Court of Appeal File No. CA039348
Registry: Vancouver

COURT OF APPEAL

ON APPEAL FROM: the Order of the Honourable Mr. Justice Bernard,
of the British Columbia Supreme Court, Pronounced August 24, 2011

Between:

John Friedmann

Respondent
(Petitioner)

And:

Noemi MacGarvie

Appellant
(Respondent)

And:

The British Columbia Human Rights Tribunal

Respondent
(Respondent)

And:

West Coast Women's Legal Education and Action Fund

Intervenor

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OPENING STATEMENT

West Coast LEAF's position is that the Court below erred in law when it determined that sexual harassment of a tenant by a landlord does not constitute *per se* discrimination on the basis of sex in the area of tenancy, contrary to section 10 of the *Human Rights Code*.

Sexual harassment is *per se* discrimination based on sex, and once a finding of sexual harassment has been made, no further analysis is needed to determine that there has been a *prima facie* breach of the *Code*.

Further, sexual harassment is sex discrimination, not only in the area of employment, but in all areas covered by the *Code*, including tenancy.

Women are particularly vulnerable to sexual harassment by their landlords, and a complaint under the *Human Rights Code* is the only legal means of addressing such conduct. It is respectfully submitted that the Court below subjected the Human Rights Tribunal's decision to an overly technical analysis. Rather than presuming, as a court on judicial review must do, that the Tribunal knew and applied the law, the Court below proceeded from the opposite presumption, leading it to find an error where none existed. Such an intrusive approach will have the detrimental effect of rendering the Human Rights Tribunal's processes more legalistic and inefficient, creating unnecessary barriers to women and members of other vulnerable groups seeking access to justice by means of filing human rights complaints.

PART 1- STATEMENT OF FACTS

1. West Coast LEAF adopts the Appellant's Statement of Facts, as set out in Part 1: Statement of Facts in the Appellant's Factum.

PART 2 - ISSUE ON APPEAL

2. Does sexual harassment of a tenant by a landlord constitute sex discrimination, contrary to section 10 of the *Human Rights Code*?

PART 3 - ARGUMENT

Sexual Harassment is Discrimination on the Basis of Sex

A. Janzen *and subsequent jurisprudence have established that sexual harassment is discrimination on the basis of sex*

3. The Court below held that the Human Rights Tribunal misinterpreted the principles from *Janzen v. Platy Enterprises Ltd.*, and applied them too broadly. It held that the general principle arising from *Janzen* is "simply that the existence of sexual harassment in the workplace is capable of supporting a finding of differential treatment based upon sex and, thus, may establish discrimination contrary to human rights legislation." Consequently, the Court below ultimately held that the Tribunal erred when it concluded that Ms. MacGarvie's complaint was justified "merely upon proof that she had been sexually harassed by her landlord."

> *Friedmann v. MacGarvie,* 2011 BCSC 1147, paras. 23 and 24; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 ("*Janzen*").

4. In the Intervenor's submission, the Supreme Court of Canada conclusively established in *Janzen* that sexual harassment is sex discrimination. Furthermore, while that case arose in the context of the relationship between an employer and employee, the principles apply broadly to all areas covered by the *Code*, including in tenancy relationships.

5. This is apparent from the Supreme Court of Canada's review of and reliance on various definitions of sexual harassment, including the following oft-cited passage from Arjun Aggarwal's *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987):

> It [sexual harassment] occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or both. […] [It] is an attempt to assert power over another person.
>
> *Janzen*, *supra*, para. 49.

6. The necessary implication of the Court below's failure to find that sexual harassment is sex discrimination is that there are circumstances in which sexual harassment is not discriminatory, and therefore a not human rights infringement . Such an implication must be based on an assumption that there is a male prerogative to make unwanted sexual advances or otherwise exercise sexual power towards women; that sometimes, such behaviour is simply boys being boys. This assumption was reflected in the Manitoba Court of Appeal's decision in *Janzen*, where the Court expressed disbelief at the argument that sex harassment is discriminatory: "When a schoolboy steals kisses from a female classmate, one might well say that he is harassing her. He is troubling her; vexing her; harrying her; - but he surely is not discriminating against her." This sentiment – roundly rejected by the Supreme Court of Canada in *Janzen* – appears to be echoed by the lower court in this case.

> *Janzen v. Platy Enterprises*, 8 C.H.R.R. D/3831 at D/3834 (Man. C.A.); *Janzen*, *supra*, see, e.g., paras. 52, 55-56 (SCC).

7. A similar sentiment was also exhibited in the *Bliss* case, where the Court found that discrimination on the basis of pregnancy was created by nature, and not by legislation. Similarly in this case, the necessary assumption underlying the decision on appeal is that some sexual harassment is merely a natural, if annoying, expression of male sexuality, rather than a manifestation of discrimination that is contrary to law. The Supreme Court of Canada in *Bliss*, the Manitoba Court of Appeal in *Janzen*, and the Chambers Judge in this case failed to recognize that sex

role behaviour is a product of social and cultural factors and appears natural only from a gendered perspective that has accepted women's disempowerment as fact.

Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183.

8. Human rights legislation in British Columbia, Alberta, Saskatchewan and Prince Edward Island does not explicitly prohibit harassment on prohibited grounds generally or sexual harassment in particular. This was also true of the legislation in effect in Manitoba at the time of the events in *Janzen*.

Janzen, *supra*, para. 11.

9. It is well established that human rights legislation has a unique quasi-constitutional nature and must be given a large, liberal and purposive interpretation. The Supreme Court of Canada has also affirmed that the *Charter* applies to provincial human rights legislation.

University of British Columbia v. Berg, [1993] 2 S.C.R. 353 ("*Berg*"), para. 26 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

10. In considering *Charter* rights, the Supreme Court of Canada has articulated certain basic aspects of equality that must also inform the construction of human rights legislation, in view of its quasi-constitutional nature. In particular, the Supreme Court of Canada has acknowledged that a commitment to social justice and equality is one of the fundamental values of society.

R. v. Oakes, [1986] 1 S.C.R. 103, para. 64.

11. These principles compel a recognition that sexual harassment is a form of sex discrimination for the purposes of the *Code* because of the ways in which sexual harassment undermines women's equality and our society's commitment to social justice.

12. In *Janzen*, the Court held that sexual harassment is a prohibited form of sex discrimination. In coming to this conclusion, the Court adopted LEAF's submission

that "... sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex." The Court stated that: “It is one of the purposes of anti-discrimination legislation to remove such denials of equality of opportunity”.

Janzen, *supra*, para. 65.

13. The Supreme Court in *Janzen* stated that the Manitoba Court of Appeal erred when it relied on federal and provincial legislation that explicitly defined and prohibited sexual harassment for the “inference that in the absence of such express legislation a prohibition against sexual discrimination could not embrace sexual harassment.” The Court stated that subsequent amendments to the Manitoba legislation were “no doubt intended to make express and explicit what had previously been implicit.”

Janzen, *supra*, para. 58.

14. The presence or absence of an explicit prohibition of sexual harassment in a given province’s human rights legislation is therefore irrelevant to the analysis. This is consistent with the Supreme Court of Canada’s statement that:

> If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

Berg, *supra*, para. 32

15. As a result, sexual harassment in British Columbia, like the rest of Canada, is discrimination based on sex.

16. A review of post-*Janzen* case law confirms that sexual harassment is itself a breach of human rights legislation. No further analysis or test is required once a finding of sexual harassment has been made. Judicial reviews of tribunal decisions have, until the decision in the Court below, consistently confirmed this. Courts have interpreted *Janzen* to mean that sexual harassment is, *per se*, discrimination based on sex.

See, e.g., *Dutton v. British Columbia (Human Rights Tribunal)*, 2001 BCSC 1256, 95 B.C.L.R. (3d) 186 ("*Dutton*"); *Bartman v. N.T.*, 2004 BCSC 1211, 133 A.C.W.S. (3d) 837; and *Vanton v. British Columbia Council of Human Rights*, 46 A.C.W.S. (3d) 483, [1994] B.C.J. No. 497 (QL) (S.C.).

17. It would therefore be wrong in law to require a complainant who has established sexual harassment in accordance with *Janzen* to also establish a *prima facie* case of discrimination in accordance with this Court's decisions in cases such as *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union,* 2006 BCCA 57 (cited at para. 16 of the Respondent's factum). Proof of sexual harassment is proof of sexual discrimination. Nothing more is required.

18. In any event, proof of sexual harassment in accordance with *Janzen* does establish the three elements of the *prima facie* test set out in *Health Employers*. Specifically, a complainant will have established: (1) membership in a particular sex; (2) adverse treatment in the form of unwelcome conduct that detrimentally affects the complainant; and (3) that her sex was a factor in the adverse treatment by virtue of the sexual nature of that unwelcome conduct. Neither *Janzen* nor *Health Employers* requires that a complainant prove she was harassed <u>because of</u> her sex; rather, she need only establish that her sex was a <u>factor</u> in the harassment. Nothing more is required to establish a *prima facie* case of discrimination based on sex, whether viewed through the lens of *Janzen* or *Health Employers*.

Janzen, *supra*, paras. 56 and 62-67; *Health Employers*, *supra*, para. 38.

19. The reasoning in *Janzen* has been applied to other grounds in analogous situations. For example, in *Jubran*, this Court affirmed the Tribunal's determination that classmates harassing another classmate due to his perceived sexual orientation was discrimination on the basis of sexual orientation. A parallel was found between sexual harassment in the work environment (as in *Janzen*) and harassment based on sexual orientation in the school environment. *Janzen* was held to be applicable in the area of services, accommodations and facilities customarily available to the public. Proof of harassment based on sexual orientation was sufficient to establish a *prima facie* case of discrimination on the basis of sexual orientation.

> *North Vancouver School District No. 44 v. Jubran*, 2005 BCCA 201, 253 D.L.R. (4th) 294, para. 62.

20. British Columbia Human Rights Tribunal decisions consistently apply *Janzen* in determining whether sex discrimination is based on sexual harassment. Once they find sexual harassment to have been proven, no further analysis is required to find sex discrimination.

> See, for example, *McIntosh v. Metro Aluminum Products Ltd.*, 2011 BCHRT 34, paras. 100, 101, 132 and 136, upheld 2012 BCSC 345; *Ratzlaff v. Marpaul Construction Ltd.*, 2010 BCHRT 13, paras. 23 and 26; *Mahmoodi v University of British Columbia*, [1999] B.C.H.R.T.D. No. 52, paras. 134, 135, 151, 152 and 242, upheld in *Dutton*, *supra*.

21. In the Intervenor's submission, in finding that sexual harassment is not *per se* discrimination, the Court below fell into the same error the Manitoba Court of Appeal did in *Janzen*, in that it "departed radically" from the "apparently unbroken line of judicial opinion" establishing that sexual harassment is discrimination based on sex.

> *Janzen*, *supra*, para. 48.

B. <u>*Broad and damaging consequences if the decision is upheld*</u>

22. Sexual harassment is, in and of itself, discrimination that it is a serious affront to the dignity of the person being harassed. As stated by the Nova Scotia Court of Appeal: "[sexual harassment] is not simply a problem between two people, but rather something seen to affect the dignity and rights of all persons thereby constituting a public wrong."

> *Nova Scotia Construction Safety Assn. v. Nova Scotia (Human Rights Commission)*, 2006 NSCA 63, para. 103.

23. A conclusion that sexual harassment is not *per se* discrimination based on sex would have damaging effects on discrimination law and the ability of those suffering harassment to seek redress. Complaints of harassment based on a prohibited ground would be unduly scrutinized to ensure that an additional finding of "differential treatment" on the basis of the prohibited ground could be made.

Friedmann, *supra,* para. 21.

24. This would create an additional hurdle for victims of harassment based on a prohibited ground, which is not faced by any other complainant who alleges discrimination based on a prohibited ground. Sexual harassment of an individual is itself adverse treatment on a prohibited ground, and no further tests or analysis must make a finding sex discrimination.

25. In *Janzen*, the Supreme Court of Canada soundly rejected the fallacious argument made in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, that pregnancy-related discrimination could not be sex discrimination because not all women become pregnant. As the Court stated: "pregnancy cannot be separated from gender". Therefore, just as only a woman can become pregnant, "only a woman could be subject to sexual harassment by a heterosexual male".

Janzen, *supra,* paras. 63 and 64.

26. Sexual harassment is a gendered expression of power, usually, although not always, perpetrated by a man against a woman. It is, at its essence, an act of sex discrimination. This is true despite the fact, of which the Court in *Janzen* was aware, that not only women may be subject to sexual harassment:

> Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female.

Janzen, *supra*, para. 57.

27. This reasoning is true of any situation involving harassment based on a prohibited ground. Just as one cannot separate gender from sexual harassment, one cannot separate race from racial harassment, or sexual orientation from "gay-bashing".

28. It follows that there is no need for a female tenant alleging sexual harassment to show that she was harassed and male tenants were not. The “scant evidence”

before the Tribunal of Mr. Friedmann's treatment of male tenants was therefore irrelevant to the question of whether Ms. MacGarvie was sexually harassed. No comparator group analysis is required to find harassment on a prohibited ground. If there were no male tenants, and thus no male group whose experiences could be compared to Ms. MacGarvie's, it would not affect the fact that she was sexually harassed by Mr. Friedmann.

> *Friedmann, supra*, paras. 4, 12 and 19; see also *Bro v. Moody*, 2010 BCHRT 8, upheld 2012 BCSC 657.

Sexual Harassment is prohibited in the Tenancy Context

A. *No distinction in the* Code *between tenancy and employment provisions*

29. The *Code* does not make any distinction between discrimination based on sex in the employment context and in any other area, including tenancy. It would be an absurd result and contrary to the purposes of *Code* to make such a distinction.

> *Human Rights Code*, R.S.B.C. 1996, c. 210 ss. 3, 10 and 13.

30. In particular, there is no additional requirement in the tenancy context to identify a particular "term or condition" of the tenancy that was affected by the harassment. Sexual harassment of a tenant by a landlord necessarily has an adverse effect on the tenancy as a whole, and in particular, the tenant's quiet enjoyment of the premises. A tenant is entitled to quiet enjoyment under s. 28 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78, including a right to reasonable privacy (s. 28(a)) and freedom from unreasonable disturbance (s. 28(b)).

31. Section 10 of the *Code*, prohibiting discrimination in tenancy, and section 13, prohibiting discrimination in employment, are identical in all relevant respects. Both provide that "a person must not…(b) discriminate against a person or class of persons regarding" a "term or condition" of the tenancy or employment, as the case may be. Under the interpretive assumption that the Legislature is an accomplished user of language and that every word or specific phrase in a statute is presumed to have meaning and a role to play in advancing the legislative purpose, the language

of the *Code* provides no basis for imposing different tests for establishing discrimination, including harassment, in the two areas.

> *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, para. 45.

B. *Tribunal cases hold that harassment is prohibited in the area of tenancy*

32. The Tribunal has consistently held that sexual harassment is included within the prohibited ground of discrimination on the basis of sex in the area of tenancy.

> *Blair v. Crestwell Realty Inc.*, 2010 BCHRT 325, para. 29; *Tenant A v. Landlord*, 2007 BCHRT 321, paras. 17 and 18; *Dietrich v. Dhaliwal*, 2003 BCHRT 6; *Williams v. Fitch*, 2005 BCHRT 151; and *Davis v. Hrycan*, 2003 BCHRT 40, para. 15.

33. The Tribunal has held that any harassment which is connected to a prohibited ground, such as family status, marital status, race and sexual orientation, is discrimination in the area of tenancy prohibited by the *Code*. As stated in *Kennedy v. Strata Corp. KAS 1310*:

> Any person who discriminated against another person regarding that person's tenancy because of their sexual orientation will have contravened the Code. In this instance, the allegations are, first, in regard to discrimination in the complainants' enjoyment of their rental premises…These allegations are within the jurisdiction of the Tribunal.
>
> *Kennedy v. Strata Corp. KAS 1310*, 2005 BCHRT 87, para. 25. See also *Emard v. Synala Housing Co-operative*, [1993] B.C.C.H.R.D. No. 39 (QL), para. 108; *Raweater v. MacDonald*, 2005 BCHRT 63, paras. 38, 41 and 43.

34. The Tribunal has explicitly recognized the power imbalance involved in a landlord-tenant relationship. For example, in *Bro v. Moody*, the Tribunal allowed a complaint of discrimination in tenancy based on harassment connected to disability, source of income and sexual orientation. In considering the remedy, the Tribunal noted that vulnerability of the victim is a factor to be considered and that the complainants were "highly vulnerable" because the events leading up to the complaints (including the physical and verbal harassment) occurred in their home and in the context of a

tenancy relationship, they did not feel safe in their home, and they had no option but to move out.

Bro v. Moody, *supra*, paras. 88, 89, 98, 104 and 105.

C. United States jurisprudence supports that sexual harassment is per se *sex discrimination in tenancy*

35. In *Janzen*, *supra*, the Supreme Court of Canada stated that the "argument that sexual harassment is sex discrimination has been recognized by a long line of Canadian, American and English… cases" and that this jurisprudence has "found sexual harassment to be sex discrimination." In coming to this conclusion, the Court reviewed and relied upon American jurisprudence.

Janzen, *supra*, paras. 54, 55 and 66.

36. Since *Janzen* was decided, numerous American cases have specifically concluded that sexual harassment is discrimination on the basis of sex in the tenancy context.

37. The *Fair Housing Act* (42 U.S.C. 3601-3619) is the primary federal American statute combatting tenancy discrimination. For the purposes of this appeal, the relevant section is:

> **Sec. 804. [42 U.S.C. 3604] Discrimination in sale or rental of housing and other prohibited practices**
>
> As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful--
>
> 1. […] (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin. [emphasis added]

38. The *Fair Housing Act* does not contain any express prohibition on sexual harassment. As in our *Human Rights Code*, the only prohibition that could include

sexual harassment is discrimination on the basis of sex. Therefore, the American courts have had to consider whether sexual harassment is sex discrimination.

39. In *Beliveau v. Caras*, the United States District Court, Central District of California, made the following statements regarding sexual harassment in tenancy:

> In sum, it is beyond question that sexual harassment is a form of discrimination. Moreover, as the above cases make clear, the purposes underlying Titles VII [*Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e-4, which pertains to discrimination in the employment context] and VIII [the *Fair Housing Act*, *supra*, which pertains to discrimination in the tenancy context] are sufficiently similar so as to support discrimination claims based on sexual harassment regardless of context. Indeed, it is the behavior that the law seeks to eradicate. The basic principles thus apply as strongly in the housing situation as in the workplace.[1] [emphasis added]
>
> *Beliveau v. Caras*, 873 F.Supp. 1393 (1995), page 4.

40. American courts have recognized that sexual harassment committed in the home may be even more harmful than when committed in the workplace. In *Beliveau*, the Court provided the following footnote on this point:

> Ftn. 1: One commentator has suggested that sexual harassment in the home is in some respects more oppressive: "When sexual harassment occurs at work, at that moment or at the end of the work day, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In contrast, when the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile." Comment, "Home is No Haven: An Analysis of Sexual Harassment in Housing." 1987 *Wis.L.Rev*. 1061, 1073 (Dec.1987). [Emphasis added]
>
> See also *Reeves v. Carrollsburg Condominium Unit Owner's Association*, (1997 U.S. Dist LEXIS 21762) and *Williams v. Poretsky Mgmt.*, 955 F.Supp. 490, 491,494-96 (D. Md. 1996), which both cite *Beliveau* for the recognition that sexual harassment in the home may have more severe effects than harassment in the workplace.

41. In *Quigley v. Winter*, the United States District Court, Northern District of Iowa, Western Division, upheld a jury decision finding the defendant landlord had sexually harassed the plaintiff tenant, contrary to the *Fair Housing Act*. The defendant relied on sexual harassment cases in the employment context to argue that his conduct was not actionable because his behaviour was not as offensive as the conduct described in the employment jurisprudence.

Quigley v. Winter, 584 F.Supp. 2d 1153 (2008)

42. The Court in *Quigley* rejected this argument, recognizing that sexual harassment in the tenancy context was more damaging than in the workplace. The Court stated that it was:

> …not persuaded that sexual harassment at work is akin to sexual harassment in one's own home by one's own landlord who just so happens to also have a key to the house. A tenant should be able to feel secure in her own home…

Quigley, *supra*, page 2.

43. In upholding the finding of sexual harassment, the United States Court of Appeals for the Eighth Circuit emphasized that the landlord's conduct was in fact more blameworthy, because the tenant was subjected "to these unwanted interactions in her own home, a place where [she] was entitled to feel safe and secure and need not flee, which makes [his] conduct even more egregious".

Quigley v. Winter, 598 F.3d 938, page 12.

D. *<u>Heightened privacy interest in the home</u>*

44. The home is a distinctly personal, private and intimate environment. It is different from the work environment, which is generally more open and public.

45. The Supreme Court of Canada has recently reiterated that s. 8 of the *Charter* protects a right to privacy, and that the privacy of the home attracts "heightened protection because of the intimate and private activities taking place there."

R. v. Gomboc, [2010] 3 S.C.R. 211, 2010 SCC 55, paras. 17 and 19.

46. The Supreme Court of Canada has stated that *Charter* rights are "inextricably bound to concepts of human dignity", and although dignity is not a free-standing constitutional right, it finds expression in rights such as equality and privacy. The inherent dignity of the human person has been recognized by the Supreme Court of Canada as an essential principle in a free and democratic society.

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, paras. 76 and 77; and *R. v. Oakes, supra*, para. 64.

47. In *Janzen*, the Supreme Court of Canada explicitly connected the concept of dignity with the harm caused by sexual harassment, stating: "Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it."

Janzen, *supra,* para. 56.

48. If sexual harassment in the workplace is a "profound affront" to the dignity of an employee, then harassment of a tenant by her landlord in her own home must also be a "profound affront" to her dignity. In fact, considering the personal, private nature of the home, the victim's dignity may be even more profoundly affected than in other contexts.

49. Without in any way minimizing the impact of sexual harassment in the workplace, victims of sexual harassment at work may be able to shield or distance themselves from their harasser more effectively than those who are harassed at home. Clearly, there are heightened expectations of privacy at one's home compared to at work.

50. In a recent case, the Ontario Human Rights Tribunal commented on the inherent power imbalance in tenancy relationships, and the pernicious effect of harassment on vulnerable tenants:

> …a superintendent is in a position of power over tenants. They can make the living situation of a tenant uncomfortable or unbearable. An abuse of this power can have a significant effect on a tenant's enjoyment of her living space. When the superintendent is an older male inappropriately exerting power over a younger female in the form of sexual harassment, this undermines her expectation of peaceful occupation of her home.
>
> *Kertesz v. Bellair Property Management*, 2007 HRTO 38, para. 57.

E. Women are vulnerable in tenancies

51. While insecure tenancies are problematic for anyone, they tend to affect women in particular ways. Female-led households, especially single-mother households, are "very likely to have low incomes, to be renters, and to have several housing affordability problems." Furthermore, since the majority of landlords are male, there is an "automatic gender imbalance of power overlaying that of property-owner and tenant."

> Novac et al., *Housing Discrimination in Canada: The State of Knowledge*, a report prepared for the Canada Mortgage and Housing Corporation, February 2002, pp. 25 and 26.

52. Sexual harassment in housing is often related to a combination of more than one prohibited ground. Due to their vulnerability in our society, young women, women from minority ethnic groups, women with disabilities, women receiving social assistance, lone mothers and lesbians may be more often targeted for sexual harassment.

> Ontario Human Rights Commission, *Policy on preventing sexual and gender-based harassment*, 2011, p. 32.

53. Women may also be reluctant to report sexual harassment by their landlords for fear of retaliation, loss of shelter, and/or concerns about the safety of themselves and their families.

> Ontario Human Rights Commission, *Policy on preventing sexual and gender-based harassment*, 2011, pp. 30-31.

F. International obligations

54. The values reflected in international law can assist adjudicators with the task of interpreting domestic law. The international community has long recognized that housing is a fundamental and universal human right worthy of legal protection.

> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 70; see also Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing in Ontario*, p. 5.

55. Both the *Universal Declaration of Human Rights*, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) and the *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (the "ICESCR"), recognize the right to housing. Other international treaties affirming the right to housing include the *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (in force January 4, 1969) and the *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180 (in force September 3, 1981) ("CEDAW").

56. Canada has ratified these treaties, thereby affirming both that housing is a human right, and the importance of respecting and protecting women's rights. Because human rights legislation in Canada has a quasi-constitutional status, international law has a special relationship to human rights codes. As stated in the *Universal Declaration of Human Rights*, economic, social and cultural rights go to the core of dignity and equality.

> *Universal Declaration of Human Rights*, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); see also Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing in Ontario*, pp. 8 and 34.

57. Of particular importance in this case is Article 11 of the ICESCR, which states that State Parties must recognize the right of everyone to an "adequate standard of living", including adequate housing, and must take appropriate steps to ensure realization of this right. General Comment 4 under this Article "clarifies that the right

to adequate housing includes security of tenure, accessibility, habitability, and affordability", among others.

> Committee on Economic Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing*, 13 December 1991, Article 11(1).

58. CEDAW speaks directly to the need to remove barriers women face in employment, education, health care, housing, *et cetera*. The *Declaration on the Elimination of Violence Against Women*, which complements CEDAW, specifically recognizes "sexual harassment and intimidation [of women] at work, in educational institutions and elsewhere" as a form of violence against women. The Declaration states:

> [T]hat violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.
>
> *Declaration on the Elimination of Violence Against Women*, Resolution A/RES/48/104, adopted 20 December 1993; see also Ontario Human Rights Commission, *Policy on preventing sexual and gender-based harassment*, 2011.

59. The United Nations has provided guidance by way of "fact sheets", which assist Member States in interpreting their obligations. One such duty regarding adequate housing is the "obligation to protect", which requires States to prevent third parties from interfering with this right, by including adopting legislation or other measures to ensure that private actors (including landlords) comply with human rights standards related to the right to adequate housing. This includes ensuring that third parties do not arbitrarily and illegally withdraw such services and that landlords do not discriminate against particular groups.

> Office of the United Nations High Commission for Human Rights, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev. 1.

Effective Access to Justice for Victims of Sexual Harassment

60. Contrary to the findings of the Court below, the Tribunal did not err in concluding the complaint was justified upon proof of sexual harassment. Nor did the Tribunal err in finding the complaint justified on the basis of sexual harassment despite dismissing the parts of the complaint alleging sexual discrimination based on differential treatment. The Tribunal implicitly held that the proven sexual harassment was discrimination on the basis of sex, as the harassment was connected to the prohibited ground of sex.

    Tribunal Decision, paras. 159, 163, 168 and 169.

61. The complaint before the Tribunal was one of sex discrimination. The Tribunal's finding of "the complaint to be justified" was a finding of sex discrimination. It could be nothing else, as that was "the complaint" before it.

    Complaint Form, Appeal Book, Volume 1, page 9; Tribunal Decision, para. 220.

62. It is not uncommon for the Tribunal, when dealing with a sex discrimination complaint that includes both allegations of sexual harassment and other forms of sex discrimination, to assess those aspects of it alleging sexual harassment separately from those alleging other types of sex discrimination. Indeed, given the different character of the two types of discrimination and the applicable legal tests, the Tribunal could scarcely do otherwise.

    Davis v. Western Star Trucks Inc. (c.o.b. Western Star), 2001 BCHRT 29, paras. 80-95.

63. Access to justice for low-income people, in particular female tenants, depends upon the existence of a Human Rights Tribunal capable of effectively addressing these issues. Excessively technical review of the Tribunal's decisions by the courts tends to prevent the Tribunal from performing its statutory functions in an effective and efficient manner.

64. Just as judges are presumed to know the law, so too are administrative tribunals. As stated by this Court in *Lee v. British Columbia Hydro and Power Authority*, the use of "infelicitous" language does not open a decision to judicial review. Human Rights Tribunals are "assumed to know the law".

> *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457, 244 D.L.R. (4th) 404, para. 26. See also *Yuan v. British Columbia (Human Rights Commission)*, 2005 BCCA 31, 207 B.C.A.C. 193.

65. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, the Supreme Court of Canada described the manner in which a reviewing court should approach a tribunal's reasons:

> To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist.
> …
> Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
>
> *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, 2011 SCC 62, paras. 13 and 17.

66. In another recent decision, the Supreme Court of Canada stated that: "contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness…."

> *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, 343 D.L.R. (4th) 385, para. 44.

67. The Supreme Court of Canada has also recently commented on the importance of deference when the administrative body is interpreting a provision of its "home" statute, stating that there is a "very strong presumption of deferential review when a

statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle".

> See *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, 2011 SCC 61, paras. 30 and 41.

68. Tenants who have been sexually harassed have one forum in which to seek a remedy: the Human Rights Tribunal. The Residential Tenancy Branch does not have jurisdiction to apply the *Code*, by virtue of s. 78.1 of the *Residential Tenancy Act* and s. 46.3 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Therefore, sexual harassment and discrimination matters cannot be addressed by the RTB.

> See, for example, *Devine v. David Burr and others*, 2009 BCHRT 345.

69. Civil courts are also not a reasonable, accessible alternative. The Supreme Court has dismissed civil actions for sexual harassment (based in contract and tort) on the basis that the proper procedure to address a complaint of sexual harassment was under the *Code* or under a collective agreement arbitration scheme. While both the Supreme Court and this Court have held that it may be appropriate for the Supreme Court to hear certain cases involving allegations of sexual harassment, this only occurs in limited circumstances, such as when the facts reasonably support other causes of action in tort or contract, where the harassment complaint is only partly based on gender, and where the Supreme Court proceedings are the only opportunity for the plaintiff to seek redress.

> *Sulz v. Canada (Attorney General)*, 2006 BCSC 99, 263 D.L.R. (4th) 58, paras. 76-78 and 88-92, aff'd 2006 BCCA 582, 276 D.L.R. (4th) 391, paras. 24-36.

70. Even in those limited circumstances when a civil cause of action may technically be available, court cases are costly and out of reach for persons such as low-income female tenants who may be particularly vulnerable to harassment. Absent rare circumstances, filing a complaint with the Tribunal under the *Human Rights Code* is the only forum available to address harassment in tenancy. Tribunal decisions

should be given an appropriately respectful reading so as not make redress through that forum illusory.

Newfoundland and Labrador Nurses' Union, supra, paras. 23-25.

PART 4 - NATURE OF ORDER SOUGHT

71. West Coast LEAF submits that this appeal should be allowed and the judgment of the Supreme Court be set aside.

72. West Coast LEAF seeks leave to make oral submissions in the hearing of this appeal, not to exceed 20 minutes.

73. Pursuant to the terms of the Order of the Honourable Madam Justice Bennett granting intervenor status, the Intervenor does not seek costs and asks that costs not be ordered against it.

All of which is respectfully submitted this 13 day of June, 2012.

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Laura Track

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West Coast Women's Legal Education and Action Fund

APPENDIX – STATUTORY PROVISIONS

Administrative Tribunals Act, S.B.C. 2004, c. 45

Tribunal without jurisdiction to apply the *Human Rights Code*

46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Human Rights Code, R.S.B.C. 1996, c. 210

Purposes

3 The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code;

(f) and (g) [Repealed 2002-62-2.]

Discrimination in tenancy premises

10 (1) A person must not

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or

(b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

(2) Subsection (1) does not apply in the following circumstances:

(a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;

(b) as it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or

(ii) a rental unit in a prescribed class of residential premises;

(c) as it relates to physical or mental disability, if

(i) the space is a rental unit in residential premises,

(ii) the rental unit and the residential premises of which the rental unit forms part,

(A) are designed to accommodate persons with disabilities, and

(B) conform to the prescribed standards, and

(iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation

or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

***Residential Tenancy Act*, S.B.C. 2002, c. 78**

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

…

Application of the *Administrative Tribunals Act*

78.1 Sections 1, 44, 46.3, 48, 56 to 58 and 61 of the *Administrative Tribunals Act* apply to the director as if the director were a tribunal and to dispute resolution proceedings under Division 1 of this Part and reviews under Division 2 of this Part.

42 USC Sec. 3604
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 45 - FAIR HOUSING

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful -

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

…

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