COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association,* 2018 BCCA 132

Date: 20180411
Dockets: CA42770; CA42777

Docket: CA42770

Between:

Vancouver Area Network of Drug Users on behalf of people who are, or appear to be, street homeless and/or drug addicted

Respondent
(Petitioner)

And

Downtown Vancouver Business Improvement Association

Appellant
(Respondent)

And

British Columbia Human Rights Tribunal and City of Vancouver

Respondents
(Respondents)

And

The Coalition of West Coast Women's Legal Education and Action Fund and Community Legal Assistance Society

Intervenor
(Intervenor)

– and –

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Intervenor
(Intervenor)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated April 10, 2015 (*Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2015 BCSC 534, Vancouver Docket No. S122532).

Counsel for the Downtown Vancouver Business Improvement Association:	G.E.H. Cadman, Q.C. R.R. Veerapen
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Place and Date of Hearing:	Vancouver, British Columbia October 5 and 6, 2016
Place and Date of Judgment:	Vancouver, British Columbia April 11, 2018

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

Summary:

Downtown Ambassadors, operating in a program sponsored by the appellants, approached people who were loitering or sleeping in front of businesses, in alcoves of buildings, and in a city park and pressed them to move along. The program affected primarily the street homeless population of downtown Vancouver. The Vancouver Area Network of Drug Users filed a representative complaint alleging that, because Aboriginal persons and persons with disabilities were disproportionately represented in the street homeless population, the program discriminated on the basis of race, ancestry, colour, and physical and mental disability. The Human Rights Tribunal dismissed the complaint, finding that the complainant had not established a "connection or link" between adverse treatment and a prohibited ground of discrimination. On judicial review, the chambers judge quashed the dismissal of the complaint, finding that the tribunal erred in requiring a "connection or link". Rather, she said that a prohibited ground need only be a "factor" and that the statistical correlation was sufficient to establish that such grounds were a factor in this case. Held: Appeal allowed. The Tribunal made no error in the test that it applied, and was entitled to deference on the question of whether there was a "link or connection" established (or, alternatively, whether the prohibited ground of discrimination was a "factor" in the adverse treatment). The Tribunal was entitled to find that the complainant had failed to establish that adverse treatment was "because of race, colour, ancestry, or physical or mental disability".

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] Homeless persons in downtown Vancouver face significant challenges in simply living their daily lives. For them, downtown storefronts, alcoves, and parks may represent the safest, and most available places to spend their time and to sleep. Their very presence in these public spaces, however, is sometimes perceived by others in the community as a nuisance.

[2] During the period of the complaint, the Downtown Ambassadors Program (the "Program") was sponsored by the Downtown Vancouver Business Improvement Association (the "DVBIA"), and for a short period, by the City of Vancouver. While the Program had many facets, the one giving rise to the complaint was a concerted effort to prevent people from loitering or sleeping in areas in front of businesses and in a Vancouver park. Downtown Ambassadors were trained to press people to move on from those places. It is evident that most of the people adversely affected by this effort were members of Vancouver's homeless population.

[3] The Vancouver Area Network of Drug Users ("VANDU") is a grassroots organization aimed at assisting active and former drug users. I will refer to it as "the complainant". It brought a complaint before the BC Human Rights Tribunal on behalf of a class of persons that it described as follows:

> Individuals who are, or who appear to be, street homeless and/or drug addicted and engage in rough sleeping, sitting or lying down in public spaces, panhandling, vending, begging, or binning, or other behaviours related to those personal circumstances, within the geographical jurisdiction of the [Downtown Vancouver Business Improvement Association].

[4] The parties and the Tribunal used the shorthand description “street homeless” to describe members of the class. That description appears to capture the essence of the class on whose behalf the complaint is brought, and I will also adopt that terminology.

[5] The complaint alleged that impugned aspects of the Program violated s. 8(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, which, at material times, read as follows:

> 8(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 race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.[1]

[6] Discrimination on the basis of homelessness is not, *per se*, contrary to s. 8 of the *Code*. A program that negatively affects homeless people, therefore, does not automatically constitute a *prima facie* violation of the statute.

[7] The complainant says, however, that, because certain groups that are protected under s. 8 of the *Code* are over-represented in the street homeless population in comparison with the general population of Vancouver, a program that discriminates against street homeless persons necessarily discriminates against those protected groups. In particular, it says that the over-representation of persons with mental and physical disabilities and of Aboriginal persons among the street homeless population means that a program that negatively affects homeless persons discriminates on the basis of race, ancestry, colour, and physical and mental disability.

[8] The BC Human Rights Tribunal considered that the evidence did not establish a “connection or link” between the adverse treatment complained of and membership in a group protected under the *Code*. It therefore dismissed the complaint. On judicial review, the Supreme Court judge considered that the Tribunal erred in looking for a “connection or link”. Rather, she considered that it should have simply considered whether membership in a protected group was a “factor” in the adverse treatment. She held that, if the proper test had been applied, the Tribunal would have found that *prima facie* discrimination had been established.

[9] As I will explain, I am not convinced that the Tribunal erred in the test that it applied. The Tribunal is entitled to deference in respect of its assessment of the connection between prohibited grounds of discrimination and the impugned acts. I am, therefore, of the view that the Tribunal’s decision should be reinstated.

Factual Background

The Downtown Ambassadors Program and “Removals”

[10] The DVBIA is a community association designed to represent the collective interests of business and commercial property owners in a 90-square-block area of the downtown peninsula of Vancouver. The area covered is that generally described as “downtown Vancouver” [2]; it does not include adjacent or nearby areas generally described as “Yaletown”, “the West End”, “Gastown”, “Chinatown”, or the “Downtown Eastside”. Separate, independent Business Improvement Associations serve each of those areas.

[11] The DVBIA’s members include about 8,000 businesses within its boundaries. The association is funded through property taxes levied on commercial property and businesses in the area.

[12] The DVBIA inaugurated the Program in 1994. For the first few years, it focussed on offering customer service, assistance to tourists, and hospitality during the summer months. In 2000, the Program underwent significant modifications. It began to operate full-time, year-round. The DVBIA added outreach, public safety, and crime prevention functions to the Program, and hired private security contractors to operate it.

[13] The City of Vancouver provided funding for the Program for one year from September 2008 to August 2009, so that the DVBIA could expand the Program’s hours. As a result of the City’s funding, the Program operated 24-hours per day during that year.

[14] The most controversial aspect of the Program was the “removal” of street homeless people by Downtown Ambassadors. Patrolling Ambassadors would look for individuals who appeared to be engaging in certain unlawful activities – open use of drugs, trafficking, panhandling in an aggressive manner, or trespassing. Upon finding such a person, the Ambassador would advise them of the apprehended breach of the law, and ask that they cease the activity or leave the area. Often, the Ambassador would provide the person with an information sheet regarding the availability of food and shelter. If the person was not compliant with the Ambassador’s requests, the Ambassador might threaten to call the police.

[15] In undertaking “removals”, the Ambassadors confronted people verbally, but did not touch or physically move them. Rather, they relied on the compliance of those targeted. At times, Ambassadors would verbally wake sleeping people and request that they move. The tactics employed by the Ambassadors often made their targets uncomfortable, and they were typically successful in moving them along.

[16] The Tribunal found that the activities of the Ambassadors were not confined to dealing with people who were actually breaking the law. In particular, it found that in 2007 and 2008, Ambassadors engaged in removals of homeless people (especially those who were sleeping) from Portal Park, a public city park. As well, Ambassadors told people who were leaning on exterior walls of buildings or who were situated in alcoves or indentations of buildings to move along. In

some cases, the Ambassadors treated an area within one metre of a storefront as private property and conducted “removals” of people in those areas. The Tribunal found that these various spaces were not invariably private property. The Tribunal also found evidence that Ambassadors sometimes asked street homeless people to move from private property when they did not have a valid authorization to do so under the *Trespass Act*, R.S.B.C. 1996, c. 462, or any other legal authority.

Demographics of Vancouver’s Homeless Population

[17] The complainant presented the Tribunal with evidence regarding the demographic makeup of the street homeless population of Vancouver. Specifically, the Coordinator of the City of Vancouver’s Tenant Assistance Program initiated a regular count of Vancouver’s homeless population several years ago. She prepared a number of reports on the subject and testified before the Tribunal. Her evidence established that Indigenous persons and those suffering from medical conditions were disproportionately represented in the homeless population.

[18] The reports tendered before the Tribunal included homeless counts for the city as a whole. They did not break down numbers for the DVBIA area specifically. The 2008 report, the most recent one in evidence, indicated that 35% of the city’s street homeless population self-identified as Aboriginal. The count also provided evidence of the proportion of street homeless people suffering from a disability (identified through either self-reporting or observation of specific health conditions by the interviewers). According to the count, 68% of the street homeless were addicted to drugs or alcohol, 33% suffered from a mental illness, and 32% had a physical disability. These findings were generally consistent with earlier reports.

The Hearing Before the BC Human Rights Tribunal

[19] The complainant, together with Pivot Legal Society, brought the complaint to the BC Human Rights Tribunal under the *Code*. The Tribunal conducted a hearing that occupied 26 days spread over a period of five months. It heard 25 witnesses, and ultimately delivered a 675-paragraph decision (indexed as *Pivot Legal Society v. Downtown Vancouver Business Improvement Association (No. 6)*, 2012 BCHRT 23). The decision comprehensively examined the evidence and the law.

[20] The Tribunal noted that a discrimination claim is analysed in two stages. At the first stage, complainants bear the burden of establishing a *prima facie* case of discrimination. If they are successful, the inquiry moves to the second stage, where respondents bear the burden of demonstrating that there is a *bona fide* and reasonable justification for the impugned practices.

[21] The Tribunal, at para. 588, described three aspects of a claim that complainants must prove in order to establish a *prima facie* case of discrimination:

a) That the members of the Class belong to a protected group under the *Code*;

> b) That they have experienced adverse treatment (with respect to a service, facility or accommodation customarily available to the public); and
>
> c) That there is a connection or link between that adverse treatment and the protected grounds. It is not necessary that the protected grounds be the sole factor in the adverse treatment, provided they are at least a factor ….

[22] The Tribunal relied on the statistical evidence of the demographics of the street homeless population to find that the complainant had established the first element of the test. It concluded, at para. 595, that "certain members of the Class belong to groups protected under the *Code*, and that these groups are disproportionately represented among the street homeless population, and the Class, as compared to the general population."

[23] The Tribunal then considered the second element of the test, beginning by asking the question "are the facilities at issue customarily available to the public".

[24] The Tribunal noted that the complainant did not allege that the Program constituted discrimination insofar as it dealt with behaviour that was contrary to the aggressive panhandling provisions of the *Safe Streets Act*, S.B.C. 2004, c. 75; nor did the complainant allege that proper enforcement of the provisions of the *Trespass Act* was discriminatory:

> [611] I note, in this regard, that the complainants do not appear to be challenging the actions of the Ambassadors as it relates to aggressive panhandling under the *Safe Streets Act*, or in relation to open drug use. Further, the complainants do not appear to challenge the actions of the Ambassadors under Authorizations to the extent that those Authorizations clearly describe the private property in issue, and that the Ambassadors' actions are consistent with the legal description of the private property.

[25] The Tribunal accepted these positions. Public property, where used in violation of the *Safe Streets Act*, was not treated as a "facility customarily available to the public". The Tribunal also appears to have accepted that, for the purposes of the complaint, actions of the Ambassadors that were properly authorized under the *Trespass Act* were not discriminatory.

[26] On the other hand, the Tribunal appears to have assumed that any activity undertaken on public property, short of a violation of the *Safe Streets Act*, constituted the use of a "facility customarily available to the public". In assessing whether the complainant had established adverse treatment in respect of a facility customarily available to the public, then, the Tribunal focussed exclusively on the question of whether the places from which homeless persons were removed were private or public property.

[27] This focus, in some respects, fails to come to grips with the specific language of s. 8 of the *Code*, which does not speak of a "place" customarily accessible to the public, but rather of an "accommodation, service or facility customarily available to the public". It is clear, for example, that a sidewalk on public property is a place that is accessible to the public, and that, when used as a walkway, it is a "facility customarily available to the public". It is much less evident that when used

as a place for sleeping, it constitutes a "facility" or "accommodation" customarily available to the public. The Tribunal appears to have recognized this distinction, but found it unnecessary to deal with it, as it was not one on which the parties joined issue:

> [610] In their arguments, the parties did not fully engage the issue of whether, and to what extent, the sidewalks, alleys and parks in issue were "customarily available to the public', and if so, for what purposes. In light of this, and on the basis of the evidence before me, it is not necessary for me to exhaustively determine which of the "facilities" patrolled by the Ambassadors could be found to be customarily available to the public.

[28] The Tribunal made the following findings:

> [617] On the basis of the information before me, I have no difficulty concluding that Portal Park is a facility customarily available to the public. Further, I accept that the sidewalk and alley areas outside businesses are facilities customarily available to the public.

[29] The appellants did not take serious issue with these conclusions before the Tribunal, and did not challenge them on judicial review in the Supreme Court, or on this appeal. I accept, for the purposes of this appeal, the Tribunal's conclusion that the Ambassadors denied members of the Class access to "facilities customarily available to the public". I should not be taken, however, to endorse the idea that any place that is generally accessible to the public is, regardless of the purpose for which it is used, a "facility customarily available to the public."

[30] The Tribunal, having found that Portal Park and the sidewalks and alley areas outside businesses constituted "facilities customarily available to the public" had no difficulty coming to the conclusion that the Ambassadors, in removing people from those areas subjected them to "adverse treatment".

[31] Since the Tribunal found that the first two aspects of the test for *prima facie* discrimination had been established, it turned to the most difficult part of the analysis: whether there was a connection or link between the adverse treatment and the membership of class members in a group protected from discrimination under the *Code*.

[32] The Tribunal acknowledged that protected groups were disproportionately represented among the street homeless population, and recognized that this fact was relevant to the issues before it. It found, however, that the evidence did not establish a link between membership in a protected group and the adverse treatment:

> [645] In this case, … the evidence before me establishes that, given the demographic composition of the street homeless population, the Ambassadors Program could potentially have a discriminatory impact on protected groups: that is, could lead to adverse treatment in relation to grounds prohibited by the *Code*. What is largely absent, however, is actual evidence of such an outcome or impact.
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> …
>
> [648] In this case … there is no evidence that the actions of the Ambassadors selectively target individuals of Aboriginal ancestry, viewing them as suspicious. For example, there is no evidence that Ambassadors are more likely to attempt removals of Aboriginal, as opposed to

non-Aboriginal, individuals, in similar circumstances.

[33] The Tribunal accepted that, even without any selective targeting of Aboriginal persons, it was conceivable that Aboriginal persons might be disproportionately impacted by the Program because of their own life experiences and cultural norms. It noted certain theories propounded by Dr. Bruce Miller, who appeared as an expert witness for the complainant, but did not find the evidence presented in the case to be sufficient to support those theories:

> [651] [The evidence of Dr. Miller] raises a clear potential that the actions of Ambassadors may have a differential impact on those of Aboriginal ancestry. However … there is no evidence before me which would move the evidence of Dr. Miller from a conceptual framework to lived reality. In particular, there is no evidence before me from any Aboriginal member of the Class which would support Dr. Miller's report in this regard. I cannot find that Dr. Miller's report, in and of itself, is sufficient to establish the assertion of differential impact.

[34] Having found that the complainant had failed to establish a connection or link between adverse treatment and Aboriginal identity, the Tribunal then considered whether the evidence showed a connection between drug addiction and adverse treatment.

[35] The complainant conceded that activities by the Ambassadors that targeted open illegal drug use did not constitute discrimination under the *Code*:

> [654] As it relates to members of the Class who suffer from the disability of drug addiction, there is evidence that targeting open drug use and drug dealing is a function of the Ambassadors. Such actions may well have a disproportionate impact on the drug addicted. However, the complainants do not argue actions relating [to] those actively engaged in illegal drug use or drug dealing constitute discrimination under the *Code*.

[36] The complainant argued, however, that the evidence supported the proposition that "perceived drug users" were targeted by the Ambassadors, even when they were not engaged in drug use or drug dealing. The Tribunal found that assertion was not borne out by the evidence:

> [655] [W]hile the complainants attempted to establish that Ambassadors would act to remove individuals if they *perceived* those individuals to be drug users, there is very little evidence before me to support this proposition. The almost invariable evidence of the individual Ambassador witnesses, as well as the evidence of the Operations Managers, was that Ambassadors would advise individuals actively engaging in open drug use that they were in contravention of the law. The only evidence before me that would provide any support to the proposition that individuals were targeted because they were perceived to be drug users, although not actively using drugs, was that of Ms. Kruger, who testified that she understood that she was to move people along if they appeared to be drug users; and possibly that of Ms. Hippensteel, who testified that, if someone was known to her as a drug user, and someone passed them something, she assumed it was a drug. In my view, this evidence is not sufficient to establish that individuals were systemically targeted by the Ambassadors as a result of the perception that they were drug users. [Emphasis in original.]

[37] Ultimately, the Tribunal dismissed the complaint, finding that the complainant had failed to establish a connection between adverse treatment and membership in a protected group:

> [659] For the reasons outlined above, and on the basis of the evidence before me, I find

> that the complainants have not established a connection, or link, between the adverse treatment experienced by members of the Class and their membership in a protected group. Thus, they have failed to establish a *prima facie* case of discrimination in relation to the actions of the Ambassadors. As a result, the complaint as against both the DVBIA and the City must fail. I do, however, add the following comments.
>
> [660] In their argument, the DVBIA argued that … the Ambassadors Program does not target particular individuals, but particular behaviour that is unlawful or illegal (trespass to property, aggressive panhandling, open drug use, etc.). My finding that the complainants have not established a connection between the adverse treatment alleged and a prohibited ground of discrimination should not be taken as a finding that I accept the DVBIA's assertion in this regard. In particular, I note that the evidence in relation to Portal Park raises the potential that the Ambassadors were not acting solely on the basis of illegal behaviour, but were also targeting certain types of individuals. I also note that the removal of individuals under the purported authority of Authorizations is, intuitively, much more likely to occur with respect to individuals who are or appear to be members of the Class than with other members of the public.
>
> [661] The Class is made up of some of the most vulnerable and marginalized individuals in British Columbia. One of the reasons that the *Code* provides for representative complaints is to permit individuals who, individually, may face barriers in bringing human rights complaints to more easily coordinate and obtain assistance in doing so. In this complaint, the role of Pivot and VANDU as representatives was to coordinate the Class and to bring forward relevant evidence. In the end, there was no evidence from any member of the Class directly affected by Ambassadors' actions. While I fully accept that the complainants' task in this regard was an extremely sensitive and challenging one, the evidence before me was simply not sufficient to establish discrimination.

The Supreme Court of British Columbia

[38] VANDU applied for judicial review of the Tribunal's decision. It argued that the Tribunal erred in its interpretation and application of the *prima facie* test for discrimination under s. 8 of the *Code*.

[39] The chambers judge agreed, and quashed the Tribunal's decision. The main error identified by the chambers judge was the Tribunal's insistence on evidence of a "connection or link" between adverse treatment and membership in a protected group. She found this requirement to constitute a "formalistic" approach to discrimination. Instead, she considered that the Tribunal ought to have adopted a more "contextual and nuanced approach", in which discrimination could be proven simply by showing that the group adversely affected by the Program included members of protected groups in numbers that were disproportional to their percentage of the general population. She described the correct test as one in which membership in a protected group was "a factor" in the adverse impact:

> [59] In my view, there is a significant difference between proving personal characteristics are "causally" connected to adverse treatment versus them being "a factor" in the adverse treatment. Requiring claimants to prove a causative connection elevates the legal burden on the claimant beyond what the SCC stated in *Moore* [*Moore v. British Columbia (Education),* 2012 SCC 61] and would be inconsistent with the equality jurisprudence under the *Charter*.
>
> [60] The essence of discrimination is the disproportionate *impact* of a law or activity and, therefore, the focus of the legal test must also be on effects. The definitions of the *prima facie*

> test in both *Coast Mountain* [*Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada), Local 111*, 2010 BCCA 447] and *Moore* do require claimants to demonstrate a relationship between the personal characteristics and adverse treatment. But proving a causative connection imports a "cause and effect" analysis; the claimant would need to establish that the protected ground was *the factor* that caused the adverse treatment, rather than simply *a factor*. This neglects the practical reality of situations in which discrimination is found. Adverse impacts are often the result of a constellation of factors, where the protected grounds are but one factor, but a factor nonetheless. The test in *Moore* properly recognizes this distinction. Furthermore, undertaking a "cause and effect" analysis could improperly focus on the design or intention underlying the actions or system at issue. … [T]his would be a further source of potential error, as one does not need to prove an intention to discrimination to find a violation of the *Code*.
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> [Emphasis in original.]

[40] On this basis, she found that the Tribunal erred by requiring the complainant to provide "something more" beyond the statistical evidence that it adduced.

[41] The judge was also of the view that the case should be considered in a broader context than that taken into account by the Tribunal. While the complainant had effectively conceded before the Tribunal that, to the extent that the Program targeted violations of the *Safe Streets Act* and the *Trespass Act*, it was not discriminatory, the judge considered that the legislation that was relied upon was critical to the context of the case:

> [129] … The Association chose to focus on the *Safe Streets Act* and the *Trespass Act*. The ambassadors were not searching for potential violations of traffic laws, municipal bylaws or any of the other numerous laws or regulations which govern activity in public space. Instead, they focused on two pieces of legislation that – and this point was not contested – were enacted for the purpose of addressing aggressive panhandling on public or private property. The Association also says it was targeting open drug use, which is a criminal offence, but, of course, that is only one of numerous other criminal offences that could occur in any public space in Vancouver.
>
> [130] In other words, the Program focussed on the same behaviours that are the focus of legislation aimed at the street homeless. At the very least, that raises a presumption that the Program would affect street homeless more than other members of the population. In my view, this is a crucial contextual consideration missing from the Decision.

[42] Relying on these two identified errors (which, in turn, allowed her to undertake her own re-analysis of the evidence), the chambers judge found that the Tribunal erred in failing to find that a *prima facie* case of discrimination had been established:

> [107] … [T]he Tribunal erred in not recognizing that, on the whole of the evidence before it, the "potentiality" to which it refers (in paras. 645 and 660 of its Decision) is the reality that exists. The Tribunal concluded there was no evidence proving that individuals were subjected to adverse treatment because of their race or physical or mental disability. However, that conclusion was drawn without sufficiently taking into account the nature of the adverse treatment and the social environment in which it was taking place. The Program, and thus the adverse treatment, was rooted in two pieces of legislation associated with the street homeless. Applying the correct legal test to the facts leads to the inevitable conclusion that individuals of Aboriginal ancestry and individuals with mental or physical disabilities are

differently and disproportionately impacted by the Program.

[43] Accordingly, the judge quashed the Tribunal's dismissal of the complaint, and remitted the matter to it, to consider whether the DVBIA and the City could establish a *bona fide* and reasonable justification for the *prima facie* discrimination.

Issue

[44] The appeal before this Court raises two issues:

1) Whether the Tribunal identified the correct test for establishing a *prima facie* case of discrimination under the *Code*, specifically with regards to the required connection between the adverse treatment and the protected characteristics of class members; and

2) Whether the Tribunal erred in failing to find the necessary connection between the adverse treatment suffered by class members and their membership in protected groups under the *Code*.

Analysis

Standard of Review

[45] Section 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applies to judicial review proceedings from decisions of the Tribunal:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[46] In *J.J. v. School District 43 (Coquitlam)*, 2013 BCCA 67 at para. 23, this Court noted that:

> [Q]uestions do not always fall neatly into the categories set out in s. 59(1). Questions may be partly questions of fact, and partly questions of law. Equally, exercises of discretion may be premised on findings of fact or determinations of the law. The courts have struggled to

> articulate rules that govern situations in which a tribunal's decision involves more than one of the categories set out in s. 59.

[47] After noting that this Court had established, in *British Columbia v. Bolster*, 2007 BCCA 65, and *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114, that questions of mixed fact and law were to be reviewed on a correctness standard, the Court in *J.J.* cautioned against automatic application of a correctness standard of review:

> [26] This non-deferential standard of review for questions of mixed fact and law contrasts with the standard that applies at common law. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 the Court indicated that a tribunal will normally be entitled to deference when deciding a question of mixed fact and law:
>
> > [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically. We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
>
> …
>
> [28] A court on judicial review will not, of course, have heard the witnesses who testified before the tribunal. Many tribunals do not record their proceedings, so the court may have no record at all of the testimony. It will, therefore, be practically impossible for the court to fairly or efficiently make findings of fact. For that reason, it is important that courts not be too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness. If there is an extricable issue of fact involved in the "mixed" question, the court must defer to the tribunal in respect of that issue in accordance with s. 59(2) of the *Administrative Tribunals Act*.

[48] In the case before us, there are two separate issues to be addressed. First, there is the question of the correct test for the establishment of a *prima facie* case of discrimination. The identification of the correct test is an issue of law, and the appropriate standard of review is correctness under s. 59(1) of the *Administrative Tribunals Act*.

[49] The question of whether facts have been established that meet the identified legal test, however, involves extricable issues of fact. The appropriate standard of review is that set out in s. 59(2). The Tribunal is entitled to deference on that issue.

The Legal Test for Prima Facie Discrimination

[50] For convenience, I repeat the provisions of s. 8 of the *Human Rights Code* as it read at material times:

> 8(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 race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

[51] The section is most easily interpreted by separating it into its component parts. Paragraphs (a) and (b) set out the prohibited acts of discrimination (denial of, or discrimination regarding, accommodations, services, or facilities). The closing words of the section set out the prohibited bases of discrimination (race, colour, ancestry, etc.). Lying between the prohibited acts of discrimination and the prohibited bases are the words “because of”, which establish the requirement of a particular type of connection between the two. The preliminary clause of the section (which contain the words “bona fide and reasonable justification”) sets out a defence to a claim of discrimination. The law has developed in a manner that treats each of these components of the statute as having a specific role in the analysis of a discrimination claim.

[52] The provisions of the *Code* are similar to those in human rights legislation across the country. It has long been established that the complainant bears the burden of showing *prima facie* discrimination, by establishing both a prohibited act and a prohibited ground of discrimination, as well as the requisite connection between the two. Once *prima facie* discrimination has been established, the respondent bears the burden of demonstrating *bona fide* and reasonable justification (*Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558-59; *Moore* at para. 33).

[53] I have already set out the test for *prima facie* discrimination as it was articulated by the Tribunal in this case, but I repeat it here, for convenience:

> [588] … What the complainants must show to establish a *prima facie* case is:
>
> a) That the members of the Class belong to a protected group under the *Code*;
>
> b) That they have experienced adverse treatment (with respect to a service, facility or accommodation customarily available to the public); and
>
> c) That there is a connection or link between that adverse treatment and the protected grounds. It is not necessary that the protected grounds be the sole factor in the adverse treatment, provided they are at least a factor ….

[54] It is common ground that the Tribunal was correct in its statement of the first two criteria. The primary issue on this appeal is whether it erred in requiring a “connection or link” between the adverse treatment and the protected grounds. The statutory language (“because of”) appears to support such a requirement. The chambers judge, however, considered that the Tribunal erred in imposing this requirement.

[55] The judge considered that the appropriate test was the one described at para. 33 of *Moore*:

> [33] … [T]o 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. [Emphasis added.]

[56] In particular, the judge sought to draw a marked distinction between “a connection or link” on the one hand, and something being “a factor” on the other. She appears to have considered a “connection or link” to be a much stronger association than a “factor”, and considered that the legislation should not be interpreted as requiring that stronger association.

[57] In my view, the judge erred in her interpretation of the law. First, it seems to me that saying there is a “connection or link” between a ground of discrimination and adverse treatment is no different from saying that the ground of discrimination was “a factor” in the adverse treatment.

[58] Moreover, in this case, the Tribunal specifically used the word “factor” in explaining what it meant by a “connection or link”, stating that “it is not necessary that the protected grounds be the sole factor in the adverse treatment, provided they are at least a factor”.

[59] The judge’s emphasis on the language used in *Moore* was, in my view, unjustified. The dispute in *Moore* primarily concerned whether a special educational program meeting Mr. Moore’s needs was properly characterized as a “service customarily available to the public”. The other parts of the test for *prima facie* discrimination were uncontroversial:

> [34] There is no dispute that Jeffrey’s dyslexia is a disability. There is equally no question that any adverse impact he suffered is related to his membership in this group. The question then is whether Jeffrey has, without reasonable justification, been denied access to the general education available to the public in British Columbia based on his disability, access that must be “meaningful” …. [Emphasis added.]

[60] *Moore*, then, explored the second part of the test for *prima facie* discrimination. In the circumstances, it is not surprising that the Court did not spend any time in its judgment analysing the sort of connection that would suffice to meet the requirements of the third branch of the test. Such a link was manifestly made out in the evidence.

[61] In *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, the Supreme Court of Canada specifically addressed the nature of the connection required between the adverse treatment and the prohibited ground. It noted that some cases had suggested that the connection must be a “causal” one. The Court said:

> [47] This Court has used the expression “causal connection” at least once, in *City of Montréal* [*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City),* 2000 SCC 27] para. 84. …
>
> [48] In that case, this Court found, as did the Tribunal in the case at bar, that the decision or action of the person responsible for the distinction, exclusion or preference need not be based solely on the prohibited ground; it is enough if that decision or action is based in part on such a ground: *City of Montréal*, at para. 67, per L’Heureux-Dubé J., quoting with approval D. Proulx, “La discrimination fondée sur le handicap: étude comparée de la Charte québécoise” (1996), 56 *R. du B.* 317, at p. 420. In other words, for a particular decision or action to be considered discriminatory, the prohibited ground need only have contributed to it:

> see, *inter alia*, *Commission des droits de la personne et des droits de la jeunesse v. Gaz métropolitain inc.*, 2008 QCTDP 24 (decision reversed by the Court of Appeal, but only as regards the award of punitive damages), at para. 415 (CanLII).
>
> [49] In a recent decision concerning the *Human Rights Code*, R.S.O. 1990, c. H.19, the Ontario Court of Appeal found that it is preferable to use the terms commonly used by the courts in dealing with discrimination, such as "connection" and "factor": *Peel Law Assn. v. Pieters*, 2013 ONCA 396, 116 O.R. (3d) 80, at para. 59. In that court's opinion, the use of the modifier "causal" elevates the test beyond what is required, since human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes: para. 60. We agree with the Ontario Court of Appeal's reasoning on this point. Moreover, this Court used the term "factor" in a recent decision concerning British Columbia's human rights code: *Moore*, at para. 33.
>
> [50] It is more appropriate to use the terms "connection" and "factor" in relation to discrimination, especially since the expression "*lien causal*" has a specific meaning in the civil law of Quebec. In civil liability matters, the plaintiff must establish on a balance of probabilities that there is a causal relationship between the defendant's fault and the injury suffered by the plaintiff ….
>
> …
>
> [52] In short, … the plaintiff has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference.
>
> [Emphasis in original.]

[62] Courts have recognized the equivalency of such words as "connection", "factor", "nexus", and "link" in describing the association that must exist between adverse treatment and prohibited grounds of discrimination. On occasion, they have also used the language of "causation". As indicated in *Bombardier*, however, discussion of "causation" is generally best avoided, lest it be confused with the concept of "causation" in other areas of the law, which may involve "but for" tests and may import issues of the exclusivity, proximity, or dominance of a cause. The link required to found a claim under the *Code* need not satisfy the usual criteria that we associate with causation in other areas of the law. According to the caselaw, the adverse treatment must be "based in part" on the protected characteristics, or, the protected ground "need only have contributed to" the discriminatory acts. While this is not the strict causation applied in cases of civil liability, this language does describe an attenuated form of causation. This is what the *Code* means when it uses the words "because of".

[63] The judge appears to have found that the Tribunal's examination of a "connection or link" improperly imported a requirement of strict causation into its analysis of the third element of the test. This finding is primarily based on the Tribunal's citation of para. 61 of this Court's decision in *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada), Local 111*, 2010 BCCA 447 (at para. 585 of the Tribunal's decision):

> In order to demonstrate *prima facie* systemic discrimination, it is necessary to show that a group of persons sharing a protected characteristic has received adverse treatment and that

> there is a causal connection or link between the protected characteristic and the adverse treatment.

[64] As explained in *Bombardier*, the reference to a "causal connection" is apt to be misunderstood, and the language used in *Coast Mountain* should probably be avoided. That said, the Tribunal does not appear to have misinterpreted the language or the test to be followed. Its reference to *Coast Mountain* concerned the different focus that applies in systemic discrimination cases from that that applies in individual discrimination cases. The reference in the quotation to a "causal connection" was purely incidental to that point. The Tribunal did not, itself, use the term "causal connection" to describe the association that needed to be demonstrated; instead, it used the preferable terms "connection", "link", and "factor" throughout its decision. There was no basis for the chambers judge to conclude that the Tribunal improperly imported a requirement of strict "but for" causation into its analysis.

[65] The Tribunal, in the case before us, followed well-established case law in requiring a "connection or link" between the adverse treatment and a prohibited ground of discrimination. It neither misstated nor misapprehended the nature of the association required.

[66] The judge also seems to have considered that the Tribunal, in requiring a "connection or link" was demanding that the ground of discrimination be the sole basis or cause for the adverse treatment. I see nothing in the language of "connection or link" that would justify that interpretation. More importantly, however, it is clear that the Tribunal did not consider that discrimination was required to be the sole basis or cause for the adverse treatment. Citing *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457, the Tribunal specifically stated that "[i]t is not necessary that the protected grounds be the sole factor in the adverse treatment, provided they are at least a factor."

[67] The judge also suggested that using the language of "connection or link" imported a requirement of intentionality into the statute. Again, I see no basis for such an interpretation of those words. The statute itself, in s. 2, deals with intent:

> 2 Discrimination in contravention of this Code does not require an intention to contravene this Code.

[68] It must be appreciated that, while the Human Rights Tribunal is not recognized as an "expert tribunal" under s. 58 of the *Administrative Tribunals Act*, it is a specialized tribunal. As this Court commented at para. 24 of *Lee*: "It should not be readily assumed that a specialized tribunal like the [Human Rights Commission] was unaware of something as fundamental, even trite, as this". There is no reason to believe that the Tribunal was not cognizant of this fundamental provision of its home statute.

[69] In fact, the Tribunal's reasons cite at least three cases for the proposition that an intention to discriminate is not a necessary element for a discrimination claim: *Andrews v. Law Society of*

British Columbia, [1989] 1 S.C.R. 143 (cited at para. 570); *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (cited at para. 571); and *Ayangma v. Govt. of P.E.I.*, 2001 PESCAD 22 (cited at para. 575).

[70] It is true that the Tribunal considered whether there had been any evidence of intentional discrimination. It analysed the evidence to see whether there had been a "singling out" of First Nations people, or whether perceived drug addicts had been treated as "suspicious" by the Ambassadors. I do not read the Tribunal's decision as suggesting, however, that intentional discrimination was necessary to establish a *prima facie* case under the statute. The Tribunal did not err in considering those questions. Had it found that the Ambassadors intentionally treated Indigenous people or those with disabilities differently from others, those findings would have established the connection between adverse treatment and prohibited grounds of discrimination that was otherwise absent from the record.

[71] The Tribunal, in other words, treated deliberate targeting as sufficient, but not necessary, evidence that would satisfy the third criterion needed to establish *prima facie* discrimination. In this regard, the Tribunal followed *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302, where findings of intentional targeting of Indigenous people and people with disabilities were sufficient to satisfy the test for *prima facie* discrimination.

[72] The chambers judge erred in finding that the Tribunal misapprehended the legal standards that had to be met in order to establish a *prima facie* case of discrimination. The Tribunal properly identified the legal test to be applied.

Other Errors in the Judge's Approach

[73] In my view, the judge also erred in failing to appreciate the limited nature of the dispute before the Human Rights Tribunal.

[74] The human rights proceedings in this case were protracted, and the positions of the parties changed over time. Before the Tribunal, the issues were narrowed. The complainant accepted, for the purposes of the hearing, that the Ambassadors were entitled to deal with violations of the *Safe Streets Act*, address the open use or trafficking of drugs, and, where they had proper authorizations to do so, act under the *Trespass Act*.

[75] It is important to recognize that the complaint before the Tribunal did not challenge the provisions of the *Safe Streets Act* or the *Trespass Act*, nor did the complainant suggest that the Ambassadors acted improperly where those statutes were in fact violated. Rather, the complainant argued that the Ambassadors acted in instances where the *Trespass Act* had not been infringed, and in circumstances where no provisions of the *Safe Streets Act* were engaged.

[76] Given this background, some of the judge's comments about the "social context" of the case

appear to misconstrue the issues. Again, I refer to paras. 129-30 of the judge's reasons:

> [129] One other factor that was important to this case, and not sufficiently accounted for in the Decision, is that the Association chose which pieces of legislation it directed ambassadors to "enforce" (no issue was raised as to the ability of the Association to hire a private security firm to enforce laws relating to public space). The Association chose to focus on the *Safe Streets Act* and the *Trespass Act*. The ambassadors were not searching for potential violations of traffic laws, municipal bylaws or any of the other numerous laws or regulations which govern activity in public space. Instead, they focused on two pieces of legislation that -- and this point was not contested -- were enacted for the purpose of addressing aggressive panhandling on public or private property. The Association also says it was targeting open drug use, which is a criminal offence, but, of course, that is only one of numerous other criminal offences that could occur in any public space in Vancouver.
>
> [130] In other words, the Program focussed on the same behaviours that are the focus of legislation aimed at the street homeless. At the very least, that raises a presumption that the Program would affect street homeless more than other members of the population. In my view, this is a crucial contextual consideration missing from the Decision.

[77] These comments may have been apt had the case been about the validity or enforceability of the *Safe Streets Act* or the *Trespass Act*, or if there had been some contentious question as to whether the street homeless were particularly affected by the actions of the Downtown Ambassadors. None of those issues, however, were part of the dispute before the Tribunal. The validity of the statutes was accepted, and it was not seriously disputed that the street homeless were particularly affected.

[78] With respect to the judge's comments about the selective concentration of the Ambassadors on the two statutes, the judge appears to have overlooked the Tribunal's discussion of this issue toward the end of its reasons:

> [657] [T]he complainants also suggested, in their reply argument, that a finding of discrimination could be founded on the finding that the only statutes about which the Ambassadors inform members of the public are the *Safe Streets Act* and the *Trespass Act*. The complainants argue that the evidence demonstrates that the Ambassadors do not target the unlawful activities of business owners by informing them of bylaws and legislation applicable to their business operations. The complainants continue:
>
> > There has been no evidence to suggest that when a business owner or operator in the DVBIA area impedes pedestrian traffic by placing a sandwich board on the sidewalk, or allowing customers to use patio/sidewalk seating, the Ambassadors assist these members of the public by distributing informational sheets informing the businesses of possible bylaw infractions and a list of locations to which the business operator could relocate in order to avoid bylaw violations. Ambassadors did not threaten to call by-law enforcement officers if business owners did not comply with the applicable by-laws.
>
> [658] However, the focus of the evidence was on the Ambassadors' interactions with members of [the] Class, and there was only limited evidence before me in relation to the Ambassadors' other functions and the way those functions fit in to the Program as a whole. I note that the complainants' argument in this regard appeared in their reply submissions. Further, this submission appears to conflict with other submissions made by the complainants, to the effect that they were not challenging actions of the Ambassadors taken under the clear authority of Authorizations. In any event, the evidence before me in relation to

> the [Ambassadors'] activities *vis-à-vis* business owners, and the provision of information about legislation, is not sufficient to enable me to make a finding in this regard. Inferences and suppositions do not provide a proper evidentiary basis.

[79] I can see no error in the Tribunal's decision not to give effect to a new argument raised by the complainant for the first time in reply submissions, particularly when the record had not been developed with a view to allowing the Tribunal to assess the argument.

Did the Tribunal Err in Failing to Find a Connection?

[80] I will deal, finally, with the question of whether the evidence in this case was such that the Tribunal erred in failing to find a connection between prohibited grounds of discrimination and the adverse treatment experienced by members of the class represented by the complainant.

[81] The question of whether the evidence establishes a sufficient connection between adverse treatment and prohibited grounds of discrimination is largely one of fact (see *Forsyth v. Coast Mountain Bus Co.*, 2013 BCCA 257, and *Victoria Gardens Housing Cooperative v. Nicolosi*, 2013 BCSC 1989 at para. 13). It is, therefore, a question that will generally be reviewed on a reasonableness standard, pursuant to s. 59(2) of the *Administrative Tribunals Act*.

[82] *Bombardier* set out the burden of proof that complainants must meet in establishing the requisite connection:

> [56] In our opinion, even though the plaintiff and the defendant have separate burdens of proof … and even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[83] In this case, the Tribunal comprehensively reviewed the evidence and held that the complainant did not satisfy this burden. The Tribunal found that many of the allegations made by the complainant were not established on the evidence. It did find that certain features of the Program improperly interfered with the rights of street homeless people to loiter or sleep in public areas, including public sidewalks, alcoves and indentations in buildings, and in Portal Park. The Tribunal found that these interferences amounted to "discrimination regarding facilities customarily available to the public". It was not convinced, however, that the discrimination was connected to prohibited grounds under the statute.

[84] There were two types of evidence tendered that attempted to connect the adverse impact on the street homeless to prohibited grounds of discrimination. First, there was expert evidence put forward by Dr. Miller postulating a theory of how interactions between Ambassadors and homeless people might affect those people. Dr. Miller concentrated particularly on Indigenous people. Second, there was statistical information that showed that Aboriginal persons and persons with disabilities were disproportionately represented in the street homeless population.

[85] Dr. Miller's evidence was designed to demonstrate that the Ambassadors' actions had a differential impact on Indigenous street homeless people. It appears that the Tribunal was not persuaded by the theories of Dr. Miller, who relied on his own interpretation of incident reports, and his speculation as to how the incidents might have unfolded. The judge considered that the Tribunal had undervalued Dr. Miller's evidence, saying:

> [98] … [T]he Tribunal did not appreciate the probity of Dr. Miller's evidence. Dr. Miller was accepted as an expert with respect to anthropology, public policy with respect to indigenous people, relations between mainstream society and Aboriginals, and relations between mainstream society and homeless people of Aboriginal descent. His opinions were strongly supportive of the petitioner's case. The Tribunal did not reject his evidence and yet it did not incorporate his conclusions in its analysis.

[86] The Tribunal cited Dr. Miller's evidence in considerable detail, and indicated why it was not prepared to accept his theories in the absence of concrete evidentiary support. It was for the Tribunal, not for the reviewing judge, to determine what weight to place on the expert evidence.

[87] I turn, then, to the statistical evidence. The Tribunal accepted that evidence, and assumed that the statistics, while not specifically based on the street homeless population within the boundaries of the DVBIA, were reflective of its population.

[88] The role of statistics in establishing a claim for systemic discrimination is complex. Statistical evidence is circumstantial evidence. It may assist in establishing that the connection between adverse treatment and a prohibited ground of discrimination is present. A.W. Bryant, S.N. Lederman & M.K. Fuerst, *The Law of Evidence in Canada,* 4th ed. (Markham: LexisNexis, 2014) at 73 state:

> In civil cases, the treatment of circumstantial evidence is quite straightforward. It is treated as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact.

[89] Systemic discrimination is typically established by showing that facially neutral criteria in laws or practices serve as proxies for, or mask, discriminatory impact (see *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 15). Statistical evidence may permit the trier of fact, alone or in combination with other evidence, to draw the necessary factual inferences.

[90] Statistics can show correlations between membership in a particular group and facially neutral characteristics that have legal consequences. This correlation can point to a connection between adverse treatment and protected grounds. Where, as in *Kahkewistahaw*, solid statistical evidence is lacking, the correlation may not be adequately demonstrated.

[91] A correlation itself, however, is not sufficient. While often indicative of the sort of link that must be shown to permit an inference of *prima facie* discrimination, a statistical correlation is not, itself, a link. A correlation may be merely coincidental, or may be the result of confounding factors or a constellation of influences that are so remote from protected grounds of discrimination as to fail

to constitute a link.

[92] For example, persons convicted of violent crimes in Canada are overwhelmingly male. That correlation, however, does not establish that statutes that prohibit acts of violence discriminate against men. The correlation between sex and criminal liability, while not mere coincidence, is also not indicative of a connection that would satisfy the requirements of human rights legislation. Even the much-attenuated causal relationship that will establish discrimination in a human rights context is absent.

[93] A tribunal must analyse the evidence to determine whether the statistics demonstrate the sort of link required by the *Code.* In this case, the complainant sought to have the Tribunal draw the inference from the statistical evidence that street homeless people's membership in protected groups was a factor in the adverse treatment they encountered as a result of the Program.

[94] Typically, in a human rights case involving systemic discrimination, a decision maker will infer the existence of the requisite connection from statistical information because of an understood theory as to the nature of the connection between the facially neutral law or practice and the prohibited basis of discrimination. In this way, the claim attempts to explain why the law has a disproportionate impact on members of a protected group. This, in turn, demonstrates that the protected characteristic "contributed to" the suffering of the adverse treatment.

[95] Various cases referred to by the parties demonstrate the effective use of statistics in showing the presence of the required link. In some cases, the connection between the facially neutral characteristic and the protected ground is simple and straightforward. In these cases, the court or tribunal may have little difficulty inferring from the statistical evidence and common sense that adverse treatment was "based in part on" protected characteristics, or that membership in a protected group "contributed to" the decision or action. In such circumstances, little more than the statistical evidence of correlation may be necessary to draw the requisite inference.

[96] In *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449 (C.H.R.T.), for example, statistics were used to show that a height requirement for airline pilots had a disproportionate impact on women. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (often referred to as the *Meiorin* case), statistics were used to show that physical tests given to candidates for jobs as forest firefighters disproportionately affected female applicants. In both these cases, the impressive statistical evidence was supported by a straightforward and persuasive theoretical explanation – the physiological differences between men and women accounted for differences in average heights and in aerobic capacity. In both cases, the triers of fact had little trouble inferring from the statistical evidence that sex was a factor in the employment discrimination that the complainants suffered.

[97] In *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, overtly discriminatory hiring practices were replaced with requirements for high school diplomas or achievements on intelligence tests.

The new requirements were unrelated to job performance, and continued to exclude a high proportion of Black people from employment. While the connection in that case may have been more complex than the ones in *Chapdelaine* or *Meiorin*, the U.S. Supreme Court made the inference, at 430, that the consequences of the impugned policy were “directly traceable to race”, due to the history of segregated schooling. It is not difficult to understand how facially neutral qualifications, like educational attainment, can serve as proxies or masks for discrimination.

[98] In other cases, the links between the adverse treatment and the protected characteristics are more complex, multifaceted, and tenuous. In such cases, courts and tribunals will often have more difficulty using statistical evidence to draw the factual inference that membership in a protected group was a factor in discrimination. These instances may demand that the evidence of statistical correlation is supplemented with additional evidence explaining the connection. Such evidence may take the form of expert reports, direct testimony from members of the affected group, or even judicial (or official) notice. Ultimately, it is for the trier of fact, not a reviewing court, to determine whether to infer from all the evidence, including the circumstantial statistical evidence, that the complainant has established the necessary connection under the third branch of the test.

[99] In this case, it was established that the actions of the Downtown Ambassadors had an adverse impact on the street homeless, and that certain groups protected under the *Human Rights Code* are over-represented among the street homeless population. As the parties to this case have recognized, however, the root causes of homelessness are complex and multi-dimensional (see the judgment of the chambers judge at para. 21).

[100] Before the Tribunal, the complainant did not seek to provide an explanation of the connection between street homelessness and Aboriginal background or between physical and mental disabilities and homelessness. Rather, it simply relied on statistical evidence to show that Aboriginal people and those with disabilities were more prevalent among the street homeless than in the general population. Intuitively, the association between homelessness on the one hand and Aboriginal heritage or disability on the other, does not appear to be mere coincidence. It is, however, a complex association. In the absence of evidence or any articulated theory, the Tribunal found the statistical correlations to be insufficient to demonstrate that prohibited grounds of discrimination were “a factor” for the purposes of establishing *prima facie* discrimination.

[101] On this appeal, it has been suggested that the connection between homelessness and Aboriginal heritage is a result of historical discrimination, displacement, and alienation. While no explicit attempt has been made to show a similar connection between disabilities and homelessness, it is not difficult to understand that such an explanation might be advanced. These various explanations have a strong plausibility, and might, it seems to me – at least if fully articulated – establish the link necessary to connect the adverse treatment in this case with prohibited grounds of discrimination.

[102] The difficulty is that it was for the Tribunal, not this Court, to test and consider these theories and to determine whether they support the inferences suggested by the complainant. These theories were not adequately advanced or proven before the Tribunal. It had no opportunity to test them, or to determine whether they served to establish the requisite link. The Tribunal expressed its conclusion as follows:

> [656] [I]n the circumstances of this case, I find that there is insufficient evidence before me to establish that the actions of the Ambassadors had a disproportionate impact on members of protected groups, within the boundaries of the complaint. [Emphasis added.]

[103] The Tribunal's task was to address the impact of the Program on the protected groups "within the boundaries of the complaint". Particularly in light of the complex mixture of social issues surrounding homelessness, I am unable to say that the Tribunal acted unreasonably in its assessment of the evidence and in finding the link to be unproven, especially given the limitations of the statistical evidence.

Conclusion

[104] In my view, the judge erred in finding any legal error in the Tribunal's assessment of the case. I am, further, unable to say that the Tribunal's assessment of the evidence was unreasonable. In the circumstances, the complainant has not made out a basis for judicial review.

[105] While the complainant's application to the Supreme Court included a constitutional challenge to the *Human Rights Code* and its failure to include "homelessness" as a prohibited ground of discrimination, that relief was not pursued in this Court. Accordingly, there is no basis for us to address that issue.

[106] In the result, I would allow the appeal, and re-instate the Human Rights Tribunal's decision to dismiss the complaint.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fenlon"

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[1] The section has been amended, so that it now includes "gender identity or expression" as an additional prohibited ground of discrimination. The current appeal does not engage this additional prohibited ground.

[2] With minor exceptions, the area covered by the DVBIA runs from Pacific Street on the south to Burrard Inlet on the

north, and includes the areas between Burrard Street on the west and Richards Street on the east. North of Robson Street, the western boundary extends to Jervis Street, and between Smithe Street and Pender Street, the eastern boundary extends to Hamilton Street.