meaningfully participate in academic, hospital and clinical settings as a medical student. She came to UBC reasonably optimistic: she was a brilliant student making every effort to assist with her accommodation. The discrimination entirely undermined her optimism, brilliance, and efforts.

[772] Dr. Dunkley testified that she was traumatized when she was told at the January 20 meeting that she would not be permitted to continue in her program. She testified that she:

> … felt dehumanized throughout the whole experience, in every meeting with the university, with Providence Health Care, with Dr. Rungta, with Maria Corral, of all the things they said to me. I have never felt so discriminated in my life. It was one of the worst days of my life. And I was constantly objectified, treated like a dollar sign. I wasn't treated like a human being [or valued for] what I had to offer to society. I mean, I ... I -- I shared, you know, privileges as one of the recipients of an award at the University of Ottawa and being told that I had talent, my esteemed position at the University of Ottawa, I felt that all of that had gone to waste, all of the money and time that I

> invested in my medical education was worthless and didn't mean anything because I cost too much money to the university.
>
> I felt betrayed by UBC because they constantly promote their mandate to increase the number of Aboriginal physicians in Canada. And I felt that I was lied to, betrayed. I mean, I worked so hard for so many years to become a doctor because of the Aboriginal initiative that allowed us to train and all of that was taken away basically…I feel that I've been let down by the system, that claim that they want to increase the number of Aboriginal physicians, they want to increase diversity, increase their number of doctors.

[773] Dr. Dunkley testified that she was heartbroken with the knowledge that since she was not allowed to continue with her residency her father (who had cancer) would probably not live to see his daughter work as a doctor. She related that her father, who is also Deaf and Metis, "never had access to opportunities and forty decades later it's the same".

[774] Dr. Dunkley said that since she was taken out of the program she is constantly asked by people why she is not a doctor and she has started to question whether she made the right decision to dedicate a portion of her life to do medicine only to have it all taken away from her. She could have chosen another university when she made her CaRMS application, another university would have accommodated her.

[775] Dr. Dunkley testified that she went into a depression after she was told that she could not continue with her program. I accept Dr. Dunkley's evidence as descriptive of her state of mind.

Conclusion on Quantum for Injury to Dignity, Feelings and Self-Respect

[776] I find that the discrimination had a profound impact on Dr. Dunkley, a person with so much to contribute on the brink of her professional career. She was plagued by the uncertainty and fear that her dream of working as a doctor was coming to an end, and the dream of her Dad seeing his daughter succeed was gone. Indeed she lost her residency. She lost her confidence, and was forced to explain again and again why she wasn't working as doctor. She felt dehumanized and devalued. I do not hesitate to award Dr. Dunkley $35,000 for the injury to her dignity, feelings and sense of self-respect.

9. Pre- and Post-Judgment Interest

[777] Dr. Dunkley seeks an order for pre and post-judgment interest.

[778] The Tribunal has discretion to order interest so that its remedial orders under s. 37 of the *Code* fully compensate the complainant. I order the Respondents to pay to Dr. Dunkley pre- and post-judgment interest on the award for lost wages as of September 2011, and post-judgment interest on the award for injury to dignity, feelings and self-respect based on the rates set out in the *Court Order Interest Act,* R.S.B.C. 1996, c. 79, as amended.

VII CONCLUSION

[779] Dr. Dunkley's complaint is justified against both Respondents.

VIII SUMMARY OF ORDERS

[780] A summary of my orders is as follow:

- Pursuant to s. 37(2)(a), I order the Respondents to cease the contravention and refrain from committing the same or a similar contravention.
- Pursuant to s. 37(2)(b), I declare that the conduct complained of in this complaint is discrimination contrary to the *Code*.
- Pursuant to s. 37(2)(d)(i) I order that Dr. Dunkley be reinstated in UBC's dermatology residency program, at her option, and I direct that Dr. Dunkley notify UBC of her decision within two months of the date this decision is issued.
- Pursuant to s. 37(2)(d)(ii) I order that the Respondents compensate Dr. Dunkley for wage loss and expenses incurred as follows:
    - The Respondents are ordered to pay Dr. Dunkley wage loss from January 20, 2011 to September 6, 2011
    - The Respondents are ordered to pay to Dr. Dunkley $500 for expenses incurred to attend the Dermatology Conference in New Orleans
    - UBC is ordered to reimburse Dr. Dunkley for payment of her UBC fees for her PGY 1

- The Respondents are ordered to reimburse Dr. Dunkley her application fees for Masters of Health Science program and the Masters of Public Health program
- The Respondents are ordered to reimburse Dr. Dunkley for the amount she paid to re-acquire her physiotherapy licence and insurance.

- Pursuant to s. 37(2)(d)(iii) for injury to her dignity, feelings and self-respect the Respondents are ordered to pay to Dr. Dunkley the amount of $35,000.

- I remain seized in relation to my order under s. 37(2)(d)(i) until it is confirmed that Dr. Dunkley is re-instated in the dermatology program or has declined to do so, and in relation to my order under s. 37(2)(d)(ii). I direct the parties to notify the Tribunal within two months of this decision if there is an issue regarding the calculation of the wage loss ordered or the costs incurred.

Marlene Tyshynski, Tribunal Member

Appendix A

File: 8462

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

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

B E T W E E N:

Jessica Dunkley

COMPLAINANT

A N D:

University of British Columbia and Providence Health Care (St. Paul's Hospital)

RESPONDENTS

REASONS FOR DECISION
Ruling on Qualifications of Dr. Debra Russell to give Expert Evidence

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Tribunal Member:	Murray Geiger-Adams
Counsel for the Complainant:	David Tarasoff Emily Luther
Counsel for the Respondent UBC:	Don Jordan Rosyln Goldner
Counsel for the Respondent Providence Health Care	Penny Washington Esther Jeon Erica Lambert A/S
Hearing Dates:	March 22-25, April 1, and April 20, 2012
Additional Written Submissions:	November 30, December 12, 13, and 21,2012

Introduction

[1] Dr. Jessica Dunkley received her Doctorate in Medicine from the University of Ottawa in May 2010. That same month, having been matched through the Canadian Resident Matching Service ("CaRMS"), the University of British Columbia offered, and Dr. Dunkley accepted, a position in a postgraduate training program in dermatology, beginning July 2, 2010. UBC also granted her request that, for the first year of her residency, she be placed at St. Paul's Hospital, owned and operated by Providence Health Care ("St. Paul's"), which by virtue of that placement, became her employer.

[2] Before May 2010, both UBC and St. Paul's were aware that Dr. Dunkley was deaf, and that she had completed her medical training with the assistance of sign language interpreters.

[3] Although Dr. Dunkley began her residency in July 2010, both UBC and St. Paul's eventually took the position that she could not continue in the program, because the cost of providing her with sign language interpreters to accommodate her disability constituted an undue hardship for them. In January 2011, they placed her on an unpaid leave, and did not permit her to participate further in the program. She has not been able to return.

[4] Dr. Dunkley filed a complaint under the *Human Rights Code*, alleging that, in denying her the opportunity to continue in the program, UBC discriminated against her with respect to a service customarily available to the public, because of her physical disability, contrary to s. 8 of the *Code*; and St. Paul's discriminated against her with respect to her employment, because of her physical disability, contrary to s. 13 of the *Code*.

[5] I conducted an oral hearing of the complaint over ten days in April and July, 2012, and received additional written submissions from the parties in December 2012.

Ruling on Qualifications of Dr. Debra Russell to give Expert Evidence

[6] Dr. Dunkley sought to call Dr. Debra Russell as an expert witness. Her relevant expertise was said to be in the area of the means by which deaf people overcome barriers and access the services and benefits society offers, including models of interpretation services, their costs, the relationship of the models to the quality of services, and interpreter availability.

[7] The parties disagreed about the procedure to be followed in determining whether Dr. Russell was qualified to give expert opinion evidence in those areas. In particular, Dr.

Dunkley said that Dr. Russell's report should be before me in making that assessment; the respondents disagreed, arguing that this was not a proper subject of expert evidence, that Dr. Russell's opinion was not within her stated expertise, and that she was partial to Dr. Dunkley's position in the hearing, rather than a neutral expert.

[8] After hearing from all parties, I ruled that we would proceed by permitting Dr. Dunkley to call Dr. Russell for the limited purpose of attempting to establish her qualifications to give expert opinion evidence in the areas set out above. In accordance with this ruling, the complainant put Dr. Russell's *curriculum vitae* before the Tribunal, and examined her in chief on her education and experience, and any other matter going to her expertise, and seeking to connect that expertise to the areas in which Dr. Dunkley sought to have Dr. Russell testify.

[9] The respondents then had an opportunity to cross-examine Dr. Russell on her qualifications, and the connection (or lack of it) between her expertise and her proposed areas of evidence, including any evidence that bore on their objections as to these not being proper subjects of expert evidence, or not within her expertise, and her alleged partiality.

[10] Dr. Dunkley then had an opportunity to re-examine Dr. Russell on anything arising from the cross-examination.

[11] I then heard full argument on Dr. Russell's qualifications, and the admissibility of her proposed evidence. After reviewing the parties' arguments and authorities, and considering the matter overnight, I ruled, with reasons to follow, that:

- Dr. Russell's evidence in the areas in which the complainant sought to qualify her was "necessary", as that term is used in *Mohan* and the cases which apply and explain it, and "necessary and appropriate", as that phrase is used in s. 27.2 of the *Code*, and the cases which apply and explain it;
- Dr. Russell was qualified as an expert to give opinion evidence in those areas; and
- Dr. Russell was not disqualified from giving opinion evidence because of an appearance of partiality.

[12] These are my reasons for reaching those conclusions.

Necessity and appropriateness

[13] There was no issue with the extent or quality of Dr. Russell's academic and practical qualifications with respect to deafness in general, and sign language interpretation in particular. She earned her PhD in 2000 at the University of Calgary, in the Faculty of Education, Department of Educational Psychology. She has held the David Peikoff Chair of Deaf Studies at the University of Alberta, one of only two such endowed chairs in North America, since 2003, where she is also the director of the Western Canadian Centre for Studies in Deafness. She is a contract faculty member in a number of post-secondary institutions, including the respondent UBC. Her published research at the University of Alberta has addressed the quality and effectiveness of sign language interpretation in a variety of settings, including legal interpretation, the use of interpreters in public schools, and models and policies to serve post-secondary deaf students. She has been involved since 1984 in training, and providing professional development for sign language interpreters. Through her consulting business, she has assisted in developing screening tools for medical interpreters in B.C.

[14] Dr. Russell has been accredited as a sign language interpreter in both Canada and the United States, and is personally active in interpreting as a way of informing her teaching and research. She has engaged in ongoing professional development as an interpreter, specifically in medical, legal, and mental-health interpreting. For 30 years she has interpreted for deaf patients in a range of medical settings, including at doctor's appointments, in the operating room during surgery, and in conference settings. She has interpreted for a deaf pharmacist, a deaf chiropractor, and for a deaf medical student, though never for a deaf physician.

[15] I was satisfied, based on Dr. Russell's education and experience, and her record of research and publication, that her evidence would be "given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify:" *R. v. Mohan*, 2 S.C.R. 9, para. 27.

[16] I was also satisfied that the proposed evidence of Dr. Russell was likely outside my experience and knowledge as a trier of fact, and that it was, due to the technical nature of the matters in issue, necessary to enable me to appreciate matters in issue: *Mohan*, para.22. In particular, I consider that her evidence could assist me to understand how sign

language interpreters interact with deaf professionals, and how their work can be organized to ensure availability, accuracy, and continuity.

[17] I am not overlooking the fact that the complainant was also calling as witnesses individuals with personal experience in these matters – Dr. Dunkley as a deaf physician who has used sign language interpreters throughout her academic training, and Mr. Agan as an interpreter who has worked closely with a deaf physician. However, I thought that Dr. Russell was in a position to provide a broader perspective on those individual experiences, and put them in a larger context with which I was completely unfamiliar. "Evidence may be necessary which serves the function of clarifying or contextualizing the issues in dispute": *Radek v. Henderson Development (Canada) Ltd.*, 2004 BCHRT 340, para. 33.

[18] Finally, I was satisfied that Dr. Russell was not disqualified from giving opinion evidence in her areas of expertise because of an appearance of bias. The respondents' position on this issue rests on e-mails exchanged between Dr. Russell and Dr. Dunkley in 2010 and 2011, and a letter of support Dr. Russell wrote on Dr. Dunkley's behalf to Providence Health Care in 2010. The overwhelming tenor of these communications is that Dr. Russell, while supportive of Dr. Dunkley as the first deaf student in Canada to successfully complete medical school, was offering her assistance to the respondents to address two issues: the risk of miscommunication in the interpretation process, and the costs associated with interpreters in a medical residency program. For her part, Dr. Dunkley was seeking information from Dr. Russell, who she knew only slightly, based on her professional experience, that might assist UBC and PHC in fairly evaluating her requirements for interpreters. Nothing in these materials suggests to me that Dr. Russell had become Dr. Dunkley's advocate, or that her wish for Dr. Dunkley's success in her program (to which she had already been admitted) was in danger of distorting her opinions.

[19] At the end of the respondent UBC's argument, I raised the question of whether s. 27.2(1) of the *Code*, which permits the Tribunal to accept, "evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law," might affect the applicability of the *Mohan* criteria, and thus the admissibility of Dr. Russell's evidence. Counsel responded that, while the section might "attenuate" some of the rules applying to the admissibility of expert evidence in court, it could not be interpreted to affect something as fundamental, so

as to permit the advancement of evidence whose only purpose can be to usurp the function of the trier of fact.

[20] I agree that the section does not go so far as to make admissible evidence whose only purpose is to usurp the function of the trier of fact. The "necessity" for the evidence, considered in *Mohan*, remains an important consideration, though I note that, even in *Mohan*, para. 22, the Court said that it "would not judge necessity by too strict a standard."

[21] However, I disagree that Dr. Russell's proposed evidence had the purpose of usurping the function of the trier of fact, or that it would have this effect. In acceding to counsel's argument that I should not have Dr. Russell's report in front of me before ruling on her ability to give admissible opinion evidence, I deprived myself of knowledge of what opinions she expressed, beyond those referred to in submissions, and in her examination and cross-examination on her qualifications. I did not hear anything that made me concerned that her opinion would be, "[d]ressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, [and so] apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves:" *Mohan*, para. 19. The weight to be accorded Dr. Russell's opinion evidence is a separate question from its admissibility, and one to be assessed in light of considerations including its consistency with the other evidence, and its careful testing by cross-examination.

Murray Geiger-Adams,
Tribunal Member

Appendix B

IX IN THE MATTER OF A COMPLAINT FILED PURSUANT TO

THE *HUMAN RIGHTS* CODE, R.S.B.C. 1996, c. 210 (as amended)

AND BEFORE THE B.C. HUMAN RIGHTS TRIBUNAL

BETWEEN:

DR. JESSICA DUNKLEY

COMPLAINANT

AND:

UNIVERSITY OF BRITISH COLUMBIA –AND- ST. PAUL'S HOSPITAL, PROVIDENCE HEALTH CARE

RESPONDENTS

(Case No. 8462)

STATEMENT OF AGREED FACTS

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1. Dr. Jessica Dunkley attended the University of Ottawa in the Faculty of Medicine from August 2006 to May, 2010 when she received her Doctorate of Medicine degree.

2. Dr. Dunkley is Deaf. She has profound hearing loss in the right ear and moderate to profound hearing loss in the left ear. She wears a hearing aid in her left ear. Dr. Dunkley is also Metis.

3. Although Dr. Dunkley is adept at lip reading she required American Sign Language ("ASL") interpreters in many settings throughout her 4 years of medical studies, including interpreters for lectures, extracurricular activities, information sessions, clinical duties and professional courses. Dr. Dunkley is fluent in ASL. The interpreters were provided by the University of Ottawa.

4. After she obtained her Doctorate of Medicine degree, Dr. Dunkley wished to pursue post graduate medical training in dermatology at the University of British Columbia (the "University").

5. The University is a university under the *University Act*, RSBC 1996, c. 468 and is composed of a chancellor, a convocation, a board, a senate and faculties, including a Faculty of Medicine.

6. The University Board of Governors has implemented a policy respecting "Academic Accommodation for Students with Disabilities" (no. 73). "Academic accommodation" is defined (in part) as "a change in the allocation of University resources…which is designed to meet the particular needs of a student with a disability."

7. The University sponsors postgraduate medical training though Postgraduate Medical Education ("PGME") in the Faculty of Medicine at the University. PGME programs are accredited by the College of Family Physicians of Canada ("CFPC") or the Royal College of Physicians and Surgeons of Canada ("Royal College"). PGME provides postgraduate training in family medicine and specialty and sub-specialty residency programs including a dermatology program. Residency training is offered through various teaching hospitals in the province that are affiliated with the University, including St. Paul's Hospital.

8. The Royal College sets national standards by which residency programs offered by universities are assessed, including (Minimum) Specialty Training Requirements in Dermatology.

9. Application by medical doctors for entry level post graduate positions in the various residency programs is made to Canadian Resident Matching Services ("CaRMS").

10. CaRMS applicants are invited to interviews at the institution(s)/programs that they have expressed an interest in attending. Following the interviews, the applicants rank the programs and the programs rank the applicants. A computer then generates a "match". Applicants are matched to one program only and must accept the offer from Program to which they are matched through CaRMS.

11. Once a resident is matched to a residency program, the residency program assigns the resident to specific rotations within the various affiliated teaching hospitals or other designated sites.

12. PGME operates a Postgraduate Training Program in Dermatology (the "Program") in the Department of Dermatology and Skin Science at the University. At the relevant time, Dr. Laurence Warshawski, Clinical Professor of Dermatology, was the Program Director.

13. As Program Director, Dr. Warshawski reports to the Associate Deans of Medicine in PGME in the Faculty of Medicine at the University.

14. As Program Director, Dr. Warshawski also sits on the Residency Training Education Committee.

15. In March, 2010, Dr. Dunkley submitted an application to CaRMS with the intention of securing an entry level post-graduate position in the Program. Dr. Dunkley attended interviews at various medical schools with the assistance of interpreters provided by the University of Ottawa, including an interview with the Program.

16. Ultimately, Dr. Dunkley was "matched" to the Program with a start date of July 1, 2010 and was offered and accepted a position.

17. (On May 5, 2010, the BC Residents and Interns Paying Agency and the University formally offered Dr. Dunkley a position in Dermatology as a resident PGY1 from July 1, 2010 to June 30, 2011. She formally accepted the offer on or about May 21.)

18. In March, 2010, having been matched to the Program, Dr. Dunkley made a request of the Program through the Director of Administration of PGME, Lois Moen. She asked the Program if she could be placed at St. Paul's Hospital in

Vancouver for the first year ("PGY 1") of her Residency to allow for easier access to the resources at the Hearing Clinic located at St. Paul's Hospital. This request was granted.

19. Dr. Maria Corral is Site Director for PGY 1 residents at St. Paul's Hospital and in this capacity reports to Dr. Warshawski regarding residents in his Program.

20. Dr. Dunkley was scheduled to work through a number of 4 week rotations or "blocks" in her first year of residency at St. Paul's. These blocks were required to meet the minimum specialty training requirements in Dermatology required by the Royal College which include two years of basic clinical training. Dr. Dunkley was scheduled for rotations in the following services: internal medicine, pediatrics, emergency medicine, psychiatry, obstetrics/gynecology, general surgery, plastic surgery and family practice.

21. Because she is a Resident at the University, Dr. Dunkley became an "employee" of Providence Health Care ("PHC") when she was assigned there by the Program. PHC is the organization which operates St. Paul's Hospital and other facilities.

22. As an employee of PHC, Dr. Dunkley is a member of the Professional Association of Residents of British Columbia ("PAR-BC"). PAR-BC is a trade union certified under the *Labour Relations Code* as bargaining agent for residents in the province.

23. PAR-BC is party to a collective agreement with PHC and other health employers in the province, who are members of the Health Employers' Association of British Columbia ("HEABC").

24. In e-mail correspondence dated March 18, 2010, Dr. Dunkley advised the Program through Lois Moen that "I use sign language interpreters in the medical setting and just had a meeting the UBC Access office yesterday to start the process."

25. The University maintains an Access and Diversity Office. Ruth Warick is a Senior Diversity Adviser (Disability) who met with Dr. Dunkley in March.

26. On March 25, 2010, Lois Moen replied that PGME and PHC and the University were "in discussions" regarding her requirements for an interpreter and "…will most likely have some questions for you shortly so that the resources can be in place for July 1."

27. In early April, 2010, Dr. Dunkley posted a notice through the Association of Visual Language Interpreters of Canada and West Coast Association of Visual Language Interpreters listserv. to solicit applications from sign language interpreters interested in working with her during her residency. She provided a brief description of the residency experience. Dr. Dunkley received expressions of interest from several interpreters in Canada.

28. In e-mail correspondence dated April 7, 2010, Dr. Dunkley advised Lois Moen of these efforts to recruit an interpreter(s). She also suggested that initially at least, her interpreter Janet Null might be flown in from Toronto to because of her skill with medical terminology to transition to the new team of interpreters.

29. Lois Moen replied that the University's Access and Diversity Office would "be taking the lead in assessing your accommodation requirements and you should discuss your interpreter requirements and your efforts to recruit one directly with them." Lois Moen also suggested contacting Dr. Corral regarding any accommodations she may require in the clinical setting.

30. On April 23, 2010, Lois Moen wrote to [the Administrative Assistant] (Program Assistant, Royal College, PGY 1 Program, St. Paul's Hospital i.e. assistant to Dr. Corral) and Dr. Corral "to give you the heads up regarding Jessica Dunkley." Lois Moen advised that Dr. Dunkley is Deaf and requires an interpreter.

31. On May 4, 2010, Dr. Dunkley advised [the Administrative Assistant] about the need for an interpreter in the OR because the surgical masks preclude lip reading and pointed out that her interpreter would require a call room. On May 5 and again on May 12, [the Administrative Assistant] sought a more comprehensive list of requirements from Dr. Dunkley, but there was some delay in receiving a response as Dr. Dunkley was out of the country for nine days in May.

32. In an e-mail message to Dr. Corral and [the Administrative Assistant] dated May 11, Lois Moen pointed out that the parties had not determined who is responsible for the cost of the interpreters. She raised this point again in a message to Dr. Corral and [the Administrative Assistant] dated May 26. Dr. Corral also alluded to "potential financial burden" in her correspondence to Lois Moen on that same date.

33. Having received several expressions of interest from sign language interpreters, Dr. Dunkley held an "information night" for interested candidates on May 6, 2010 and for that purpose, prepared a document entitled "Dermatology

Interpreter FAQ" outlining the work required of the team of interpreters during her residency.

34. Dr. Dunkley described her vision or understanding of how her Residency Program would unfold with the assistance of interpreters in the FAQ document.

35. On May 18, Dr. Dunkley responded to [the Administrative Assistant's] request for a comprehensive list and advised that she would "only mention the most important ones in the next few days" due to other matters she was attending to at the time. On May 23, Dr. Dunkley wrote to Lois Moen with "a quick list of things" and identified the following "accommodation requirements" in addition to sign language interpreters:

    - Call room for the interpreter with 2 beds
    - Memorandum to rotation director advising that she uses sign language
    - Lecture contents provided to interpreter in advance
    - Locating to "page" her rather than PA system, including for codes

36. In correspondence to Dr. Dunkley dated June 1, 2010, Dr. Kamal Rungta, Associate Dean, PGME, requested medical documentation supporting the requested accommodations, details as to what services are required of an interpreter, and the estimated cost of the interpreter.

37. Dr. Dunkley continued to correspond with Ruth Warick at the Access and Disability office in June. However, in mid-June, Ruth Warick advised that because Dr. Dunkley is a "resident" and not a "student", her office would no longer be involved in the matter.

38. In an e-mail message to PGME dated June 7, 2010, Dr. Dunkley advised that she would require "at least two full time interpreters" and that for "any interactions that is not one on one scenarios I will require them." She was not able to comment on the cost of such services.

39. In mid-June, 2010, PAR-BC contacted HEABC and urged PHC to provide the necessary sign language interpreter services. PAR-BC filed a grievance on July 5, 2010. PAR-BC also communicated with Dr. Rungta at that time, who said the University was not committed to funding the cost of the interpreters.

40. On June 21, 2010, Dr. Dunkley communicated with HEABC to allow for sharing of information between PHC and the University.

41. On June 21, Dr. Rungta advised Dr. Dunkley that her clinical duties would be postponed (though she would be paid as a PGY 1). She was initially scheduled to do her Psychiatry rotation from July 1 to 25, 2010 and her ICU rotation from July 26 to August 22, 2010. She was also on the on call schedule for July, 2010 and scheduled for her General Surgery rotation from September 20, 2010 to October 17, 2010. It was anticipated she would do her Plastic Surgery rotation from June 6 to 30, 2011.

42. Dr. Dunkley attended the PGY 1 orientation ("New Resident Orientation") at St. Paul's on June 29, 2010 with the assistance of an interpreter paid for by the University. Dr. Dunkley did not attend orientation on July 2 at Children's Hospital but did attend the Neonatal orientation and the Dermatology orientation with an interpreter.

43. On June 29, 2010, Dr. Eric Webber, Dr. Rungta's successor as Associate Dean PGME, advised Dr. Warshawski that the issue of paying for the cost of interpreters remained outstanding.

44. Instead of the clinical rotations referred to above, Dr. Dunkley and the Program arranged for her to do rotations that would not require interpreter services. She was scheduled for a Research Elective in Block 1 for 4 weeks commencing July 2, 2010 and another such rotation in Block 2 from August 2 to 22 and Family Medicine in Block 3.

45. On July 13, 2010, Dr. Dunkley was contacted by Dr. Corral, the Site Director at St. Paul's. Dr. Corral explained that she had been contacted by Rebecca Knowles, a human resources officer with the Employer and was asked to participate in the accommodation process.

46. A meeting was held on July 20 between PHC, PAR-BC, the University and Dr. Dunkley. It was agreed that:

    - PHC would assist with making arrangements for Dr. Dunkley to see an ENT specialist to assess the extent of her disability and the medical basis for the request for accommodation and its extent
    - Dr. Corral would examine the possibility of scheduling a Family Practice rotation or others wherein it was not anticipated that Dr. Dunkley required interpreters because most patient contact is direct and "one on one"
    - further examination of the extent of the required accommodation was necessary

47. Dr. Rungta summarised the issues raised in the meeting in a letter to Dr. Dunkley dated July 21, 2010.

48. In July, 2010, [the Administrative Assistant] endeavoured to find a preceptor for a Family Practice rotation for Dr. Dunkley.

49. Dr. Dunkley completed a one week outpatient rotation at a rheumatology clinic (elective) from July 26, 2010 to August 1, 2010 with Dr. [HD]. She did a research elective from August 2 to 22 (Block 2) that was supervised by Dr. [R].

50. Starting July 6, 2010, she attended academic half day ("AHD") sessions on Tuesdays, with an interpreter. She continued to attend AHD sessions with the assistance of an interpreter until about November 30.

51. Further to the "accommodation meeting" held on July 20, 2010, Rebecca Knowles wrote on August 13 that "once the [ENT] specialist has completed his/her assessment, the Employer can begin to review the parameters of a reasonable accommodation. VCH Disability Management can provide a more accurate estimate of how long this review process might take…".

52. Sandy Coughlin was the Team Lead, Disability Management Services at Vancouver Coastal Health ("VCH") at the material time until February 2011 when she became the Manager of Occupational Health at PHC. In her role as the Team Lead of Disability Management at VCH, she provided advice to PHC, Vancouver Coastal Health Authority ("VCHA") and Provincial Health Services Authority through the Integrated Human Resources initiative.

53. On July 20, 2010, Dr. Dunkley filed a complaint under the *Human Rights Code* of British Columbia against the University, PHC and HEABC (amended on April 4, 2011). The complaint against HEABC was withdrawn on or about April 14, 2011.

54. Dr. Dunkley attended a 15 minute "residents meeting" or interview on August 10, 2010 with Dr. Corral (as did all other residents).

55. Dr. Dunkley commenced her Family Practice rotation with preceptor Dr. [K] at the Mariners Clinic on August 23 to September 19, 2010. On September 15, 2010, Dr. [K] raised concerns about Dr. Dunkley's performance and suggested that she stay on to do another 4 weeks in Family Practice at his clinic to assess her skill level. Consequently, Dr. Dunkley completed another block of rotation in Family Practice from September 20 to October 17, 2010 instead of her

scheduled surgery rotation which was cancelled due to the outstanding issues with respect to accommodation.

56. A meeting was held on August 31, 2010. Dr. Rungta was in attendance for the University and Pria Sandhu, Executive Director of PAR-BC, attended with Dr. Dunkley. Dr. Rungta noted that:

    - The examination by the ENT specialist would soon be complete
    - Certain rotations had been reorganized to allow Dr. Dunkley to pursue the Program
    - Dr. Dunkley was able to attend AHDs with interpreters paid for by PGME
    - That he had contacted the Indigenous Physicians Association of Canada

57. According to Dr. Rungta's notes, Dr. Dunkley noted that:

    - She was engaged in a research project with Dr. [R]
    - She was currently doing her Family Practice rotation without interpreters
    - Interpreters worked only booked hours and would not be held on retainer
    - It would take 2 to 3 months to secure suitable interpreters
    - She would require the services of 2 interpreters and another interpreter to fill in
    - On average, she would require 1.5 interpreters over the term of her residency
    - Interpreters cost $40 to $65 per hour

58. On that basis, Dr. Rungta calculated that if 1.5 interpreters worked a 60 hour work week, the cost would be $259,200 per year, that is, 1.5 X 60 hours X $65 per hour X 48 weeks.

59. Dr. Dunkley saw the ENT Specialist, [the ENT Specialist], at the St. Paul's Rotary Hearing Clinic on August 30, 2010 and then again on September 1. Following tests conducted on the first, [the ENT Specialist] reported that with respect to her left ear, Dr. Dunkley experiences "moderate falling to profound sensorineural hearing loss" and "no measurable hearing thresholds across frequency range to limits of audiometer" in her right ear. That is, Dr. Dunkley experiences "significant hearing loss in her left ear and no usable hearing in her right ear."

60. In a report dated September 7, 2010, [the ENT Specialist] concluded that:

- Dr. Dunkley has a profound hearing loss
- She functions well in one on one situations, relying on her hearing aid and lip reading, and would be able to deal effectively with patients "one on one"
- There is a potential risk of miscommunication, esp. in emergency situations
- It would not be possible for her to complete the Program without "liberal access" to a sign language interpreter
- A sign language interpreter would be required a substantial amount of the time, esp. in team situations

61. On September 15, 2010, Sandy Coughlin wrote to Dr. Dunkley and advised that following [the ENT Specialist's] report, she discussed certain issues relating to accommodation with the physicians involved in the Program, viz.

    - Whether or not the Program itself requires modification
    - Costs associated with services provided by interpreters
    - Patient safety and acceptable risk

62. Dr. Dunkley replied that same day and urged Sandy Coughlin to involve her in the process of selecting an interpreter(s). Dr. Dunkley also noted the importance of retaining an interpreter with knowledge of medical terminology. Sandy Coughlin replied that the Employer was simply assessing the cost of hiring interpreters which it currently estimated at $40 to $65 per hour or more, according to Dr. Rungta.

63. In mid-September, various physicians at St. Paul's/PHC communicated certain concerns to Dr. Corral, namely:

    - Nuanced communications through a third party in situations ranging from the mundane to emergent
    - Ensuring interpreters are qualified (medical terminology)
    - Communication when scheduled on call
    - Interpreter unavailable?
    - Surgical masks
    - Interpreter in OR (positioning and patient consent)
    - Confidentiality

64. In mid-September, certain VCHA physicians were involved in the process. It was concluded that "…patient risk would be mitigated by having rotations modified if necessary and accommodations made (i.e. interpreters etc) to minimize the potential for patient risk – if this is done then the patient risk

would presumably be no higher than what we would expect for any resident in our health authorities."

65. As for modified rotations, the VCHA physicians noted that while the Royal College expects Dermatology Residents to manage dermatologic issues arising in an emergent setting, the Royal College requirements only recommend rotations in Emergency and an ER rotation could be modified so that the Resident is not required to do every aspect of it (not first responder for acute resuscitations).

66. It was also noted that the Royal College standards for Dermatology do not require rotations in general surgery, obstetrics, or psychiatry in the first two years.

67. Dr. Patrick O'Connor said that "we certainly should be splitting any costs (I hope yet to be determined and made as efficient as possible) as at this cost level all sorts of impacts will be felt both at UBC and VCH/PHC.

68. Sandy Coughlin met with the physician group on September 13, 2010. She wrote that Rebecca Knowles (VCH human resources) would gather costs, and that the current rough estimate was $2.5 to $3.0 million over the 5 years. She also noted that 3 interpreters were needed.

69. In e-mail correspondence dated September 21, Dr. Corral set out certain issues that require consideration:

    - Patient consent
    - Ensuring interpreters are qualified (medical terminology)
    - Who employs the interpreters?
    - On call (extra call rooms, answering pages)
    - Interpreter in OR (positioning and resident looking up from case/surgical field)

70. Dr. Dunkley's General Surgery rotation (Block 4) was scheduled from September 20, 2010 to October 17, 2010 but was cancelled due to the outstanding issues with respect to accommodation.

71. In mid to late September, 2010, Dr. Dunkley set e-mail messages to Sandy Coughlin (copy to the University) to provide her with the names of persons who might be able to assist or inform her about the nature of the accommodation, namely:

- Dr. Wendy Osterling, pediatric neurologist, Spokane, WA
- Dr. Chris Moreland, intern, internal medicine, San Antonio, TX
- Dr. G. Moineau, Dean of Medical Education, University of Ottawa, Ottawa, ON
- Dr. Micheal McKee, Family Medicine, Rochester, NY
- Dr. Bressler, Family Medicine, Toronto ON
- Janet Null, sign language interpreter, Toronto, ON
- Dr. Debra Russell, University of Alberta, David Peikoff Chair of Deaf Studies, Edmonton, AB
- Gary Malkowski, Canadian Hearing Society, Toronto, ON
- Deaf Access Office, Provincial Services for the Deaf and Hard of Hearing, Vancouver, BC

72. These potential resource persons were listed in an e-mail message from Bonnie Kwan (PAR-BC) to Sandy Coughlin dated October 7, 2010. Bonnie Kwan also sought an update and urged the parties to move toward accommodation more expeditiously.

73. A meeting was held on October 12 between Drs. Corral, Warshawski, Rungta, Kernahan, and Dr. Dunkley and her interpreter. A range of issues were discussed, including:

    - differences between clinical rotations in undergraduate studies and postgraduate residency
    - Interpreters and associated costs
    - Issues potentially arising from surgical rotations
    - Issues potentially arising from ER/ICU/trauma rotations
    - Issues potentially arising from periods on call
    - Non-verbal auditory cues

74. At this meeting Dr. Rungta also advised that the issue of payment for interpreter services had not yet been resolved. The Program cancelled Dr. Dunkley's rotations for the remainder of 2010 pending resolution of the interpreter services issue. Dr. Dunkley was placed on paid leave on October 18, 2010. She did not commence her Medicine rotation (Block 6) on November 15 as scheduled.

75. Dr. Dunkley continued to work on her research elective with Dr. [R].

76. In response to a request from Dr. Dunkley, Dr. Debra Russell of the University of Alberta (Department of Educational Psychology/David Peikoff Chair of

Deafness Studies) wrote a letter to the Employer (Sandy Coughlin) dated October 19, 2010.

77. On October 27, Sandy Coughlin advised PAR-BC that the Ministry of Health was now involved in Dr. Dunkley's case.

78. Dr. Dunkley worked with Dr. [K] at his clinic from November 22 to December 3, 2010 and then travelled to Haiti to provide medical assistance in the aftermath of that country's earthquake. These activities were neither arranged though nor approved by the Program. When she completed these activities, she sought, but was denied, academic credit for these activities.

79. In early January, 2011, Dr. Rungta wrote to Dr. Dunkley to advise that "I am now in a position to respond to your request for accommodation" and a meeting was arranged for January 20.

80. Dr. Kernahan and Dr. Webber wrote to the Ministry of Health (Libby Posgate) on January 6, 2011 and stated that the costs of the accommodation proposed by Dr. Dunkley were "prohibitive and cannot be borne by this office [PGME] unless the Ministry is prepared to provide the additional funding…"

81. On January 10, 2010, PAR-BC advanced the grievance filed on behalf of Dr. Dunkley to stage 2 of the grievance procedure.

82. On January 17, 2011, Sandy Coughlin shared the following calculations with Libby Posgate of the Ministry of Health:

    - Hourly rate for interpreter = $60.00 per hour for the first 7.5 hours, then $90.00 for the next 4 hours and then $120.00 per hour thereafter
    - 2 interpreters required
    - For a 12 hour day, the cost is $1620 (or $810 per interpreter)
    - For on call days (24 hours), the cost is $4500 (or $2250 per interpreter)
    - So, for 2 days on call and 3 regular days, cost = $13,860
    - So, for 48 weeks per year, cost = $665,280

83. Sandy Coughlin described these calculations as "rough numbers."

84. At a meeting with Dr. Rungta and Dr. Kernahan and Dr. Webber on January 20, 2011, Dr. Dunkley and Pria Sandhu, were advised that neither PHC nor the University could accommodate her needs because the cost of the accommodation constituted undue hardship. Dr. Rungta advised that Dr.

Dunkley would be placed on unpaid leave effective that date and could no longer participate in any residency activities, including academic days and clinical activities.

85. At that meeting, Dr. Rungta said that interpreters required would cost $500,000 per year for a total of $2,500,000 over the term of Dr. Dunkley's residency.

86. On or about January 27, 2011, Dr. Dunkley applied to the University's Faculty of Graduate Studies (School of Population and Public Health) to pursue a MHSc Degree in Public Health. She was admitted to the program on March 7, 2011 with a start date of September 6, 2011. As Dr. Dunkley is a student of the University while registered in a graduate studies program, University Access and Diversity has provided and funded the interpreter services required by Dr. Dunkley.

87. In a letter to the Vice President of Clinical Quality and Safety (VCHA) dated February 2, 2011, Drs. Webber and Kernahan wrote that neither the University nor the Employer could accommodate Dr. Dunkley's needs "…based on the projected costs of the interpreter services that Dr. Dunkley will require throughout her training…"

88. Dr. Dunkley remains on unpaid leave from the Program to date.

89. In March, 2012, Dr. Dunkley applied to CaRMS and thereby arranged interviews with the University of Alberta Residency Program. Dr. Dunkley attended an interview regarding the Public Health Residency Program on March 20. In addition, she interviewed for the Family Practice Residency in Grand Prairie on March 21 and in Edmonton on March 23.

90. In addition, through CaRMS, Dr. Dunkley arranged interviews with the McMaster University Residency Program and the Public Health Program on March 28, 2012.

91. The various programs submitted their ranked list of candidates to CaRMS by April 4, 2012 and the would-be residents submitted a ranked list of programs to CaRMS by that date as well. CaRMS will then "match" residents to programs.

92. On April 18, 2012, CaRMS will advise Dr. Dunkley and the other applicants which program they have been assigned to.