

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VANCOUVER AREA NETWORK OF DRUG USERS
On behalf of people who are, or who appear to be,
street homeless and/or drug addicted

PLAINTIFFS

AND:

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL, DOWNTOWN
VANCOUVER BUSINESS IMPROVEMENT ASSOCIATION and CITY OF
VANCOUVER

DEFENDANTS

AND:

THE COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND
ACTION AND COMMUNITY LEGAL ASSISTANCE SOCIETY

PROPOSED INTERVENER

NOTICE OF APPLICATION

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

To: Vancouver Area Network of Drug Users

Jason Gratl
Gratl & Company
302-560 Beatty Street
Vancouver, BC V6B 2L3

And to: Downtown Vancouver Business Improvement Association

George E.H. Cadman, Q.C.

George E.H. Cadman Law Corp. on behalf of Boughton Law Corp.
Suite 700, 595 Burrard Street
P.O. Box 49290
Vancouver, BC V7X 1S8

And to: British Columbia Human Rights Tribunal

Katherine Hardie, Barrister & Solicitor

British Columbia Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, BC V6B 5J3

And to: City of Vancouver

David Hill, Barrister & Solicitor

Vancouver City Hall
Law Department
453 West 12th Avenue
Vancouver, BC V5Y 1V4

And to: Ministry of Justice

Karen A. Horsman, Barrister & Solicitor

Legal Services Branch
Ministry of Justice
1301 - 865 Hornby St
Vancouver, BC V6Z 2G3

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on January 6, 2013 at 9:45 a.m. for the Orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order that the Coalition be granted leave to intervene in this proceeding on the following terms:

- a) be limited to making arguments within the scope of the issues as defined by the parties and not raise new issues;

- b) bring a different and useful perspective to the resolution of the issues and not be merely repetitive of the submissions of the parties;
- c) be limited to written submissions, subject to the discretion of the trial judge to permit oral submissions;
- d) not adduce evidence or cross-examine witnesses;
- e) not seek costs; and
- f) be liable for costs and disbursements arising from its intervention to the extent that the trial judge determines appropriate at the conclusion of the proceeding.

2. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

Summary of the Case at Bar

1. This is an application by West Coast Women's Legal Education and Action Fund (West Coast LEAF) and the Community Legal Assistance Society (CLAS) collectively, "the Coalition" to intervene in the judicial review of the following human rights complaint.
2. In February 2012, the British Columbia Human Rights Tribunal issued its reasons in *Pivot Legal Society and VANDU v. Downtown Vancouver Business Improvement Association and another (No.6)*, 2012 BCHRT 23.
3. In their human rights complaint, Pivot Legal Society and the Vancouver Area Network of Drug Users (VANDU) alleged that the Downtown Vancouver Business Improvement Association (DVVIA) and the City of Vancouver, through the policies and practices of their Downtown Ambassador Program, had discriminated against street homeless and/or addicted people on the basis of race and disability. The claimants allege that the discrimination was in respect to a service customarily available to the public, namely access to

public spaces such as sidewalks and parks, and therefore was prohibited under s.8 of the *Human Rights Code*.

4. The Complainants alleged that the Ambassadors Program consisted of security guards directed by DV BIA to remove homeless persons, drug users, and other persons deemed undesirable from storefronts and other public spaces. The claim was one of adverse effects: that because homeless people are disproportionately Aboriginal and disproportionately disabled (including addictions), targeting of homeless people by the DV BIA amounts to discrimination on the basis of race and disability and is prohibited under the *Code*.
5. The Tribunal found that the complainants failed to establish *prima facie* discrimination. The Tribunal found that those people who appear to be street involved and/or drug addicted are disproportionately Aboriginal and disproportionately disabled. Further, the Tribunal found that the class suffered adverse treatment in respect to a facility customarily available to the public. However, the Tribunal concluded that the complainants failed to adduce sufficient evidence to establish a nexus between the adverse treatment and the prohibited grounds of discrimination.
6. The Tribunal agreed with the submission of the DV BIA that the complainants bore a burden to show “that there is a greater effect on the protected class not simply because they make up a greater proportion of a specific population, but because they are treated or affected differently.”
7. On April 10, 2012, the Complainants brought a petition seeking judicial review of the Tribunal’s decision. The Petitioners seek to have ‘homelessness’ found as an analogous ground of discrimination prohibited under s.15(1) of the *Canadian Charter of Rights and Freedoms*. The Petitioners argue that the Legislature’s failure to include ‘homelessness’ as a ground based upon which discrimination is prohibited under s.8 of the *Human Rights Code* violates s.15(1) of the *Charter* and is not justified under s.1.

8. In the alternative, the Petitioners take the position that there were sufficient findings of fact by the Tribunal to establish that the Respondents discriminated against individuals contrary to s.8 of the *Code*.

History and Experience of the Coalition Members

9. The Coalition has extensive experience with public interest litigation, the principles of substantive equality, and ensuring that the test for discrimination (including adverse effects discrimination) meets the needs of the most vulnerable litigants.

WEST COAST LEAF

10. West Coast LEAF is an incorporated non-profit society in British Columbia and a federally-registered charity. West Coast LEAF's mission is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education
11. West Coast LEAF was created in April 1985, when the equality provisions of the *Canadian Charter of Rights and Freedoms* ("*Charter*") came into force. West Coast LEAF is an affiliate of a national organization, Women's Legal Education and Action Fund (LEAF).
12. West Coast LEAF's law reform initiatives seek to ensure that all legislation in British Columbia complies with guarantees of equality for woman pursuant to both s.15 of the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), to which Canada is a signatory.
13. West Coast LEAF has intervened in its own name in seven legal proceedings: *SWUAV v. Canada*, 2010 BCCA 439; *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588 (the Polygamy Reference); *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*,

2012 BCCA 445; *Vilardell v. Dunham*, 2013 BCCA 65; and *Inglis v. Ministry of Public Safety and Solicitor General of BC*, at the BC Supreme Court (decision pending). West Coast LEAF also intervened in coalition with two other organizations in *SWUAV v. Canada*, 2012 SCC 45.

14. Together with LEAF, West Coast LEAF has intervened in an additional 17 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.

15. In the following cases, West Coast LEAF provided general information and support to LEAF, which had primary conduct of the intervention: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.); *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Canada (Attorney General) v. Lesiuk* (C.A.), [2003] 2 F.C. 697 (C.A.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

16. In the following cases, West Coast LEAF took the leading role: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Smith (Guardian ad litem of) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 28; *R. v. Watson*, 2008 BCCA 340; and *Rick v. Brandsema*, 2009 SCC 10.

17. In all of these cases, West Coast LEAF and LEAF have focused their submissions on the application of principles of substantive equality for women to the issue at bar. Through its litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of the meaning of

substantive equality and of equality rights jurisprudence in British Columbia and in Canada.

COMMUNITY LEGAL ASSISTANCE SOCIETY (CLAS)

18. CLAS is a non-profit charitable society incorporated in 1971, with a mandate to provide legal advice and assistance to, and use and develop the law for, the benefit of people who are physically, mentally, socially, economically or otherwise disadvantaged or whose human rights need protection. CLAS pursues its mandate through advocacy, test case litigation, law reform, and public legal education, in addition to a wide range of legal services provided to people with a low income, people with disabilities, people who have been victims of discrimination, and related groups that we work with and represent.

19. CLAS has been counsel in cases which have laid the foundation for human rights and equality jurisprudence in this province and in Canada. These cases include:

- *Grismer v. British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868 (application of the duty to accommodate to the issuance of a driver's license to a person with a disability, under the B.C. *Human Rights Code*; counsel for Mr. Grismer);
- *School District No. 44 (North Vancouver) v. Jubran* (2005), 39 B.C.L.R. (4th) 153 (whether a complainant must actually be a member of a protected group, or be perceived to be a member of a protected group; whether a school board was responsible where the conduct of students violated the Code; counsel for Mr. Jubran);
- *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 (the meaning of "services customarily to the public"; counsel for Ms. Berg);
- *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (the test for establishing discrimination under the *Charter*; counsel for Ms. Law);
- *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (the *Charter* rights of a terminally ill patient to commit suicide; counsel for the intervener B.C. Coalition of People with Disabilities);

- *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 (whether the rules governing the entitlement of pregnant women to unemployment insurance benefits were discriminatory under the *Canadian Bill of Rights*; counsel for Ms. Bliss);
- *R v O'Connor*, [1995] 4 S.C.R. 411 (procedure to be followed where accused seeks production of records in hands of third parties; counsel for the intervener Canadian Mental Health Association);
- *British Columbia Human Rights Commission v Blencoe*, [2000] 2 S.C.R. 307 (whether the Mr. Blencoe's s. 7 *Charter* rights were violated by state-caused delay in the human rights proceedings against him; counsel for the intervener B.C. Human Rights Coalition);
- *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 (whether a tort of discrimination should be recognized; counsel for the intervener Council of Canadians with Disabilities); and
- *Ganitano v. Metro Vancouver Housing Corporation*, 2012 BCSC 1308, reserved on appeal to the BCCA (whether the equitable remedy relief from forfeiture applies in residential tenancies).
- *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (which address the obligation of school districts and government to accommodate the needs of students with disabilities).
- *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 (which considered the jurisdiction of two administrative tribunals to deal with the same subject matter).

20. CLAS has been accepted by the B.C. Court of Appeal and by the Supreme Court of Canada as an intervener in its own right in *Mazzei v. British Columbia, Director of Adult Forensic Psychiatric Services*, [2006] 1 S.C.R. 326, *R v. Conway*, 2010 SCC 22 and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R.; and in *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56.

The Coalition's Expertise and Interest in the Litigation

21. This case concerns the development of human rights law, in particular the adverse effects analysis and the associated evidentiary burden on claimants.

The Coalition has experience and expertise in intervening in cases to make arguments about how the discrimination analysis under human rights legislation impacts marginalized and vulnerable claimants, including:

- a. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3. In this case, West Coast LEAF argued that a unified justificatory framework that incorporates the bona fide occupational requirement and duty to accommodate to the point of undue hardship defenses should be applied to both direct and adverse effect discrimination; and
- b. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61. West Coast LEAF intervened to argue against the importation of a comparator group requirement into the *prima facie* test of discrimination in human rights case. West Coast LEAF also intervened to ensure that the test for undue hardship did not act to unduly protect discriminatory conduct of human rights respondents, and that the Court must inquire as to whether funding cuts prioritized human rights.
- c. *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56 where CLAS (as intervener) made submissions before the B.C. Court of Appeal on the proper elements of the *prima facie* discrimination analysis.
- d. *Silver Campsites Ltd. v. James*, 2013 BCCA 292, CLAS acted as counsel in this case, in which the B.C. Court of Appeal described the purpose of representative complaints under human rights legislation, and also discussed the evidence required to maintain an award of damages in representative complaints.

22. In addition, West Coast LEAF has considerable expertise in developing research reports, law reform recommendations and submissions to key

decision makers on how the law impacts marginalized people whose equality rights are subject to adverse impacts of state or private action. For example:

- a. In 2011, West Coast LEAF developed a gender audit tool to analyze legislation for potential and/or actual disproportionate impacts on women and other historically marginalized groups. This tool was used to assess the gendered implications of the *Residential Tenancy Act*, S.B.C. 2002, c. 78. West Coast LEAF analyzed the *Act* for disproportionate adverse impacts on two particularly vulnerable groups of women: seniors and single mothers, and concluded that women, especially single mothers and senior women face disproportionate adverse impacts as a result of a number of the *Act's* provisions.
- b. In May 2010, West Coast LEAF and Pivot Legal Society filed a systemic complaint with the Ombudsperson of British Columbia regarding a policy of the Ministry of Housing and Social Development, which saw families' monthly shelter allowance reduced if their children were taken into temporary care by the Ministry of Children and Families. In the complaint, West Coast LEAF and Pivot argued that the policy was discriminatory due to its disproportionate impact on women, and marginalized low-income women in particular, who would be more likely to lose their homes as a result of a reduction in their shelter allowance. The policy was amended by the Ministry of Housing and Social Development in 2011.

23. This case also concerns the expectations placed on representative complainants, and the obstacles to their effective participation in litigating equality claims. To this end, both West Coast LEAF and CLAS intervened in *SWUAV v. Canada*, 2010 BCCA 439; 2012 SCC 45 to make separate submissions in regard to public interest standing, the equivalent structure to representative complaints in *Charter* based equality claims. In that case, West Coast LEAF argued that the law of public interest standing must be

interpreted in a manner that is in accordance with *Charter* values and the right to equality, and therefore must not act as an undue impediment to access to justice for the most vulnerable members of our society who have little means to access to the court processes on their own.

24. The Coalition's collective expertise in substantive equality and adverse effects discrimination offers a unique and important perspective that would assist this Court in its deliberations in this case.

Part 3: LEGAL BASIS

25. This application is made pursuant to Part 8 of the *BC Supreme Court Civil Rules* and the inherent jurisdiction of this Court.

The Coalition's proposed legal argument

26. The Coalition submits that its expertise in systemic equality and adverse effects discrimination analysis will assist the Court in resolving the human rights issues in this case. It will make submissions on two discrete points:

- (1) the necessary legal requirement to establish discrimination in disproportionate impact cases; and
- (2) the nature of the evidentiary burden in representative complaints filed under the B.C. Human Rights Code.

27. The Coalition does not intend to make submissions in regard to the Petitioner's proposed argument that homelessness is an analogous ground of discrimination under s.15(1) of the *Charter*.

Point #1: Proving discrimination in disproportionate impact cases

28. If granted leave to intervene, the Coalition will argue that the Tribunal erred in law in finding that the complainants failed to establish a nexus between the adverse treatment established and the prohibited grounds of discrimination under s.8 of the *Human Rights Code*.

29. Further, the Coalition will argue that the Tribunal erred in law in finding that there was insufficient evidence to establish, on a balance of probabilities, that the Downtown Ambassadors' actions had an adverse impact in relation to the protected grounds of discrimination.

30. In this case, the proposed intervener will argue that to require claimants to adduce additional evidence beyond the general demographics of homeless people in the downtown core (and the fact that the respondent Downtown Ambassadors' practices disproportionately impact homeless people in the downtown core) is to create an unreasonable burden on claimants. Such evidence is most often within the means and control of the respondent, rather than the claimant.

Point #2: The evidentiary burden in representative complaints

31. The Coalition will also argue that it is unnecessary in a representative complaint to adduce evidence from an individual directly impacted. The legislative scheme was developed to provide access to the human rights process to vulnerable individuals who are not always be in a position to pursue a legal claim on their own. It is not necessary for such individuals to provide direct evidence when pursuing their rights. The Tribunal's reasoning that direct evidence is required in such cases is inconsistent with the B.C. Court of Appeal's reasoning in *Silver Campsites Ltd. v. James*, 2013 BCCA 292.

32. The burden of proof on women, people with disabilities and other human rights complainants is a significant issue for equality seeking litigants and therefore is an issue of concern for the Coalition.

The Coalition's Proposed Involvement in the Hearing

33. The Coalition will work to ensure that its submissions do not duplicate those of the parties.

34. The Applicant seeks leave only to make written and oral submissions on the issues before the Court. It does not seek leave to adduce evidence

Part 4: MATERIAL TO BE RELIED ON

Affidavit #1, Francesca Marzari, sworn on December 10, 2013.

Affidavit #1, Aleem Bharmal, sworn on December 10, 2013.

The applicant(s) estimate(s) that the application will take 30 minutes.

[Check the correct box]

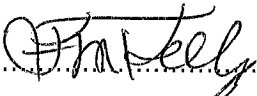
[] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

- (a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the date of service of this notice of application, and
- (b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and the other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: December 10, 2013

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Signature of lawyer for applicant

To be completed by the court only:	
Order made	
[]	in the terms requested in paragraphs of Part 1 of this notice of application
[]	with the following variations and additional terms:
.....	
.....	
.....	
Date:
Signature of [] Judge [] Master	

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

[B.C. Reg. 119/2010, Sch. A, s. 43]