No. S122532
Vancouver Registry

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

PETITIONERS

AND:

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

RESPONDENTS

AND:

THE COALITION OF WEST COAST LEGAL EDUCATION AND ACTION FUND AND COMMUNITY LEGAL ASSISTANCE SOCIETY

INTERVENER

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

OVERVIEW

This case is about whether the removal of a group of people who are perceived to be "bad for business" from public property in downtown Vancouver is discrimination contrary to the *Human Rights Code* ("*Code*"). The Human Rights Tribunal ("Tribunal") found that this group was disproportionately composed of people who are aboriginal and/or have mental or physical disabilities, and it also found that the group was adversely treated when they were required to move from parks and sidewalks. However, the Tribunal held that the representative complainant had failed to prove *prima facie* discrimination because it had not established a "connection" or link between the group's *Code*-protected characteristics and their adverse treatment.

The coalition of West Coast LEAF and the Community Legal Assistance Society ("Coalition") was granted leave to intervene in this case. The focus of the Coalition's submission is on the test for *prima facie* discrimination. In particular, what evidence will establish the connection between Code-protected

characteristics, such as disability, race and ancestry and adverse treatment required by that test? The Coalition submits that the Tribunal erred in its interpretation of the "connection" element of that test, both with respect to its nature and purpose, and with respect to how it may be proven in a representative complaint.

PART I - FACTS

1. The Coalition relies on the facts as found by the Tribunal. This section highlights aspects of the Tribunal's findings and reasons salient to the issues addressed by the Coalition.

A. The Complaint and the Class

2. This human rights complaint ("Complaint") was brought by Pivot Legal Society ("Pivot") and the Vancouver Area Network of Drug Users ("VANDU") as representative complainants on behalf of a class of persons defined by the Tribunal as follows:

> [I]ndividuals who are or appear to be street homeless and/or drug addicted and engaged 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 ("DVBIA") ("Class").
>
> *Pivot Legal Society* v. *Downtown Vancouver Business Improvement Assn. (No. 6)*, 2012 BCHRT 23 at para. 1 ("*Decision*")

3. The Complaint alleged that, through its Downtown Ambassadors Program, the DVBIA and the City of Vancouver discriminated against the Class contrary to s. 8 of the *Code* with respect to facilities customarily available to the public (including sidewalks, alleyways, alcoves and parks) on the basis of race, colour, ancestry and physical and mental disability by targeting them for removal from such locations.

> *Decision*, para. 2

4. In its preliminary decision accepting Pivot and VANDU as representative complainants, the Tribunal noted:

> ...The complainant class is comprised of extremely vulnerable and marginalized individuals. Such individuals would face many barriers on attempting to enforce their human rights in any forum. It would not be in the interest, or in conformance with, the purposes set out in s. 3 of the *Code*, to erect additional barriers to the participation of such individuals.

Pivot Legal Society v. *Downtown Vancouver Business Improvement Assn.*, 2009 BCHRT 229 at para. 43 ("Preliminary Decision"); see also *Decision*, para. 661

5. The Tribunal accepted that evidence about the characteristics of Vancouver's homeless population applied to members of the Class. In particular, the Tribunal accepted evidence that:

a. Aboriginal people were disproportionately represented in the homeless population, and within the Class. In 2001, a Homeless Count for Vancouver found over 20% of the people counted were Aboriginal, compared with 2% of the City population. In 2005, that number increased to 30%, and in 2008 it was recorded as 32%. (*Decision*, paras. 595, 56, 62(b) and 67)

b. A significant proportion of the homeless population, and Class, suffered from one or more disabilities. In 2001, the Homeless Count found that at least 30% of people counted had symptoms of a mental illness and 66% had severe additions. In 2005, 74% of people counted had one or more health conditions, and 53% reported issues with addiction. In the 2008 Homeless Count, 26% of the street homeless reported one health condition, while 46% reported two or more. Over 68% reported being addicted to drugs or alcohol. (*Decision*, paras. 595, 56, 62 (d-e) and 68)

6. Individual Ambassadors also testified that the homeless population had these characteristics:

> Several Ambassadors also testified about their experiences of the homeless population. Ms. Civen agreed that some individuals she "removed" were of Aboriginal descent, and that some had visible disabilities. Mr. Pootlas agreed that some of the street-involved people he dealt with as an Ambassador were First Nations, and that some suffered from substance abuse. Ms. Hippensteel testified that many of the homeless individuals she interacted with were drug addicted. She agreed that some were First Nations, some were missing limbs, and some exhibited extraordinary behaviour that may indicate a mental illness. Mr. Corlett testified that, in his experience, there are large numbers of drug addicts and the mentally ill among the homeless population. Ms. Kruger testified that many of those she dealt with had addiction issues, and mental illness (possibly as the result of drug use).
>
> In addition, Mr. Penner agreed, in cross-examination, that there were high rates of addiction and mental illness among the homeless. He also agreed that the

> behaviour of those with addictions and mental illness can often be perceived as aggressive, and that people can feel uncomfortable around those with mental illnesses.
>
> *Decision*, paras. 71-72

7. There was expert evidence about how current stereotypes about Aboriginal people might shape the ways that the Ambassadors would interact with them. The Tribunal accepted the following expert evidence from Dr. Miller:

> Dr. Miller states that stereotypes are exaggerated beliefs about a category of people. Members of the category are assumed to share a set of traits and are thought to be similar to each other. These beliefs allow for a simplification of social complexities and the creation of narratives which facilitate and make predictable the control or domination of others. Stereotyping can lead to prejudicial attitudes that are the basis for discriminatory behaviours or policies toward the stereotyped group.
>
> Dr. Miller states that current stereotypes about Aboriginal people include the idea that Aboriginal peoples are backwards looking, and therefore stand in the way of social progress. There is also the idea that non-productive Aboriginals live by donation/welfare from the mainstream society and that they ungratefully take and waste more than their share of the resources of society. These ideas include views that all Aboriginals drink or are alcoholics, are careless and wasteful of money and property, and are lazy and can't work hard or keep a steady job. Further, Aboriginals are thought to have ill-health and a fatalistic disinclination to do anything about their health and other problems. They are regarded as a permanently poor, under-class.
>
> *Decision*, para. 18(b) (qualifying Dr. Miller as an expert), paras. 513-514

8. Addiction is a disability within the meaning of the *Code*.

> *British Columbia (Public Service Agency)* v. *British Columbia Government and Service Employees' Union*, 2008 BCCA 357 at para. 50; *Kemess Mines Ltd.* v. *International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para. 31

B. The Downtown Ambassadors

9. The DVBIA is an organization of property and business owners in the downtown Vancouver business area. From 2006 to 2012, the DVBIA's Safety and Security Committee had five goals, each of which related to the street homeless: (1) to aid enforcement of the *Safe Streets Act* and *Urban Trespass Act,* with a particular concern about aggressive panhandling; (2) to work with authorities to eliminate the open illicit drug market; (3) to improve safety and comfort in public

spaces in the DVBIA; (4) to protect property; and (5) to eliminate visible homelessness in the DVBIA.

Decision, paras. 29, 36-46

10. In furtherance of these objectives, the DVBIA operated the Downtown Ambassadors Program, which comprised a significant portion of the DVBIA's annual budget. The DVBIA contracted with a security company to provide staff ("Ambassadors") who patrolled areas within Vancouver's downtown core, among other things, to provide "an effective street presence" to monitor, deter and report crime and disorder.

Decision, paras. 132, 78

11. One of the Ambassadors' specific objectives was to remove or displace individuals who appeared to be "panhandlers and street people."

Decision, paras. 135-136

12. The Ambassadors used two types of "removal": removal by speech or removal by sight. In the former situation, the Ambassador asked the person if they needed assistance, informed them that they were in contravention of particular legislation, and attempted to persuade them to leave the location. In the latter, the Ambassador engaged in non-verbal communication, using their physical presence to motivate the individual to move. If this did not occur, the Ambassador might call the police.

Decision, para. 591

13. The Ambassadors used codes to record their perceptions of those with whom they interacted and displaced. Common abbreviations included: "SP" for street person; "DD" for drug dealer; "DU" for drug user; "PH" for panhandler; "active SP" for squeegee; and "sleeper" for someone who was sleeping. The evidence regarding use of these codes demonstrated that the Ambassadors targeted people likely to be Aboriginal or disabled.

Decision, paras. 177, 591(q)

C. The Tribunal's Decision

14. The Tribunal dismissed the complaint on the basis that the complainants had not established a case of *prima facie* discrimination, which required the complainants to prove:

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 ground. It is not necessary that the protected grounds be the sole factor in the adverse treatment, provided they are at least a factor ("connection requirement").

Decision, para. 588

15. The Tribunal concluded that the complainants had satisfied the first two elements of the test for *prima facie* discrimination, but had failed to establish the connection requirement.

16. With respect to the first element, the Tribunal found that the Class is disproportionately comprised of Aboriginal people and people with mental and physical disabilities as compared to the general population.

Decision, paras. 592-595

17. With respect to the second element, the Tribunal found that the Ambassadors' removal practice was adverse treatment of the Class with respect to a facility customarily available to the public:

> In my view, being asked to leave from a public park, or other facility customarily available to the public, in such circumstances, constitutes adverse treatment. This treatment is compounded by having an Ambassador "stand by" to make it clear that one's presence is unwanted, or to return to an area to ensure that one has in fact left.
>
> *Decision*, para. 626

18. The Tribunal expressly rejected the City's argument that the evidence of affected individuals is required to establish adverse treatment:

> The City argues that the absence of evidence from individuals who are homeless or had direct encounters with the Ambassadors results in an absence of proof that street people experience their interactions with the Ambassadors as negative. For the reasons which follow, I do not agree.
>
> First, while the City argues that "we do not know what the homeless think, because we have not heard from them" there is some evidence before me of what individuals who are subject to removals feel. In particular, I note that there was some evidence from apparently homeless individuals, in the form of

> the video introduced by Mr. Jones, that some of those individuals view some of their interactions with the Ambassadors in a negative light. Further, there was the evidence of Ms. Shaver which does not speak specifically to the Ambassadors but which does provide some evidence of the impact that being asked to move along would have on homeless individuals. Finally, there is the evidence of individual Ambassadors about the difficulties they encounter with members of the Class when engaging in removals. That evidence would indicate that members of the Class do not view removals in a positive light.
>
> I note that Ms. Shaver's testimony was that the security guards she interacted with made comments such as "we don't want your kind here", while there is no evidence before me that any individual Ambassador made similar statements. Of course, direct comments such as this one would have a magnifying effect on the injury to one's dignity suffered as a result of the interaction. Even in the absence of direct comments, however, I would find, on the basis of Ms. Shaver's testimony, in particular, that being asked to relocate has an adverse impact on the dignity of the targets and causes humiliation. Such requests, in and of themselves, communicate, in part, that the individual is socially undesirable. In addition, where the individual in question actually leaves the area as a result of the request, the request results in an actual loss of use and enjoyment of public space, which I find also constitutes an adverse impact.
>
> In this regard, a single incident or request to move may not, in and of itself, create an adverse impact constituting discrimination. However, in this case, there is evidence before me of a large number of such interactions: approximately 100 such incidents over an 18-month period in Portal Park alone.
>
> *Decision*, paras. 627-630 (Emphasis added)

19. However, the Tribunal found that the third requirement, that there be a link or connection between the adverse treatment experienced by the group and their *Code*-protected characteristics, had not been established:

> The complainants have established that the proportion of Aboriginal and disabled people in the homeless and drug-addicted population is higher than in the general public. They have established that some of the Ambassador's actions are targeted to the homeless population. They have established that some of the Ambassadors' actions have an adverse effect on that population.
>
> However, for the reasons which follow, I find that this is not enough to establish a connection, or nexus, between the adverse treatment and the grounds of discrimination prohibited under the *Code*. I find, further, that while the evidence presented by the complainants certainly raises the possibility that the actions of the Ambassadors may have an adverse impact in relation to protected grounds of discrimination, the complainants have not provided evidence that establishes, on a balance of probabilities, that the Ambassadors' actions have done so in practice.

Decision, paras. 635-636

20. The Tribunal held that evidence from an individual who was actually removed by an Ambassador was essential to establish the connection requirement. The fact that the representative complainants did not adduce such evidence was fatal to the complaint.

Decision, paras. 645, 651, 655-656, 661

21. The Tribunal held that statistical evidence demonstrating the disproportionate representation of Aboriginal and/or disabled people within the Class could only establish a potential connection between the protected grounds and the adverse treatment; it was insufficient to prove it:

> In this case, and for the reasons discussed above, the evidence before me establishes that, given the demographic composition of the street homeless population, the Ambassador 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.

Decision, para. 645; see also paras. 636-643

22. The Tribunal held that the connection requirement meant that the representative complainants had to prove that the protected members of the Class were treated or affected differently than others. Evidence of the overrepresentation of protected members within the Class was insufficient:

> Above, I have found that members of the Class were asked to leave public property in circumstances where neither the *Trespass Act* nor the *Safe Streets Act,* or any other identified statute or enactment applied to the situation. The DVBIA argues that, even if this is the case, the complainants cannot prove that this had a disproportionate effect on the members of a protected class, as the phrase "disproportionate effect" is understood in human rights law. The respondents argue as follows:
>
> > The Complainants cannot make out their case simply by showing that the proportion of aboriginal or disabled persons in the homeless population is higher than in the general public and thus any action which affects homeless people is *prima facie* discriminatory. The Complainants must go further. They must 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.

I agree with the DVBIA's submission in this regard.

Decision, paras. 633-634

23. However, the Tribunal rejected the Respondents' submission that the Ambassadors targeted people based on their behaviour and not on *Code*-protected characteristics:

> ...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 not 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.

Decision, para. 660

24. In the result, the Tribunal dismissed the complaint.

PART II - ISSUES ON REVIEW

25. The Coalition's submission focuses on the connection required in the third element of the test for *prima facie* discrimination. Two questions arise with respect to the connection requirement:

a. What is the nature of the connection between the protected characteristics and adverse treatment?

b. What evidence must a complainant adduce to prove the connection requirement?

26. Before addressing these issues, the Coalition identifies the standard of review and sets out the principles governing the interpretation and application of human rights laws.

PART III - ARGUMENT

A. Standard of Review

27. The issues addressed by the Coalition are issues of law for which the standard of review is correctness.

Administrative Tribunal Act, S.B.C. 2004, c. 45, s. 59

B. The Interpretation of Human Rights Statutes and the Test for *Prima Facie* Discrimination

i. *Human rights legislation is fundamental law*

28. The *Code* is quasi-constitutional legislation that aims to identify and eliminate discriminatory barriers that impede full and free participation in society, and to create a more inclusive British Columbia. The Legislature has identified housing, employment and services available to the public as areas in which *Code*-protected characteristics, including disability, race, ancestry and colour, must not operate to disadvantage groups and individuals.

Code, s. 3

29. The special status of human rights legislation has been frequently noted by the Supreme Court of Canada. In *Tranchemontagne,* the majority of the Court discussed the interpretation of Ontario's *Human Rights Code* in terms equally applicable in BC:

> The most important characteristic of the [Ontario *Human Rights*] *Code* for the purposes of this appeal is that it is fundamental, quasi-constitutional law... Accordingly, it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies... And not only must the content of the *Code* be understood in the context of its purpose, but like the *Canadian Charter of Rights and Freedoms*, it must be recognized as being the law of the people... Accordingly, it must not only be given expansive meaning, but also offered accessible application.
>
> *Tranchemontagne* v. *Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para. 33 ("*Tranchemontagne*") (Citations omitted; emphasis added)

30. The Court emphasised the importance of ensuring that human rights laws are accessible to the most vulnerable members of society:

> In *Zurich Insurance Co.* v. *Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321, at p. 339, Sopinka J. described human rights legislation as often being the "final refuge of the disadvantaged and the disenfranchised" and the "last protection of the most vulnerable members of society". But this refuge can be rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective.
>
> *Tranchemontagne*, para. 49 (Emphasis added)

31. As alluded to in this passage, one of the significant barriers facing historically marginalized groups is access to the justice system itself. Human rights legislation must be interpreted and applied in a way that enhances access to the justice system, rather than restricting it. For this

reason, the test for discrimination applied by human rights tribunals and courts has been developed so as to enhance access to fundamental rights for vulnerable groups.

ii. The test for discrimination

32. The foundational definition of "discrimination" remains Justice McIntyre's articulation in *Andrews:*

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
>
> *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-75 ("*Andrews*") (Emphasis added)

33. The adverse treatment of people based on their presumed association with negative stereotypes based on characteristics such as race and disability is precisely what Justice McIntyre described as the mischief at which human rights laws are aimed.

34. A discrimination claim under s. 8 of the *Code* consists of two steps. First, the complainant has the burden of proving *prima facie* discrimination. If so, the second step shifts the evidentiary burden to the respondent to show a "*bona fide* and reasonable justification" for the treatment.

> *Moore* v. *British Columbia (Education),* 2012 SCC 61 at para. 33 ("*Moore*")

35. The test for *prima facie* discrimination lies at the heart of this case. It requires a complainant to prove three things:

a. they have been treated as members of a group protected under one or more of the section's enumerated grounds;

b. they experienced some adverse treatment or effect in accessing a facility customarily available to the public; and

c. it is reasonable to infer that the protected ground was a factor in the adverse treatment (the "connection requirement").

> See e.g. *West Fraser Mills Ltd. (Skeena Sawmill Division)* v. *United Steelworkers of America, Local I-1937*, 2012 BCCA 50 at para. 33; *Lavender Co-operative Housing Assn.* v. *Ford,* 2011 BCCA 114 at para. 17; *Moore* at para. 33

36. The burden on a complainant to prove *prima facie* discrimination is not onerous. This is because the purpose of the initial stage of the discrimination analysis is to raise an inference of discrimination that requires some explanation. The Human Rights Tribunal of Ontario has described it this way:

> The sole purpose of the initial stage of the circumstantial evidence test is merely to shift an evidentiary burden to the respondent to come forward with evidence explaining the decisions or actions at issue. If a *prima facie* case of discrimination is not made out at this initial stage, then the respondent need not come forward with any evidence at all to explain its actions. As a result, it has been observed that the burden to establish a *prima facie* case at this initial stage is not an onerous one: *Almeida* v. *Chubb Fire Security Div.*, (1984), 5 C.H.R.R. D/2104 (Ont. Bd.Inq.), at para. 17845.
>
> *Ogunyankin* v. *Queen's University*, 2011 HRTO 1910 at para. 91; see also *Matthews* v. *C.A.W., Local 1285*, 2010 HRTO 1116 at para. 13; *Troy* v. *Kemmir Enterprises Inc.,* 2003 BCSC 1947 at para. 25

37. It can be difficult for complainants to prove that their association with a protected group was a factor in their adverse treatment. For this reason, courts and tribunals have articulated principles to ensure that the connection requirement does not operate to bar meritorious complaints.

> *Radek* v. *Henderson Development (Canada) Ltd. (No. 3)*, 2005 BCHRT 302 at para. 482; *Toronto (City) Police Service* v. *Phipps*, 2010 ONSC 3884 (Div. Ct.) (Aff'd by 2012 ONCA 155) (*"Phipps"*)

38. First, membership in a protected group need only be one factor in the adverse treatment. It need not be the sole or main factor.

> *Lee* v. *British Columbia Hydro and Power Authority*, 2004 BCCA 457 at para. 24; *Troy*, para. 25

39. Second, discrimination, including the connection between the protected characteristics and the adverse treatment, does not need to be intentional. This principle, codified in s. 2 of the *Code*, was explained by the Supreme Court of Canada as follows:

> Since the [Canadian *Human Rights Act*] is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the *Act* is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.

> *Robichaud* v. *Canada (Treasury Board),* [1987] 2 S.C.R. 84 at para. 10; see also *British Columbia (Public Service Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 at para. 49 ("*Meiorin*")

40. Thus, the focus of a discrimination analysis is on the effect of the treatment on the complainant with Code-protected characteristics, not on the intentions of the respondent. This concept was explained by McIntyre J. in *O'Malley* as follows:

> The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.
>
> *Ont. Human Rights Comm.* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536 at 547 ("*O'Malley*") (Emphasis added); see also *Radek* at para. 482; *North Vancouver School District No. 44* v. *Jubran*, 2005 BCCA 201 at paras. 37, 50 ("*Jubran*")

41. Third, discrimination, and in particular the connection requirement, will most often be proven by "circumstantial evidence and inference" rather than by direct evidence. This is because of the insidious and subconscious nature of many forms of discrimination, which is notoriously difficult to prove. Decision makers must use common sense, logic, judicial notice and inference to properly assess the likelihood of discrimination. This is discussed more fully below.

> See *Radek* at para. 482; *Jacques* at paras. 20, 25; *Kennedy* at paras 58-60; *Mbaruk* v. *Surrey School District No. 36* (1996), 30 C.H.R.R. D/182 (B.C.C.H.R.) at paras. 44-46.

42. Fourth, racial discrimination is particularly difficult to prove because it is usually the result of subtle unconscious beliefs, biases and prejudices.

> *Phipps* at para. 34; *Lee* at para. 23

43. Above all, the discrimination analysis is to be applied flexibly and purposefully in a manner that takes into account the insidious nature of discrimination and the barriers that marginalized groups face in trying to expose it. Questions about the types of evidence a complainant is required to adduce to prove a *prima facie* case of discrimination, including the connection requirement, must be answered consistently with these principles.

C. What is the nature of the "connection" between a protected ground and adverse treatment?

44. The purpose of the *prima facie* discrimination analysis generally and of the connection requirement in particular is to link the protected ground(s) with the adverse treatment such that the conduct of the respondent requires explanation. For example, it is not enough for a complainant to say, "I am a woman" and "I was treated adversely by the respondent" as two unrelated facts. There is no *prima facie* discrimination unless they are related to each other in some way. Because discrimination takes subtle and diverse forms, the courts have confirmed that a connection can be established in different ways.

> *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para. 49

45. One way to establish the connection is through intention. Although proof of intention is never necessary to establish *prima facie* discrimination, where there is such intention it will satisfy the connection requirement. For example, if a respondent refuses to hire a man as a technician whose duties include performing mammograms, the protected ground of sex is connected to the adverse treatment because of the respondent's intention.

> *St. Boniface General Hospital (Re)* (1992), 32 L.A.C. (4th) 217, 29 C.L.A.S. 679; see also *Stanley* v. *Canada (Royal Canadian Mounted Police)*, T.D. 3/87

46. Another way to establish the link is through causation without intention. For example, if a respondent has a hard hat requirement at a job site and the complainant is denied work at the site because he will not wear a hard hat over his turban there is an unintentional causal connection between the adverse treatment and the *Code*-protected ground of religion. "But for" the religious requirement, the complainant would not have suffered the adverse treatment.

> *Bhinder* v. *Canadian National Railway Co.*, [1985] 2 S.C.R. 561

47. In both of these cases, although *prima facie* discrimination was established, there was no finding of discrimination and the complaints were ultimately dismissed. This is because the purpose of the *prima facie* stage of analysis is to identify all situations in which the respondent should have to explain its conduct with a *bona fide* reason, and not to ensure no potentially meritorious claim is screened out.

48. A connection between the protected characteristic and the adverse treatment can also be established without proof of a causal relationship. This is because the focus of the analysis is on the effect on the complainant. If the adverse treatment has a disproportionate or quantitatively

greater impact on a group or class characterized by a *Code*-protected characteristic, there is a connection sufficient to establish *prima facie* discrimination. For example, if an aerobic capacity test for forest firefighters means that significantly more women than men will not meet the standard, there is a connection between sex and the adverse impact of imposing the test, even if some men will also fail the test. This means that the respondent must justify the test as reasonably necessary for performance of forest fire-fighting.

Meiorin

49. Alternatively, a connection between the protected characteristic and the adverse treatment may also be established by proving a differential or qualitatively different effect on people with the *Code*-protected characteristic than on others because it exacerbates their conditions of disadvantage. For example, a Corrections Services Canada policy requiring anatomically male prisoners to be held in male institutions was held to have a differential effect on preoperative transsexual women:

> CSC's policy requiring that anatomically male prisoners be held in male institutions clearly has an adverse, differential effect on pre-operative male to female transsexual inmates. Non-transsexual inmates are placed in prisons in accordance with both their anatomical sex and their gender. Transsexual inmates, however, are placed in accordance with their anatomical sex, but not their gender. Counsel for CSC indeed concedes that the policy is *prima facie* discriminatory, on the basis of both sex and disability.
>
> *Kavanagh* v. *Canada (Attorney General)*, No. T.D. 11/01 (aff'd by 2003 FCT 89) at para. 141

50. Often an adverse effect has both qualitative and quantitative components, and the terms disproportionate impact and differential effect are used interchangeably. For example, a drug testing policy could be said to have both a greater, and a qualitatively different, impact on people with addiction disabilities.

Milazzo v. *Autocar Connaisseur Inc.*, 2003 CHRT 37 at 37

51. The flexible and purposive nature of the connection requirement mandates a flexible and purposive approach to the evidence that is sufficient to prove it. Proof of intention, causation, disproportionate impact, differential effect, any combination of these or other types of links, may establish the requisite connection in a particular case.

D. What evidence does a complainant need to prove a "connection"?

52. In this case, the Tribunal held that the representative complainants had failed to lead evidence sufficient to establish the connection requirement. The Coalition submits that the Tribunal made four errors of law in its consideration of the evidentiary requirements for proof of the connection requirement. First, the Tribunal adopted a categorical approach to its assessment of evidence inconsistent with the flexible and purposive approach. Second, it held that the absence of direct evidence from a member of the Class who was removed by an Ambassador was fatal to proof of the connection requirement, failing to appreciate the nature of representative complaints. Third, it found that statistical evidence is not sufficient to establish a connection, misinterpreting the governing cases on this point. Fourth, it appeared to suggest that the connection requirement cannot be established by inference, although courts have accepted a connection may be proved in this way.

53. The Coalition submits that the effect of these errors was that the Tribunal failed to consider the evidence as a whole, including matters properly the subject of judicial notice, in determining whether the representative complainants had satisfied the connection requirement.

i. *The usual rules of evidence do not apply in human rights proceedings*

54. The *Code* mandates flexibility in evidentiary requirements. Section 27.2(1) of the *Code* authorizes the Tribunal to accept evidence that it considers "necessary and appropriate", whether or not the evidence would be admissible in a court of law.

> *Code,* ss. 27.2(1)

55. In recognition of the insidious nature of discrimination, which is notoriously difficult to prove, and the known barriers to marginalized groups seeking to expose it, courts have held that tribunals must necessarily take a flexible, liberal and purposive approach to the types of evidence sufficient to prove *prima facie* discrimination. Categorical limitations on the types of evidence that are necessary to prove a representative complaint are inconsistent with this approach. As the Federal Court of Appeal noted in *Johnstone*:

> ... a *prima facie* case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a *prima facie* case of discrimination will largely depend on the prohibited ground of discrimination at issue.

Johnstone v. *Canada (Border Services)*, 2014 FCA 110 at para. 84

56. This is also consistent with judicial emphasis on the importance of ensuring that proof of *prima facie* discrimination is not onerous for vulnerable complainants.

See discussion above at para. 36

ii. *Evidence from an affected individual is not required in representative complaints*

57. The Legislature has recognized that some individuals are so vulnerable that they may be unable to pursue human rights claims on their own. To ensure the human rights system achieves its purposes, the *Code* allows for representative complaints to be brought by an individual or group on behalf of a person or class of persons. In the case of a representative complaint on behalf of a group or class, the Legislature has determined that it is not necessary for the person filing the complaint to be a member of that group or class.

Code, s. 21(4)

58. Section 21(4) ensures that members of very vulnerable groups are not denied access to the protection of human rights laws. This is particularly important when the very characteristics that make them vulnerable to discrimination also make it difficult for them to assert their legal rights.

Construction and Specialized Workers' Union Local 1611 v. *SELI Canada Inc.*, 2007 BCHRT 423 at para. 68 ("*SELI*")

59. Concerns about the vulnerability of the Class in this case animated the Tribunal's decision to allow the complaint to proceed as a representative complaint. The Tribunal noted:

> The complainant class is comprised of extremely vulnerable and marginalized individuals. Such individuals would face many barriers in attempting to enforce their human rights in any forum. It would not be in the public interest, or in conformance with the purposes set out in s. 3 of the *Code,* to erect additional barriers to the participation of such individuals.

Preliminary Decision, para. 43

60. A finding that individuals directly affected by the impugned conduct *must* testify or provide evidence to support a representative complaint undermines the legislative purpose of authorizing a representative complaint, effectively converting it to a series of individual complaints. This risks "weaken[ing] the public policy aspect of human rights legislation by treating a representative complaint as nothing more than a consolidation of several individual complaints which the Tribunal has decide to deal with together under s. 21(6)".

SELI, para. 73

61. In *Silver Campsites Ltd.* v. *James*, the BC Court of Appeal held that a person who is the subject of a representative complaint does not need to give evidence to sustain an award of damages for injury to his dignity. In that case, Mr. James was denied tenancy in a trailer park for reasons related to his disability. His mother pursued a representative claim on his behalf, alleging discrimination in tenancy. Mr. James did not provide evidence because of the nature of his disability. The Tribunal found that there had been discrimination and awarded Mr. James $10,000.00 in damages for injury to dignity.

> *James obo James* v. *Silver Campsites and another (No. 2)*, 2011 BCHRT 370 ("*James BCHRT*")

62. The BC Supreme Court quashed this award on the basis that, because Mr. James did not testify, there was no evidentiary foundation for a finding that his dignity was injured. The Court of Appeal allowed the appeal. It confirmed that an award for injury to dignity does not depend on testimony from the victim of discrimination in a representative complaint. Discrimination may be found in

favour of individuals who are not even parties to the complaint, as long as they are members of the group or class on behalf of which the complaint was brought. The Court explained:

> The decision of the Tribunal must be assessed in light of the purpose of the *Code* to identify and eliminate discriminatory barriers that impede full and free participation in society and to create a more inclusive society. Its purpose is also to provide a means of redress for those who have suffered discrimination. It is apparent that the Tribunal acted in accordance with those purposes in exercising its discretion to make a damages award and that it did so on a proper foundation.
>
> First, it is clear that the Tribunal was entitled to take judicial notice of the fact that denying a mentally disabled man, who had lived independently, access to stable housing in which he intended to live independently, would cause compensable injury to his dignity and feeling of self-respect. Taking notice of these facts is consistent with the principles established in cases such as *Law* v. *Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, and *Andrews* v. *Law Society of British Columbia,* [1989] 1 S.C.R. 143. In any event, reaching such a conclusion is simply common sense and does not involve assumptions and speculation.
>
> ...
>
> It was not necessary for Mr. James to testify to prove compensable injury. Indeed, the possibility that a victim of discrimination might not testify is

> contemplated by the availability of representative complaints; as this one was. The *Code* contemplates that awards may be made in favour of groups or class members who are not parties to the complaint and that in the context of representative complaints not all affected individuals will give evidence: see ss. 21(4) and 37(2).
>
> *Silver Campsites Ltd. v. James*, 2013 BCCA 292 at paras. 36-37 and 40 ("*James BCCA*") (Emphasis added)
>
> *Code,* ss. 37(2), 21(4)

iii. *Statistical evidence can be sufficient to establish a claim for discrimination*

63. The Tribunal held that statistical evidence was not sufficient in itself to establish a connection between the disproportionate representation of Aboriginal and disabled people within the Class and the adverse treatment of the Class. Citing other decisions where both statistical evidence and evidence from individuals about their treatment were adduced, the Tribunal inferred that individual testimony was necessary.

> *Decision*, para. 643

64. The Coalition submits that the cases cited by the Tribunal do not support the proposition that claims for discrimination require a certain type of evidence – namely evidence from an affected individual – in order to succeed. In some cases, statistical evidence alone can support a finding of discrimination.

65. For example, in *Meiorin,* the operative fact substantiating the finding of *prima facie* discrimination on the ground of sex was that women were statistically significantly less likely than men to pass the province's test for aerobic capacity. Although Ms. Meiorin testified, the conclusion that the connection requirement was satisfied did not turn on her testimony. The statistical evidence alone established the connection between being female and failing the aerobic fitness test.

> *Meiorin*, para. 11

66. The same is true of the other cases cited by the Tribunal on the use of statistical evidence. The fact that affected individuals testified added to the evidence as a whole in each case, but it was not necessary to prove *prima facie* discrimination.

> *Chapdelaine* v. *Air Canada*, 1987 CanLII 102 (C.H.R.T.); *Bitonti* v. *College of Physicians & Surgeons of British Columbia*, [1999] B.C.H.R.T.D. No. 60 (QL); *Griggs* v. *Duke Power Co.*; (1981), 401 U.S. 424; see also *Decision*, paras. 637-43

67. The Tribunal also relied on its earlier decision in *Radek*, a case in which the Tribunal found that a shopping mall's ejection policy had a disproportionate impact on people of Aboriginal descent and people with disabilities that was *prima facie* discriminatory even though no statistical evidence had been led. Despite the absence of such evidence, the Tribunal found that there was enough evidence from directly affected individuals and observers (a total of 6 witnesses) to support an inference of disproportionate impact.

Radek at paras. 502-504

68. *Radek* does not stand for the proposition that evidence from directly affected individuals about their experiences or evidence of observers is necessary to prove a connection, nor does it establish that statistical evidence alone is insufficient.

69. Where statistical evidence is adduced, the Tribunal must assess its probative value in the entire context of the case to determine whether it reveals patterns or practices that exclude or marginalize protected groups. In that regard, the Court of Appeal has recognized that complaints of systemic discrimination may require different evidence than an individual complaint:

> A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

British Columbia v. *Crockford*, 2006 BCCA 360 at para. 49 ("*Crockford*")

70. As discussed below, statistical evidence of disproportionate impact can provide the basis for an inference of *prima facie* discrimination. The task of the Tribunal is to assess the totality of the evidence to determine whether it supports this inference, not to rule out categories of evidence as *a priori* insufficient.

iv. The Tribunal must use judicial notice where appropriate to support reasonable inferences

71. In the context of rejecting certain submissions by the representative complainants about what inferences it should draw from the Ambassadors' treatment of individuals on private property, the Tribunal stated that "inferences and suppositions do not provide a proper evidentiary basis."

> *Decision*, para. 658

72. It is always open to a trier of fact to reject a particular inference as inappropriate in a particular case. However, inferences are often essential to proof of a connection between a personal characteristic and adverse treatment.

73. Courts have expressly recognized that direct evidence of discrimination is rare. Most often, discrimination will be proven by inferences from circumstantial evidence. Inferences based on evidence of disproportionate impact and/or differential effect are especially important to proof of the connection requirement in group discrimination claims because the link between the protected characteristic and the adverse treatment can be deeply entrenched in seemingly neutral policy or practice.

> *Radek* at para. 482(d); *Jacques* v. *British Columbia (Council of Human Rights)* (1998), 51 B.C.L.R. (3d) 111 (C.A.) at paras. 6, 21, 26 ("*Jacques*"); *Smith* v. *Ontario (Human Rights Commission)* (2005), 195 O.A.C. 323 (Ont. Sup. Ct.) at paras. 16, 22

74. Courts have recognized that the prejudices that operate to exclude or disadvantage people based on race or disability stem from preconceptions buried deep in the human psyche, which exert subtle influences at the subconscious level.

> *R* v. *Williams,* [1998] 1 S.C.R. 1128 at paras. 21-22 ("*Williams*"); see also discussion in *Radek,* paras. 474-482

75. Where a complainant alleges that such subtle prejudices, or social forces, are at play, direct evidence substantiating a claim of discrimination will be difficult to adduce. For example, in the context of racial profiling by the police, the Ontario Court of Appeal has explained:

> A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference from circumstantial evidence.
>
> *R.* v. *Brown* (2003), 64 O.R. (3d) 161 (C.A.) at para. 44; see also *Troy*, para. 25

76. Similarly, in considering a claim alleging racial prejudice of potential jury members, the Supreme Court of Canada has recognized:

> To require the accused to present evidence that jurors will in fact be unable to set aside their prejudices as a condition of challenge for cause is to set the accused an impossible task. It is extremely difficult to isolate the jury decision and attribute a particular portion of it to a given racial prejudice observed at the community level ... As recognized by Doherty J.A. in *Parks, supra,* at p. 366, "[t]he existence and extent of [matters such as] racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts".
>
> *Williams,* at para. 35

77. The use of inferences to establish discrimination recognizes that discrimination is notoriously difficult to prove. Decision makers must take a flexible approach to the evidence and may use logical reasoning and judicial notice to deduce discrimination. In the *Charter* context, the Supreme Court of Canada has explained the fact-finder's proper approach to evidence and deducing discrimination as follows:

> First, I should underline that none of the foregoing discussion implies that the claimant must adduce data, or other social science evidence not generally available, in order to show a violation of the claimant's dignity or freedom. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required. A court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1). It is well established that a court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy.... There will frequently be instances in which a court may appropriately take judicial notice, of some or all of the facts necessary to underpin a discrimination claim, and in which the court should engage in a process of logical reasoning from those facts to arrive at a finding that s. 15(1) has been infringed as a matter of law.
>
> *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 77 (Emphasis added)

78. In *Troy,* the BC Supreme Court held that the Tribunal had erred by failing to consider the likely reasons underlying the decision of a white female employee at a gas station to call the police when the complainant, a black man, parked his car at the gas station.

> *Troy,* at para. 32

79. Where a discriminatory prejudice, or historical marginalization, is notorious within a community or has been judicially recognized, a decision maker should properly take judicial notice of it. In *R.* v. *Williams,* the Supreme Court of Canada explained:

> Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976. The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule. As Sopinka, Lederman and Bryant note, at p. 977, "[t]he character of a certain place or of the community of persons living in a certain locality has been judicially noticed". Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, supra, at p. 977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule.
>
> Williams, para. 54, (Emphasis added)

80. The Supreme Court of Canada has mandated that judicial notice be taken of the systemic marginalization of Aboriginal people:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R.* v. *Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.
>
> R. v. *Ipeelee*, 2012 SCC 13 at para. 60

81. In BC, the Court of Appeal endorsed the Tribunal's reliance on judicial notice in order to infer injury to a disabled man's dignity:

> ... it is clear that the Tribunal was entitled to take judicial notice of the fact that denying a mentally disabled man, who had lived independently, access to stable housing in which he intended to live independently, would cause compensable injury to his dignity and feeling of self-respect. Taking notice of these facts is consistent with the principles

> established in cases such as *Law*... and *Andrews* ... In any event, reaching such a conclusion is simply common sense and does not involve assumptions and speculation.
>
> *James BCCA* at para. 37 (citations omitted)

E. Application of the principles to this case

82. The Downtown Ambassadors employed uniformed guards to remove certain people off public property within a defined area of downtown Vancouver. The Ambassadors did not ask everyone to leave. They applied specific criteria in determining whom to approach, what to say, and how to ensure that the person left. Those criteria were based on the perception that some people are detrimental to the image of downtown Vancouver and the businesses that operate there based on the way that they look.

83. In the Coalition's submission, the assumption that the way certain people look is detrimental to a city's image and its businesses is based on precisely the kind of damaging stereotypes which human rights laws were intended to eradicate. The Ambassadors treated people who appear a certain way – a way that corresponds with negative assumptions about Aboriginal, mentally disabled, physically disabled and/or homeless people – as less entitled to occupy public property than people who do not look that way.

84. The perception of people as undesirable in the context of the Ambassadors' program is based on deeply rooted stereotypes of social conformity. The Ambassadors approached some people on public sidewalks and parks because they looked socially unacceptable. The correspondence between those targeted and *Code*-protected characteristics was not coincidental because in our society, it is still the case that "looking" Aboriginal, addicted, or disabled attracts social discomfort and disapproval: it is "bad for business".

85. The Coalition submits that the evidence before the Tribunal probative of the connection requirement included:

- Evidence that the Ambassadors explicitly targeted people that they perceived as drug addicts, using the code "DU". This could have supported an inference of intentional discrimination on the ground of disability.

- Statistical evidence about the makeup of the Class – being disproportionately Aboriginal and/or disabled – suggests that the Downtown Ambassadors' removals may have disproportionately impacted people with those *Code*-protected characteristics.
- Evidence that the Ambassadors' removals had a differential effect on Aboriginal members of the Class because it exacerbated the lasting damaging effects of colonialization and marginalization of Aboriginal people in Canada that Dr. Miller's evidence described.

86. The Tribunal acknowledged that removals were 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".

Decision at para. 660

87. The Coalition submits that it is open to this Court to conclude that the Tribunal did not assess the whole of the evidence before it based on a correct interpretation of the law regarding the connection requirement.

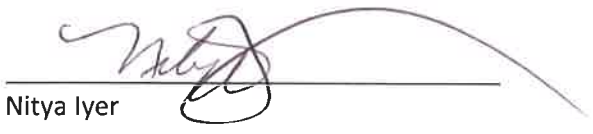
PART IV - NATURE OF ORDER SOUGHT

88. As an intervener, the Coalition seeks no order from this Court regarding the outcome of this judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this ____ day of _____, 2014.

Counsel for the intervener:



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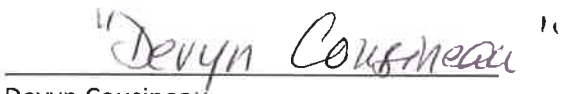

Devyn Cousineau