

**VANCOUVER**

Court of Appeal File No. CA042770

AUG 14 2015

**COURT OF APPEAL**

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BETWEEN  
**REGISTRY**

**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**

Court to Appeal File No: CA042777

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On behalf of people who are, or appear to be,  
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-and-

**BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL and  
DOWNTOWN VANCOUVER BUSINESS IMPROVEMENT ASSOCIATION**

**RESPONDENTS**

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**MEMORANDUM OF ARGUMENT ON AN APPLICATION  
FOR LEAVE TO INTERVENE**

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**Name of Appellants (Respondents)****DOWNTOWN VANCOUVER BUSINESS  
IMPROVEMENT ASSOCIATION**

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**Name of Respondents**

**VANCOUVER AREA NETWORK OF  
DRUG USERS** on behalf of people who  
are, or appear to be street homeless  
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## I. OVERVIEW

1. The Coalition of West Coast Women's Legal Education and Action Fund ("West Coast LEAF") and the Community Legal Assistance Society ("CLAS") (collectively, "the Coalition") applies under Rule 36 of the *Court of Appeal Rules* for orders that:
  - a. The Coalition be granted leave to intervene in these proceedings;
  - b. The Coalition be granted leave to file a factum of up to 20 pages;
  - c. The Coalition be granted permission to apply to the panel hearing the appeals for leave to present oral argument; and
  - d. There shall be no costs of this application or costs of the appeal awarded for or against the Coalition.
  
2. The Coalition intervened in this case before the B.C. Supreme Court. It submits that these appeals raise significant issues of public law which engage its interests as equality-seeking organizations. The Coalition has expertise in the analysis of principles governing proof of complex claims of discrimination that are in issue in these appeals.

## II. THE APPEALS

3. These appeals concern the test for *prima facie* discrimination in proceedings brought under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). The parties are in general agreement that the test for *prima facie* discrimination requires a complainant to prove:
  - a. they have a characteristic protected from discrimination under the *Code*;
  - b. they have experienced an adverse impact or treatment; and
  - c. the protected characteristic was a factor in the adverse impact.

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

4. The dispute in this case centres on the interpretation and application of the third step of this test. Courts have described this element as requiring the complainant to prove a

“connection”, “link” or “nexus” between the protected characteristic and the adverse treatment.

5. The appeals arise in the context of a judicial review from a decision of the British Columbia Human Rights Tribunal (the “Tribunal”). Before the Tribunal, the Vancouver Area Network of Drug Users (“VANDU”) brought a representative complaint on behalf of a class of people who are, or appear to be, street homeless and/or drug addicted (the “Class”). VANDU alleged that the actions of the City of Vancouver and the Downtown Vancouver Business Improvement Association (“DV BIA”) constituted discrimination against the Class in the provision public services, contrary to s. 8 of the *Code*.
6. The Tribunal held that VANDU had failed to establish a *prima facie* case of discrimination. In reaching this decision, the Tribunal found that the Class was disproportionately composed of people who were aboriginal and/or had mental or physical disabilities. It also found that members of the Class were adversely treated when they were required to move from parks and sidewalks. However, the Tribunal held that the complaint must fail because VANDU had not proven a connection or link between the Class’s *Code*-protected characteristics and their adverse treatment at the third stage of the *prima facie* test.
7. VANDU successfully sought judicial review of the Tribunal’s decision. The Coalition was granted leave to intervene in the judicial review. It made written submissions concerning the test for *prima facie* discrimination and the evidence necessary to satisfy the third stage of the test.
8. Justice Sharma (in Chambers) held that the Tribunal had erred in law in its interpretation of the legal test for *prima facie* discrimination and in its legal analysis of what type of evidence is necessary to prove a connection between protected characteristics and adverse treatment. She found that on a correct interpretation and application of the law, *prima facie* discrimination had been established, and she remitted the matter back to the Tribunal to consider whether it was *bona fide* and reasonably justified.
9. The City of Vancouver and DV BIA (collectively, the “Appellants”) have separately appealed to this Court.

10. On appeal, the Appellants argue that the Chambers Judge erred in her application of the standard of review, and in the interpretation and application of the legal test for *prima facie* discrimination. The DV BIA also argues that the Chambers Judge effectively added street homelessness as a protected ground under the *Code*. With respect to the test for *prima facie* discrimination, the Appellants specifically argue that the Chambers Judge erred in finding that the Tribunal had required the complainants to prove an intention to discriminate; they also say that she erred in the weight she placed on social context and in her treatment of statistical evidence.

Factum of the City of Vancouver at paras. 27, 69, 86 and 95; Factum of the DV BIA at paras. 2, 61 and 68.

11. The Coalition seeks leave to intervene in the appeals to address two issues raised by the Appellants:

- a. The legal test for *prima facie* discrimination, and specifically the nature of the “connection” between a protected characteristic and the adverse treatment in group claims of discrimination based on disproportionate impact; and
- b. What evidence is necessary and sufficient to establish the “connection” element of the test for *prima facie* discrimination and, in particular, the necessity and sufficiency of social context and statistical evidence.

12. The Coalition will not make submissions relating to the appropriate standard of review or whether the Tribunal erred by importing a requirement that the Appellants intended to discriminate. The Coalition anticipates that these issues will be addressed by the respondent VANDU.

### III. LEGAL FRAMEWORK: APPLICATION TO INTERVENE

13. This Court will grant leave to intervene in two circumstances: (1) where a party has a direct interest in an appeal; and (2) where “the appeal raises public law issues that legitimately engage the applicant’s interests, and the applicant brings a different and useful perspective to those issues that will be of assistance in resolving them”. In the latter circumstance, the Court will consider the factors articulated in *R. v. Watson and Spratt*, namely:

...the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues...

*Carter v. Canada (Attorney General)*, 2012 BCCA 502 (Chambers) at para. 13; *R. v. Watson and Spratt*, 2006 BCCA 234 (Chambers) at para. 3

14. The Coalition does not assert a direct interest in these appeals, but rather submits that they raise public law issues that legitimately engage its interest, and says that the Coalition would bring a unique and useful perspective to those issues that will be of assistance to the Court in resolving them.

#### **IV. ARGUMENT**

15. The following sections will: identify the Coalition and its interest in these appeals; explain the position it intends to take and provide a summary of its submissions; and explain why those submissions will be useful to the Court and different from those of other parties.

##### **A. The Coalition and its interest in the appeals**

16. As set out above, the Coalition includes two organizations: West Coast LEAF and CLAS. Each of these organizations, and their special expertise, is described below.

##### *West Coast LEAF*

17. 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 three main BC-based program areas: equality rights litigation, law reform and public legal education.
18. West Coast LEAF was created in April 1985, when the equality provisions of the Charter came into force. West Coast LEAF is an affiliate of a national organization, Women's Legal Education and Action Fund ("LEAF"). Both LEAF and West Coast LEAF grew out of the efforts of a group of women who, starting in the early 1980s, worked to ensure that sections 15 and 28 of the Charter would be effective in guaranteeing women substantive equality.

19. West Coast LEAF currently has almost 329 members and approximately 165 volunteers. It typically employs five full-time and three part-time staff. This Court has recognized its "broad representative base".

*Friedmann v. MacGarvie*, 2012 BCCA 109 (Chambers) at para. 21

20. West Coast LEAF acts to promote the equality interests of all British Columbian women, regardless of race, national origin, immigration status, sexual preference or identity, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic.

21. West Coast LEAF is committed to working on a consultative and collaborative basis with other equality-seeking groups to ensure that West Coast LEAF's legal arguments, education programs and law reform activities are informed by and inclusive of the diversity of women's experiences. West Coast LEAF also consults and collaborates with leading equality rights academics and practitioners to ensure the consistently high calibre of its work.

22. Public legal education is one of West Coast LEAF's three program areas. West Coast LEAF's public legal education program aims to help British Columbians learn what their legal equality rights are, how to access those rights, and to think critically about the law as it affects them. West Coast LEAF believes that with such education, women will be able to take an active role in asserting their rights and shaping the laws that affect them. The program aims to transform public legal education, collaborate with diverse equality seeking groups, distribute public legal education materials and build upon other West Coast LEAF initiatives. West Coast LEAF's public legal education projects are based on collaboration with other groups and complement its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

23. A second program area is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation in British Columbia complies with guarantees of equality for women pursuant to both section 15 of the Charter and the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive research projects, drafting best practices and recommendations on legal reform, and making submissions to government and key decision makers.

24. Litigation is the third program area. West Coast LEAF, through litigation work with LEAF and on its own, has contributed to the development of equality rights jurisprudence including the definition of substantive equality in Canada and in British Columbia under both the Charter and human rights law, especially in reference to women's equality.
25. West Coast LEAF has intervened, or is intervening, in its own name in eleven 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; *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309; *Vilardell v. Dunham*, 2013 BCCA 65; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59; *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2014 SCC 59; and *Trinity Western University and Volkenant v. Law Society of BC* (in progress at the BC Supreme Court). West Coast LEAF also intervened in coalition with other organizations in *SWUAV v. Canada*, 2012 SCC 45 and the case at issue in these appeals.
26. Together with LEAF, West Coast LEAF has intervened in an additional 14 cases, including cases at the British Columbia Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.
27. In the following cases in which LEAF intervened, LEAF had primary conduct of the intervention and West Coast LEAF provided general information and support to LEAF: *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; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.
28. In the following cases in which LEAF intervened, West Coast LEAF took the leading role in the intervention: *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.

29. 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)*

30. 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 providing a wide range of legal services to people with a low income, people with disabilities, and people who have been victims of discrimination.

31. CLAS currently has 39 staff members across all of its programs. Its Board of Directors includes community representatives, lawyers and one law student.

32. CLAS has specific expertise in human rights law. It operates British Columbia's Human Rights Clinic, which provides free representation to human rights complainants throughout the province, as well as advice and education on matters relating to human rights. Its advocates and lawyers appear frequently before the Tribunal and have represented complainants in a high volume of complaints. This includes group and representative complaints.

33. CLAS has been counsel for human rights complainants in cases which have laid the foundation for human rights and equality jurisprudence in British Columbia and in Canada. These cases include: *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Grismer v. British Columbia Council*

of Human Rights, [1999] 3 S.C.R.; *School District No. 44 (North Vancouver) v. Jubran* (2005), 39 B.C.L.R. (4th) 153; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; and *Moore v. British Columbia (Education)*, 2012 SCC 61.

34. CLAS acted on behalf of intervening community groups in: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (counsel for the intervener B.C. Coalition of People with Disabilities); *R v. O'Connor*, [1995] 4 S.C.R. 411 (counsel for the Canadian Mental Health Association); *British Columbia Human Rights Commission v. Blencoe*, [2000] 2 S.C.R. 307 (counsel for the intervener B.C. Human Rights Coalition); and *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 (counsel for the Council of Canadians with Disabilities).
35. Finally, CLAS has been recognized by the BC Court of Appeal and by the Supreme Court of Canada as an intervenor in its own right in four legal proceedings: *Mazzei v. British Columbia, Director of Adult Forensic Psychiatric Services*, [2006] 1 S.C.R. 326; *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56; *R v. Conway*, 2010 SCC 22; and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

#### *The Coalition*

36. Together, West Coast LEAF and CLAS bring a broad range of experience and expertise directly relevant to the issues on appeal. They have specific expertise in the evolution of the test for *prima facie* discrimination and were involved in many of the cases upon which Justice Sharma relied in interpreting the meaning of the test. For example:
- a. In *Meiorin*, West Coast LEAF intervened before the Supreme Court of Canada to argue in favour of a unified justificatory framework for both direct and adverse effect discrimination;
  - b. In *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302, CLAS represented the complainant Gladys Radek in a foundational case about systemic discrimination;
  - c. In *Armstrong*, CLAS intervened before this Court and made submissions about the proper elements of the *prima facie* discrimination analysis;

- d. In *Moore*, CLAS represented Mr. Moore at the Supreme Court of Canada, and West Coast LEAF intervened. Both organizations made arguments about the test for *prima facie* discrimination;
- e. In *SWUAV*, both West Coast LEAF and CLAS intervened at the Supreme Court of Canada to make separate submissions in regard to public interest standing in *Charter*-based equality claims, the equivalent to representative complaints in provincial human rights proceedings. West Coast LEAF argued that the law of public interest standing must be interpreted in accordance with *Charter* values and the right to equality, and therefore must not act as an undue impediment to accessing justice. CLAS advanced a novel approach to public interest standing intended to ensure meaningful access to justice for marginalized groups; and
- f. In *Silver Campsites Ltd. v. James*, 2013 BCCA 292, CLAS represented Ms. James and successfully defended a decision of the Human Rights Tribunal which turned on the purpose of representative complaints and the evidence required to maintain an award of damages in such cases.

37. The Coalition has an interest in the appeals because their outcome will have a direct impact on the ability of the vulnerable groups that the Coalition represents to advance group discrimination claims based on the disproportionate impact of laws and policies. These appeals squarely raise the meaning of the “connection” element of the test for *prima facie* discrimination, proof of which has been especially contentious in systemic discrimination cases that lie at the heart of the Coalition’s mandate.

#### **B. The Coalition’s proposed submissions and their relevance to these appeals**

38. The Coalition was granted intervenor status before the BC Supreme Court by order of Justice MacIntosh dated January 6, 2014. Before that Court, the Coalition restricted its submission to the third stage of the test *prima facie* discrimination and the evidence required to establish a connection between protected characteristics and adverse treatment. The Coalition argued that the connection can be proven in different ways, and must be approached in a manner consistent with fundamental principles of human rights law. It submitted that there are no restrictions on the type of evidence that may be sufficient to establish *prima facie* discrimination; rather, the evidence must be considered

as a whole, with regard to social context that is properly the subject of judicial notice, to determine whether a connection is established.

39. These issues were addressed at length by the Justice Sharma in her reasons. In particular, she rejected an overly stringent standard for establishing a connection between protected characteristics and adverse treatment, and emphasized the importance of social context and the vulnerabilities of claimant groups when assessing the sufficiency of evidence of *prima facie* discrimination.

Decision, paras. 106-108

40. The Coalition's submissions in these appeals will be consistent with those it advanced before Justice Sharma. It will argue:

- a. There is no restriction on the types of evidence upon which a complainant group may rely to establish a connection between protected characteristics and adverse treatment. The analysis of the sufficiency of the evidence presented must accord with the quasi-constitutional status of human rights laws. As the Chambers Judge recognized, in many cases, the evidence proving the first two elements of the *prima facie* discrimination analysis will also be sufficient to establish the connection element.
- b. Decision makers must take a flexible approach to the evidence that will be sufficient to establish a *prima facie* case of discrimination. Such evidence can include social context, in the form of judicial notice and expert evidence. In claims of disproportionate impact discrimination, statistical evidence will play an important role. The Chambers Judge correctly analysed the import of *Meoirin* and *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449 in that regard.

41. Both of these issues were central to the Supreme Court of Canada's reasons in *Bombardier*, released after the BC Supreme Court's ruling in the present case. The Coalition will submit that Justice Sharma's reasons accord fully with the legal principles established in *Bombardier*.

### C. The value of the Coalition's proposed participation in the appeals

42. The issues that the Coalition proposes to address have been the subject of repeated judicial consideration. The question of what connection between a protected characteristic and adverse treatment is sufficient to require a respondent to answer a claim of discrimination goes to the very heart of human rights law. It has been particularly elusive of clear articulation in disproportionate impact claims where the allegedly discriminatory impact arises from the effects of a rule or policy on a group and there is no "causal" link in a traditional civil liability sense. It is a complex issue, and its judicial treatment will have ramifications for all marginalized groups whose human rights may be in need of protection. The Coalition's expertise in this area enables it to provide the Court with the perspective of equality-seeking groups which work daily to eradicate systemic and complex patterns of discrimination.

See for example: e.g. *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 (per Justice Abella, in dissent); *Moore*; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 ("Bombardier")

43. The Coalition did not seek leave to make oral submissions in the court below. Nevertheless at the hearing, Justice Sharma posed a number of questions to the Coalition, and gave DVBIA and the City an opportunity to respond to the Coalition's submissions.

44. The Coalition will ensure, as it did in the court below, that its submissions do not duplicate those of the parties. In that regard, it understands that the Respondent VANDU intends to focus its submission on whether the Tribunal erred by importing an element of intention to the *prima facie* analysis.

### V. ORDER REQUESTED

45. In light of the above, the Coalition requests that it be granted leave to intervene in these appeals on the following terms:

- a. That it file a factum of not more than 20 pages on or before a date to be specified by this Court;

- b. That it be granted permission to apply to the panel hearing the appeals for leave to present oral argument; and
- c. That there shall be no costs of this application or costs of the appeal awarded for or against the Coalition.

All of which is respectfully submitted.

Dated: August 14, 2015.

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