IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal,* 2015 BCSC 534

Date: 20150410
Docket: S122532
Registry: Vancouver

Between:

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

Petitioner

And

British Columbia Human Rights Tribunal, Downtown Vancouver Business Improvement Association and City of Vancouver

Respondents

And

Coalition of West Coast Legal Education and Action Fund and Community Legal Assistance Society

Intervener

Before: The Honourable Madam Justice Sharma

On judicial review from a decision of the Human Rights Tribunal dated February 7, 2012 (*Pivot Legal Society v. Downtown Vancouver Business Improvement Association and another (No. 6)*, 2012 BCHRT 23)

Reasons for Judgment

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Place and Date of Trial/Hearing:	Vancouver, B.C. October 6 - 8, 2014
Place and Date of Judgment:	Vancouver, B.C. April 10, 2015

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[1] Near the end of the 19th Century, the poet, author and Nobel laureate Antole France composed this oft-cited saying: "[t]he law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." This quote captures the cynicism attached to the simplistic notion that so long as everyone is treated the same, equality will exist.

[2] Since its inception, Canadian jurisprudence about discrimination has rejected such a formalistic approach to equality in favour of a more nuanced and contextual approach. Knowing what does not constitute equality, however, has not simplified the analytical exercise required to determine if actions or laws are discriminatory. This case illustrates the complexity of these issues.

[3] The petitioner says that a program which operates in the downtown area of Vancouver, the Downtown Ambassadors Program (the "Program"), amounts to systemic discrimination against homeless people. The petitioner also says that, as a group, the homeless are populated with a higher proportion of Aboriginal people and people with mental illness or physical disabilities, especially addiction, than the general population. Therefore, the petitioner says, the Program itself discriminates against people who are Aboriginal and/or have mental or physical disabilities. The respondents answer these allegations by saying the Program is aimed at and targets illegal behaviour and is, therefore, not discriminatory against any group of people.

[4] The Human Rights Tribunal (the "Tribunal") dismissed the complaint brought by the petitioner. It concluded that there was insufficient evidence to prove a *prima facie* case of discrimination because there was no evidence of a nexus between any adverse impact on homeless people and the race, colour, ancestry, mental or physical condition of anyone. The issue before me is whether in doing so, the Tribunal erred.

[5] As these reasons discuss and explain, I find that the Tribunal erred because it did not apply the correct legal test to the facts before it. It applied a standard of proof to the claim that was too strict and inconsistent with leading Supreme Court of Canada ("SCC") jurisprudence.

I. FACTS

A. The Decision under Review

[6] This is a judicial review of the February 7, 2012 decision of the Tribunal (the "Decision") in which the petitioner's complaint about the Program run by the Downtown Vancouver Business Improvement Association (the "Association") was dismissed. The petitioner says the Program discriminates against people of Aboriginal ancestry and people with mental or physical disabilities, mainly drug or alcohol addiction. The allegation is that ambassadors actively dissuaded the "street homeless" from occupying public space, which resulted in discrimination because people with Aboriginal ancestry and/or mental or physical disabilities were disproportionately subjected to that adverse treatment.

[7] The Association responds to the petition by saying its Program is aimed at behaviours that are contrary to law regardless of people's circumstances or personal characteristics, therefore, there is no discrimination.

B. The Parties and the Original Complaint

[8] The petitioner describes itself as follows in its written submissions:

> The Vancouver Area Network of Drug Users ("VANDU") is a democratic group of over 2,000 users and former users who work to improve the lives of people who use illicit drugs through user-based peer support and education. VANDU has had considerable impact on public policy, practices and popular attitudes. Its accomplishments include numerous actions that led to the establishment of North America's first supervised injection site in Vancouver, launching a successful legal challenge to the Controlled Drugs and Substances Act and helping to bring heroin maintenance trials to Vancouver.

[9] The original complaint was filed on behalf of "individuals 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 Association]", referred to in the Decision as the "Class".

[10] The petitioner alleged the following actions taken by the Association through the Program resulted in a disproportionately adverse impact on Aboriginal persons

and people with disabilities, and caused discrimination contrary to s. 8 of the *Human Rights Code,* R.S.B.C. 1996, c. 210 [*Code*] (at para. 5 of the Decision):

> a. Telling people who are sitting or lying down on the sidewalk to move along;
> b. Waking up people who are sleeping on the street and telling these people to move along, regardless of location or circumstances;
> c. Driving along slowly beside or behind people who are walking down the street or in back lanes, and telling people to move along if they stop, sit down or lie down;
> d. Patrolling back lanes and telling people to stop searching for recyclables in garbage cans, telling people doing so to move along;
> e. Identifying particular individuals as undesirable and telling them that they are not allowed within a particular geographic area ("no go areas");
> f. Following or staring at individuals identified as undesirable;
> g. Taking photographs or notes in order to collect information about people on the street which has the effect of harassing and humiliating the individuals photographed and "observed", all for an unknown and potentially illegal purpose.

[11] The petitioner described the "Legal Basis" of this case as follows: "on the facts found by the Tribunal, the Respondents have discriminated against individuals on the basis of race, ancestry and physical and mental disabilities, contrary to s. 8 of the *Human Rights Code."* In its written argument, the petitioner narrows its claim and submits the Tribunal erred in its application of the *prima facie* test for discrimination.

[12] In the alternative, the petitioner says if the Tribunal did not err, then the absence from the *Code* of "homelessness" as a prohibited ground of discrimination violates s. 15 of the *Canadian Charter of Rights and Freedoms*.

[13] The Association is one of a large number of community associations which were introduced in the 1970s to help neighbourhood businesses revitalize their community. At that time, suburban malls were drawing consumers away from the centre of urban areas. In British Columbia, these associations are funded by property taxes on commercial property and businesses, and they operate on a non-profit basis. At para. 29 of its decision, the Tribunal described the geographical area that falls within the Association's purview as the "90-square-block area extending,

roughly, from Pacific Boulevard to Coal Harbour (north/south), along Burrard to Robson Street and then to Robson and Jervis Street in the west, and along Richards Street in the east (extending to Hamilton Street between Smithe and Pender)."

[14] The Association has an elected Board of Directors and about 8,000 businesses are members. It is the largest of Vancouver's business improvement associations. It has five areas of focus for its operations: (i) access and mobility; (ii) advocacy; (iii) marketing; (iv) place making; and (v) safety and security, under which the Program falls. The Association had, among others, a Safety and Security Committee which in 2006 had a mandate to look at issues members felt were important to ensure the area was welcoming and safe, and to address property crime. Five goals were set by the Committee:

1. Our work with the appropriate authorities will help ensure that Safe Streets Act and Urban Trespass Act are appropriately applied and that support is continued for its implementation in its formative years in the DVBIA area.
2. We will work with the appropriate authorities to eliminate the open illicit drug market in the DVBIA area.
3. There will be increased public safety and comfort through taking measures and encouraging others to ensure that public space is available for public use.
4. We will continue to offer programs for members and work with the authorities to substantially reduce property crime and increase protection of property in the DVBIA area.
5. We will work with the various agencies and authorities to eliminate homelessness in our area.

[15] The Association did not directly operate the Program. It contracted with a security company (which at the time of the hearing was Genesis Security Inc.) which ran the Program.

[16] Between 1994 and 1999, the Program consisted of university and college students who were hired to be ambassadors during the summer only, focusing on customer service and hospitality. In 1997 or 1998, the Association joined with the Recovery Club to offer a safe ride service aimed at offering assistance to people seeking treatment for substance abuse. By 2000, the model for the Program

changed and it was run full-time, year round. It was this incarnation that was challenged by the petitioner. Ambassadors were still focusing on customer service and hospitality, but added outreach and crime prevention to their duties. The Decision has an exhaustive review of the operations, structure, organization and responsibilities of the security company contracted to operate the Program (at paras. 73 - 492).

[17] The City of Vancouver is a respondent because for one year, it provided funding to the Association to operate the Program during the night and early morning, something the Association had not been doing up to that point. The City says the petition must be dismissed against it because there is no longer a live issue between it and the petitioner.

[18] The interveners (Coalition of West Coast Legal Education and Action Fund and Community Legal Assistance Society) support the petitioner's position and provided written submissions. Their counsel attended the hearing for the purpose of answering questions but did not provide oral submissions.

[19] As the body whose decision is being reviewed, the Tribunal has the right to be a respondent to the petition pursuant to s. 15 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], although case law has limited the scope of its participation.

[20] Finally, the Attorney General appeared; under s. 16 of the *JRPA* she has the right to appear in any petition for judicial review and she is a party to the proceeding pursuant to the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68. She restricted her submissions to the *Charter* issue.

C. The Social Context

[21] A prevailing social factor underlying the issues in this case is the persistent reality of the vulnerability and marginalization of Vancouver's homeless population. All parties agree that the plight of homeless people is one of the most pressing social challenges facing governments and the public. All also agree that the root

causes of homelessness are complex and multi-dimensional. The problems are pernicious and manifest in situations that can become matters of urgency brought before this Court.

[22] The Tribunal was faced with making its decision in this context, a challenging task. This is borne out, in part, by the fact that the hearing (including final arguments) took 26 days and the Decision is 675 paragraphs long. Among the evidence presented were: eight witnesses called by the petitioner, including Dr. Bruce Miller who prepared a report and was accepted as an expert; the petitioner's affiants who analyzed certain Association documents; 15 witnesses called by the respondent, including nine who were or had been ambassadors in the Program; and two witnesses called by the City.

II. THE TRIBUNAL'S DECISION

[23] The Tribunal noted that the complaint was framed as discrimination against street homeless people and drug addicted persons who are disproportionately Aboriginal and mentally or physically disabled in relation to their access to public spaces within the geographic area of the Association (at paras. 1 and 4). To succeed, the petitioner had to prove that a *prima facie* case of discrimination existed. The Tribunal stated that the *prima facie* test requires a claimant to prove three things: (i) that members of the class belong to a protected group under the *Code*; (ii) that members of the class have experienced adverse treatment with respect to a service, facility or accommodation customarily available to the public; (iii) that there is a connection or link between the adverse treatment and the protected grounds (the correct wording of this third step is the main issue in this case).

[24] With respect to the first element of the test, the Tribunal concluded at para. 595 of the Decision:

> [595] I accept that, given this disproportionate representation, a significant number of members of the Class are likely to be Aboriginal, suffer from disabilities, or both. Neither homelessness nor social condition is a prohibited ground of discrimination under the *Code*, but race, ancestry, colour and disability are. Thus, for the purposes of this decision, I find that the complainants have established that certain members of the Class belong to

> groups protected under the *Code*, and that these groups are disproportionately represented among the street homeless population, and the Class, as compared to the general population.

[25] The Tribunal then analyzed whether Class members experienced adverse treatment. It accepted that public parks, sidewalks (including alcove indentations) and alleys are facilities within the meaning of s. 8 of the *Code* (at para. 600). The Tribunal also concluded that the fact that a service is on private property does not prevent it from also being customarily available to the public (at para. 607).

[26] The Tribunal found that the ambassadors' training stipulated that a person's contact with the exterior wall of the building, or presence in an alcove or indentation of a building, constitutes trespass justifying an attempted removal. Yet there was no evidence to support the proposition that private property invariably includes the exterior wall of a business or the alcoves or indentations. Accordingly, the Tribunal decided that for the purposes of the Decision, exterior walls and indentations were also facilities customarily available to the public (at para. 618).

[27] The Association conceded that being subject to a removal from public property does constitute adverse treatment. The Tribunal described some of the specific interactions that amounted to adverse treatment experienced by individuals in Portal Park as follows at para. 625:

> [625] Above, I have found that individuals, including sleepers, were asked to move from property customarily available to the public including, in particular, Portal Park. I have also found that, once having asked an individual to leave an area, it was an accepted practice of an Ambassador to "stand by" to maximize the possibility that the individual would actually leave and not return, or to return to the area periodically to check that the individual had not returned. This practice is reflected in PDA notations relating to Portal Park, including the following from Mr. Zurbuchen's affidavit:
>
> > a) May 8, 2008, 3:27pm, "Event PH", "Subject removed upon visual. Stood by to make sure they didn't come back".
> >
> > b) June 19, 2008, 1:36pm, "Event Sleep", with notes: "SP is waiting for his friend to return with his cart to put his belongings in. Send unit after the meeting to check up on".
> >
> > c) July 7, 2008, 8:51am: "Hotspot Patrol", "Subject left upon visual. Stood by to make sure they didn't come back";

> d) July 27, 2008, 11:11am and 12:06pm: both incidents classified as "event SP". The first states: "Left subject", the second, by the same Ambassador states "Returned to area, 1 left again".
>
> e) August 13, 2008, 10:42am, classified as an "SP Assist" and "Event Sleep". The notations state: "Gave Free Meal and Shelter Sheets. Waited 20 min for him to pack up and leave, he kept falling back asleep. He left."

[28] The Tribunal accepted that approximately 100 interactions as described above were recorded over an 18-month period in Portal Park alone (at para. 630).

[29] The Tribunal agreed with the petitioner that asking people to leave an area was adverse treatment, whether or not the person actually left (at para. 623). It also concluded waking up someone and attempting different ways to remove them from an area, or asking someone to leave a public park or other facility customarily available to the public, is adverse treatment. The impact of adverse treatment is compounded if an ambassador "stands by", clearly conveying the message that a person's presence is unwanted (at para. 625).

[30] The City argued there was no proof that street homeless people experienced their interactions with the ambassadors as negative because no homeless individuals who had direct encounters with ambassadors testified. The Tribunal did not agree, noting that video evidence introduced by the Association showed individuals who appeared to be homeless and who did view some of their interactions as negative. The Tribunal also noted that one witness, Ms. Shavers, testified that being asked to relocate (whether by a security guard or an ambassador) had an adverse impact on her dignity and caused humiliation. The Tribunal stated at para. 629:

> [629] 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.

[31] The City also argued that the Association had positive interactions with street homeless people by offering aid. The Tribunal pointed out that adverse impact can

occur even if some interactions may have been positive. For those reasons, the Tribunal rejected the City's argument that the absence of testimony from homeless people about negative interactions led to a conclusion that the complainants had not proven adverse impact (at paras. 627 - 628, 631 - 632).

[32] Based on all of the factors discussed above, the Tribunal concluded the second step of the *prima facie* test was met and Class members had been subjected to adverse treatment.

[33] However, the Tribunal concluded the petitioner had not established that a nexus between the adverse treatment and the protected grounds existed. At para. 636 the Tribunal stated:

> [636] 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.

[34] The Tribunal referred to *Griggs v. Duke Power Co.* (1981), 401 U.S. 424; *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449 (C.H.R.T.); *Bitonti v. British Columbia (Ministry of Health) (No. 3)* (1999), 36 C.H.R.R. D/263; and *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 [*Meiorin*]. It reasoned that in each of those cases "the complainants were able to establish, as a matter of fact, a disproportionate impact on a protected group", whereas "[o]n the facts of this case, and the evidence before me, I find that disproportionate impact, in the sense found in the above cases, has not been established" (at paras. 637 - 638).

[35] The Tribunal described the deficiency in the petitioner's evidence (at paras. 643 - 645):

> [643] In the above cases, the disproportionate impact on protected groups was established largely by statistical evidence which demonstrated the

> differential impact of a standard in relation to the protected ground. However, as outlined by the Tribunal in *Radek,* and as highlighted above, it is not the case that such evidence is invariably necessary. Even in the cases discussed above, the statistical evidence did not stand alone but was supported and given meaning through the testimony of individuals as to their actual experience, and through evidence relating to the actual outcomes of the policies in question.
>
> [644] This is made clear in the Tribunal's decision in *Radek.* In *Radek,* the ejection policies at issue potentially applied to all visitors to the mall. From within that group, the Tribunal found that the policies had a particularly negative impact on those of Aboriginal descent, and those with disabilities. The Tribunal came to that finding in the absence of statistical evidence, but on the basis, in part, of a significant amount of evidence relating to specific incidents of interactions between mall security guards and members of protected groups, as outlined in more detail below. This evidence, in addition to evidence about the policies and procedures in place, the attitudes of the respondents and their employees, and expert evidence relating to the impact of such actions on protected groups, led the Tribunal to the finding that systemic discrimination had been established.
>
> [645] 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 Ambassadors Program could potentially have a discriminatory impact on protected groups: that is, could lead to adverse treatment in relation to grounds prohibited by the *Code.* What is largely absent, however, is actual evidence of such an outcome or impact.

[36] The Tribunal concluded, "there is insufficient evidence before me to establish that the actions of the Ambassadors had a disproportionate impact on members of protected groups, within the boundaries of the complaint" (at para. 656). Finally, because the Tribunal found that no case of *prima facie* discrimination had been established, it did not consider the parties' arguments on the issue of *bona fide* and reasonable justification (at para. 667).

III. DISCUSSION

A. The Standard of Review

[37] The respondents point to the length of both the hearing and the Decision to caution the Court not to scrutinize or second-guess the evidence in this case. I agree the Court's role is not to re-try the complaint, but that is not because of the length or complexity of the hearing. For one thing, the petitioner did not challenge any of the Tribunal's factual findings. But more fundamentally, my task is circumscribed by the

principles of judicial review which emphasize that a court does not sit as an appeal court of a tribunal's decision. Instead, a petition for judicial review empowers a court to search for error (taking into account the appropriate standard of review), most commonly demonstrated by a breach of procedural fairness, an error of fact, law, or mixed law and fact, an exercise of discretion or an otherwise arbitrary or irrational decision.

[38] The standard of review applicable to the Tribunal is laid out in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. The *Code* does not contain a privative clause and s. 32 of the *Code* expressly states that s. 59 of the *ATA* applies. Section 59 of the *ATA* reads, in part:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

[39] The errors alleged by the petitioner in this case are errors in the interpretation and application of the *prima facie* test which is an error of law. The standard of review is correctness.

B. The Constitutional Issue

[40] During the hearing, the petitioner switched its position from that in its pleadings, raising the *Charter* issue as an alternate instead of the primary basis for relief. This was proper. It is only if I find the Tribunal did not err that the *Charter* issue would become justiciable in this proceeding. If the petitioner intended to challenge the constitutionality of the *Code* independent of the facts of this case, that would need to be commenced by notice of claim.

[41] The *Charter* issue is appropriately being raised at first instance here because the Tribunal does not have jurisdiction to address *Charter* issues: *ATA*, s. 45. The City raises an objection that the *JRPA* is "procedural only" and does not confer

additional powers on the Court to consider whether the decision was contrary to law. The City asserts that the petitioner should not be permitted to "artificially graft the constitutional issues" onto the Court's supervisory powers under the *JRPA*.

[42] The City's position is contrary to the applicable law. The *JRPA* is procedural legislation in that it defines how to bring a judicial review before the courts. But more importantly, it implements the substantial body of administrative law that has evolved from prerogative writs which originated hundreds of years ago.

[43] The City also takes the position that, unlike the *Federal Courts Act*, R.S.C. 1985, c. F-7, the *JRPA* does not confer on a court jurisdiction to consider constitutional issues in the context of a judicial review. The City's position ignores the fundamental difference between the powers of a statutory court, such as the Federal Court, and the powers of this Court which has inherent and original jurisdiction.

[44] Moreover, the City relies on a case to support its position which is outdated on the very point the City submits the case stands for. The City also misinterprets the case. *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, is one case in a trilogy (the other two were *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, and *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5) which first articulated a test to determine whether statutory decision makers have jurisdiction to address constitutional issues. The discussion in *Tétrault-Gadoury* on which the City relies, describes the Federal Court, a federal statutory tribunal. It has no application to the inherent powers of this Court. Lastly, the test from that trilogy was overtaken by the SCC's decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54.

[45] Therefore, there is nothing improper in the manner in which the petitioner has raised the constitutional issue. That it was brought properly, however, does not mean that it would be appropriate to decide it. The Attorney General's position is that the record before me is insufficient to embark upon a thorough consideration of

whether s. 8 of the *Code* violates s. 15 of the *Charter*, and if so, if that violation is demonstrably justified in accordance with s. 1. I agree. It would be premature for me to consider the *Charter* issue in these Reasons even if it became necessary to address the alternate claim. A judicial review is typically restricted to the record before the Tribunal so, naturally, no party adduced new evidence in this case. That may be very problematic, especially for the analysis that needs to be done under s. 1 of the *Charter*.

C. The Law on Discrimination

1. Principles of Equality Under s. 15 of the Charter

[46] The dispute amongst the parties involves a disagreement about what evidence is needed to establish a *prima facie* case of discrimination contrary to s. 8 of the *Code*. They agree, however, on the general legal principles of equality which I now discuss.

[47] Justice McIntyre's description of equality in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, remains the starting point for any analysis of discrimination under the *Charter* or human rights law. The SCC characterized equality as "an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition" (at 164). Ultimately, equality is a comparative concept, although the strict necessity to define a comparator group as a step in the analysis has waned in the evolution of equality law. Justice McIntyre agreed with the sentiments of Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 (1950), who said: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals" (at 164).

[48] Instead, the main consideration "must be the impact of the law on the individual or group concerned" while "[r]ecognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law" (at 165). To achieve equality "there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another" (at 165).

[49] This formulation corrected the approach adopted by the BC Court of Appeal's previous decision in *Andrews v. Law Society of British Columbia* (1986), 2 B.C.L.R. (2d) 305 (C.A.). McLachlan J.A. speaking for the Court of Appeal, had held the essential element of equality was that those "similarly situated be similarly treated" while those "differently situated be differently treated" (at 311). The SCC described this approach as "seriously deficient" because it failed to include a consideration of the nature of the law in issue (at 166). Justice McIntyre pointed out that the Court of Appeal's approach rendered the guarantee of equality toothless, as it was under the *Canadian Bill of Rights*, citing by example *R. v. Gonzales* (1962),132 C.C.C. 237 (B.C.C.A.), and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. He said this approach "[i]f it were to be applied literally … could be used to justify the Nuremberg laws of Adolf Hitler" because "[s]imilar treatment was contemplated for all Jews" (at 166 - 167).

[50] In defining discrimination under the *Charter*, Justice McIntyre referred to human rights case law and adopted the approach in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (referred to as the "*Action Travail*" case). At pages 174 - 175 of *Andrews*, Justice McIntyre quoted Chief Justice Dickson with approval from *Action Travail*:

> … Dickson C.J. in giving the judgment of the Court said, at pp. 1138-39:
>
> > …
> >
> > Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .
> >
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. 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.

[51] In many ways, the basic approach to the guarantee of equality in s. 15 has not departed from these principles over the years, even though the legal test articulated by the SCC has undergone various refinements and iterations over the years. Fortunately, the SCC appears to have settled on a simplified approach as set out in *R. v. Kapp*, 2008 SCC 41, and *Withler v. Canada (Attorney General*), 2011 SCC 12.

[52] To establish a claim under s. 15(1) of the *Charter*, a claimant must prove on a balance of probabilities that the law or action: (a) creates a distinction based on enumerated or analogous grounds; and (b) that distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Withler* at para. 30). In *Quebec (Attorney General) v. A*., 2013 SCC 5, writing for the majority on the approach to s. 15, Justice Abella stated at paras. 325 - 326:

> [325] In referring to prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. *Withler* is clear that "[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" (para. 2 (emphasis added)). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate, …
>
> [326] Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since "the very exclusion of the disadvantaged group ... fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'" (*Action Travail*, at p. 1139). …

[53] This was reiterated in *Withler*, where the Court said the following (para. 37): "[w]hether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping,

the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them."

2. Discrimination under the Code

[54] Although rooted in very different instruments, there is a symbiotic relationship between the concepts of equality and discrimination under the *Code* and the *Charter*. As a statutory standard, the test for establishing discrimination under s. 8 of the *Code* has features distinct from the s. 15 case law.

[55] Section 8(1) of the *Code* reads as follows:

> 8 (1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

[56] To prove discrimination under the *Code*, a claimant must establish a *prima facie* case of discrimination. If the claimant does so, the burden switches to the respondent to establish a *bona fide* and reasonable justification: *Moore v. British Columbia (Education),* 2012 SCC 61 at para. 33. The parties all agree that establishing *prima facie* discrimination is a three step test and that claimants have the evidentiary and legal burden. The three steps described at para. 33 of *Moore* are:

a. they have (a) characteristic(s) protected from discrimination under the *Code*;

b. they experienced an adverse impact with respect to the service identified in the complaint; and

c. the protected characteristic was a factor in the adverse impact.

[57] This is worded differently than the test articulated by the Tribunal. At the third step, the Tribunal said there must be proof of a connection or link between the

protected characteristic and adverse impact (at para. 588). At para. 585 of the Decision, the Tribunal relied on the following passage from *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada), Local 111*, 2010 BCCA 447 at para. 61 [*Coast Mountain*]:

> In order to demonstrate *prima facie* systemic discrimination, it is necessary to show that a group of persons sharing a protected characteristic has received adverse treatment and that there is a causal connection or link between the protected characteristic and the adverse treatment.

[58] However, the SCC's articulation of the test in *Moore*, decided two years after *Coast Mountain*, evinces a less strict standard than that in *Coast Mountain* and the Decision: the personal characteristic must be "a factor" in the adverse impact. To the extent the two tests differ, the SCC's articulation must govern.

[59] In my view, there is a significant difference between proving personal characteristics are "causally" connected to adverse treatment versus them being "a factor" in the adverse treatment. Requiring claimants to prove a causative connection elevates the legal burden on the claimant beyond what the SCC stated in *Moore* and would be inconsistent with the equality jurisprudence under the *Charter*.

[60] The essence of discrimination is the disproportionate impact of a law or activity and, therefore, the focus of the legal test must also be on effects. The definitions of the *prima facie* test in both *Coast Mountain* and *Moore* do require claimants to demonstrate a relationship between the personal characteristics and adverse treatment. But proving a causative connection imports a "cause and effect" analysis; the claimant would need to establish that the protected ground was the factor that caused the adverse treatment, rather than simply a factor. This neglects the practical reality of situations in which discrimination is found. Adverse impacts are often the result of a constellation of factors, where the protected grounds are but one factor, but a factor nonetheless. The test in *Moore* properly recognizes this distinction. Furthermore, undertaking a "cause and effect" analysis could improperly focus on the design or intention underlying the actions or system at issue. As

discussed below, this would be a further source of potential error, as one does not need to prove an intention to discrimination to find a violation of the *Code*.

[61] As noted above, the Tribunal concluded that members of the Class (the street homeless) did share characteristics protected from discrimination under the *Code* and were subjected to adverse treatment pursuant to the Program. But the Tribunal concluded there was no evidence to establish a connection or nexus between the adverse treatment and the protected grounds in the *Code* (at para. 636).

[62] No party challenges the Tribunal's conclusions that the petitioner has proven the first two steps of the *prima facie* test. However, the petitioner says the Tribunal erred at the third and final step of the test.

[63] Where *prima facie* discrimination is established, the analysis under the *Code* turns to the respondents' burden of proving a *bona fide* and reasonable justification. To meet this burden the respondents must satisfy the three part test articulated in *Meiorin* at para. 54.

IV. ISSUES ON JUDICIAL REVIEW

[64] The issue before me on judicial review is whether the Tribunal erred in dismissing the complaint. The petitioner says the Tribunal erred at the third and final step of the *prima facie* test of discrimination outlined above. In its written submissions, the petitioner alleges three errors:

> (a) The Tribunal fell into error by importing an intention requirement that the complainants, who were asserting that homeless persons were systemically denied access to public facilities and were discriminated against in relation to public facilities, were required in law to establish that the respondents "systemically targeted" (para. 655) or "selectively targeted" (para. 648) the complainant group on the basis of the underlying characteristics of Aboriginal ancestry or disability. …
>
> (b) The Tribunal fell into error by apparently importing a requirement that one or more members of the affected group testify as to their subjective adverse experiences;
>
> (c) The Tribunal erred by considering only "discrimination … in respect of" public facilities under s. 8(1)(b) and by failing to consider "denial" of access to public facilities under s. 8(1)(a).

[65] These questions are all properly characterized as questions of law and are, therefore, subject to a review on a standard of correctness, pursuant to s. 59(1) of the *ATA*.

[66] In my view, the first two alleged errors raise a common issue: did the Tribunal err when it concluded it needed, and did not have, specific evidence to establish the third step of the *prima facie* test? This common issue is the crux of the judicial review.

[67] In the course of this analysis I will address the following subsidiary issues:

A. What evidence is required to meet the *prima facie* test?
B. Did the Tribunal err in its characterization of the comparative analysis?
C. Did the Tribunal err by importing an intention requirement into the third step of the test?
D. Is the Tribunal's analysis on the third step internally consistent?

[68] I also address the importance of context in a decision such as this one. Lastly, I address the remaining issues raised by the petitioner and the City.

V. ANALYSIS

A. What Evidence is Required to Meet the Prima Facie Test?

[69] The parties referred me to a number of cases, largely by way of analogy, to show what evidence is necessary to prove a *prima facie* case. In my view, the essential elements of the legal test are best distilled from two cases, one of which both the petitioner and respondents relied upon. I also refer to a few other cases.

Moore v. British Columbia (Education), 2012 SCC 61

[70] In *Moore*, the SCC upheld a finding of the BC Human Rights Tribunal that Jeffrey Moore, a child with dyslexia, had been discriminated against because of his disability and had been denied a service customarily available to the public, contrary to s. 8 of the *Code*. Due to budgetary constraints, Jeffrey's school district had decided to close the District Diagnostic Centre, which would have provided the

intensive remediation Jeffrey needed in order to learn to read. As a result, Jeffrey's parents enrolled him in a private school so that he could receive the necessary instruction no longer available through public school.

[71] In its reasons, the SCC stated at para. 33 of *Moore* that the third step of the *prima facie* test requires that "the protected characteristic was a factor in the adverse impact" (emphasis added). In my view, the Tribunal mis-stated this legal test in the Decision by requiring there be evidence 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" (at paras. 633 - 634, emphasis added). This creates a stricter evidentiary standard and constitutes a legal error. This might be seen merely as a difference in the nuance of the third step of the *prima facie* test, but the difference is important and can have a dramatic impact.

[72] It is critical to understand what constitutes being "a factor" between adverse treatment and protected characteristics. The following passage from *Moore* flushes this out (at para. 34):

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

[73] In that case, the answer was informed by the mandate and objectives of public education in British Columbia. That mandate and those objectives were established by legislative provisions and various "aspirational" policy documents (*Moore* at para. 35). Ultimately, the test articulated by the SCC at para. 36 was as follows:

> [36] … [I]f the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied *meaningful* access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination. [Emphasis in original.]

[74] In *Moore*, there was no difference between the evidence that satisfied the first two steps of the *prima facie* discrimination test and the third. Jeffrey Moore had a

disability (dyslexia) and the adverse impact alleged in his claim was the closure of the Diagnostic Centre. With respect to Jeffrey's disability being a factor in the adverse impact on him, the SCC stated that "any adverse impact he suffered is related to his membership in this group" (at para. 34). The SCC did not find that there was a connection, nexus or link between the closure of the Diagnostic Centre and Jeffery's disability; instead, the SCC specifically acknowledged the Tribunal's finding that the District closed the Diagnostic Centre for "exclusively financial" reasons (at para. 46). In other words, *prima facie* discrimination was proven by the uncontested facts that met the first two steps of *prima facie* discrimination and founded the complaint. Nothing more or separate was needed at the third stage of the test.

[75] This is because the SCC held that the Tribunal (whose decision a majority of the British Columbia Court of Appeal had overturned) had correctly characterized the complaint. The Tribunal decided the relevant "service" customarily available to the public was general public education. The majority of the Court of Appeal erroneously defined the service as the provision of "special education". Because there was no evidence to demonstrate that the claimant had been disproportionately impacted when compared to other students who required special education, the government argued the claimant had not been discriminated against. This argument prevailed in the Court of Appeal but the SCC found this approach to be too narrow. The Supreme Court held at paras. 29 - 30 that:

> [29] … Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.
>
> [30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. <u>It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.</u>
>
> [Emphasis added.]

[76] Thus, the finding of discrimination in *Moore* turned on the proper characterization of both the nature of the complaint and the scope and nature of the challenged law or action. The same evidence was relied upon to meet both aspects. There was no separate or "other" evidence used to establish the second and third steps of the *prima facie* test.

[77] In my view, the Tribunal's approach to the *prima facie* test in this case is inconsistent with the SCC's analysis in *Moore* because it narrows the analysis to only those people impacted by the Program, rather than all members of the public who have unrestricted use and access to public space in downtown Vancouver.

[78] The Tribunal's approach to the evidentiary requirements under the *prima facie* test also runs counter to the majority of the SCC in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14. That decision concerned the interpretation of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. However, the majority's reasons at paras. 33 and 49 are equally applicable to BC:

> The most important characteristic of the 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.
>
> …
>
> … 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.
>
> [Internal citations omitted. Emphasis added.]

[79] This emphasis on a broad and liberal approach is particularly relevant to the legal issue before me.

Radek v. Henderson Development (Canada) Ltd., 2005 BCHRT 302

[80] Both the petitioner and respondents relied on *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302. The facts are similar to this case in that "removal" of people from publicly accessible space was the focus of the complaint.

[81] *Radek* concerned the policies and actions of security guards working at the International Village shopping mall in downtown Vancouver. These policies included ejection polices that instructed security guards to follow and, in some instances, eject from the mall "suspicious people and vagrants" that the policies suggested could be identified by looking for individuals who, among other things, had ripped or dirty clothing, open sores and wounds, red eyes or bad body odour, or who were talking to themselves, acting intoxicated or stoned or begging for money or cigarettes on the street (at para. 126). The claimant before the Tribunal in that case, Gladys Radek, alleged that she was discriminated against with regard to a service customarily available to the public on the basis of her race, colour, ancestry and physical disability, contrary to s. 8 of the *Code*. She also alleged that the actions of the respondents gave rise to systemic discrimination. At paras. 502 - 513 of *Radek*, the Tribunal discussed systemic discrimination, quoting from *Action Travail*, before turning to an analysis of how systemic discrimination is proven and, specifically, what evidence is required. The Tribunal in *Radek* found that both complaints were substantiated on the evidence before it.

[82] The allegation was that a policy of "monitoring" patrons of a mall discriminated against people of Aboriginal ancestry and people with mental or physical disabilities. Several people with those characteristics testified that they had experienced treatment that the Tribunal accepted was adverse.

[83] The mall owners argued that since there was no statistical evidence of who entered the mall, the claimants had not proven that "a disproportionate number of Aboriginal or disabled people were being ejected from the mall"; therefore, systemic discrimination was not proven (at para. 502). To put it another way, the mall owners

argued there was no evidence that the adverse treatment was both linked to the prohibited grounds of discrimination under the *Code* and disproportionately impacting people who possessed characteristics falling under the same grounds.

[84] The Tribunal in *Radek* acknowledged that no statistical evidence was available (at para. 503). It is in that context that the Tribunal stated at para. 504:

> [504] In my view, however, the absence of reliable statistical evidence of disproportionate result is not fatal to a claim of systemic discrimination. Such evidence, while it may be extremely helpful where it is available, is not an essential element of proof of systemic discrimination.

[85] The respondents in the case before me argue that the statement that statistical evidence "may be" helpful but is not necessary means that statistical evidence is not sufficient to establish both adverse impact and a nexus. In *Radek*, the Tribunal addressed that position at para. 509:

> [509] In my view, the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the *Code* are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants. In my view, to accept the respondents' arguments with respect to the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible. [Emphasis added.]

[86] At paras. 510 - 511, the Tribunal in *Radek* referred to the SCC's comments in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at paras. 77 and 80:

> [510] In this regard, I have found the following comments of the Supreme Court in *Law* with respect to the nature of the evidentiary burden on claimants in s. 15 cases of assistance:
>
> > 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) …
> >
> > Second, it is equally important to emphasize that the requirement that a claimant establish a s. 15(1) infringement in this purposive sense does not entail a requirement that the claimant prove any matters which cannot reasonably be expected to be within his or her knowledge. … (at paras. 77-80) (emphasis added)
>
> [511] While that comment was made in the context of considering the evidence necessary to establish injury to human dignity, I consider it equally applicable in the present context. Statistical evidence of disproportionate effect will be solely within a respondent's knowledge and control. A complainant could not possibly be expected to be able to produce such statistics unless the respondent collected and maintained the necessary data in the first place. To create an absolute requirement of statistical evidence in all cases of alleged systemic discrimination would be to put complainants at the mercy of the record-keeping choices of respondents.
>
> [Emphasis in original.]

[87] *Radek* presents a mirror image of this case: the Tribunal in that case had plenty of evidence from individuals but "absolutely no evidence of the racial makeup of the people entering International Village" so it was "impossible to determine if Aboriginal people were ejected from the mall in numbers disproportionate to the rate at which they visited the mall" (at para. 512). Nevertheless, the Tribunal decided it was unnecessary to prove that the individuals' experiences were disproportionate; "discriminatory effect can also be proven in other ways" (at para. 512). The Tribunal explained at para. 513:

> [513] … Rather, to return to first principles, what is necessary is evidence of "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics …": *Action Travail des Femmes* at para. 34. Statistics may be a "signal" of such effects, but they are not necessary in every case. The signal should not be confused with the thing signified. The evidence as a whole should be considered to determine if practices or attitudes are present which have the effect of limiting persons' opportunities due to their membership in one or more protected groups. In this regard, evidence about the attitudes of the respondents and their employees, evidence of the written and unwritten policies of the respondents, and evidence of the respondents' actual practices, both generally and in particular circumstances, may all be relevant to, and probative of, the question of whether systemic discrimination is present.

[88] At paras. 545 - 603 of *Radek*, the Tribunal reviewed the impact of "site post orders" (which are neutral on their face and aimed at behaviours irrespective of personal characteristics) on Aboriginal people and people with disabilities. The Tribunal relied on the evidence of Dr. Miller, which in that case appears to be very similar to what was presented to the Tribunal in this case (at paras. 132 - 142, 545, 549, 556, 563 - 566). The Tribunal concluded at para. 606 of *Radek*:

> [606] To be singled out for treatment of the kind described in this decision, because of one's race or disability or a combination of those factors, constitutes a clear violation of the human dignity of all those so affected. The opportunity to walk into a shopping mall and buy a cup of coffee, go for an inexpensive meal, use a bank machine, or simply pass through on the way to public transportation, is one which the majority of Canadians take for granted. The practices of the respondents had the effect of systematically denying the Aboriginal and disabled people of the Downtown Eastside that opportunity. It made them strangers in their own community. In so doing, the respondents impeded Aboriginal and disabled people's "full and free participation in the economic, social, political and cultural life of British Columbia" and failed to "promote a climate of understanding and mutual respect where all are equal in dignity and rights", contrary to the purposes set out in s. 3 of the *Code*. This denial of equal opportunity on the basis of stereotypes about Aboriginal and disabled people constitutes the antithesis of respect for human dignity.

[89] In the present case, the Tribunal received statistical evidence about the demographics of the street homeless population, but no direct evidence from an individual of Aboriginal descent or with a physical or mental disability who was adversely affected by the Program. Although the Association's written submissions do emphasize the lack of such testimony, it did not take the position that the third step absolutely requires such testimony. I agree. It would be remarkably insensitive to the facts and underlying social context of this particular case to conclude the claim failed only because of the unavailability of street homeless witnesses. However, the Association submits that the Tribunal was correct to require "some other" evidence; statistics alone are not enough. The Association argued that *Chapdelaine* and *Meiorin* demonstrate that something more is needed to prove a *prima facie* case.

[90] *Chapdelaine* was a case where a height requirement for applicants for pilot positions was found to be discriminatory because women were much less likely to meet the standard. Similarly, in *Meiorin*, the SCC found an aerobic fitness standard

as a condition of being hired as a forest fire fighter was discriminatory because it had a disproportionate impact on women.

[91] The Association argues, and the Tribunal agreed, that in both cases there was evidence in addition to and different from the statistical analysis about the makeup of the class and adverse impact. The position of the Association is that the statistical evidence did not stand alone in any of the cases; it was supported and given meaning through the testimony of individuals about their experience or evidence relating to actual outcomes of the policies.

[92] However, in my view, the Association's and Tribunal's reading of both *Chapdelaine* and *Meiorin* is incorrect. In *Chapdelaine*, the Canadian Human Rights Tribunal reached a finding of discrimination relying on statistical data about how the height requirement for employment impacted women versus men (at D/4454):

> As the Tribunal has already observed above (at page 10), the effect of the Respondent's height policy, although perhaps "on its face neutral" in its application, operated to deprive 82% of all Canadian women and 11% of all Canadian men between the ages of 20 and 29 from the opportunity for employment as a pilot. Considerably more women than men were adversely affected by the Respondent's height policy. In this context, it may be said that the policy affected women "differently from" men …
>
> The Tribunal concludes therefore that the Complainants have established a prima facie case of discrimination based on sex. Accepting this, the next question to determine is whether or not the Respondent was justified in imposing its height policy to pilot applicants between 1978 and 1980.

[93] Although the Tribunal had before it the direct evidence of two complainants, evidence of their specific situation was not what was relied on at the third stage of the *prima facie* analysis: it was the statistical evidence. The fact that the two complainants were less than 5'6" tall did not prove the adverse impact they experienced was linked to their sex, rather statistics on the heights of females versus males established this link.

[94] Similarly, in *Meiorin*, the SCC found that the aerobic standard required for employment with the BC Forest Fire Service was *prima facie* discriminatory, based on the arbitrator's finding that "because of their generally lower aerobic capacity,

most women are adversely affected by the high aerobic standard" (at para. 69). At the first instance, the arbitrator's decision was based only on statistical evidence, as shown by para. 172 of his decision, indexed as (1996) 45 C.L.A.S. 158, 58 L.A.C. (4th) 159:

> In my judgment, the test does have a discriminatory effect on women because women are less able to do aerobic work than men. That is because of different physiological characteristics when women are compared with men. Being, as a group, physiologically less able to do aerobic work, the evidence is persuasive and not really challenged by the employer, that most women have a lower VO_2 max than most men. There is no dispute on the evidence that government statistics have established that male applicants have a pass rate of between 65% to 70% on the initial attack fitness test as compared to 35% for women. As a group, therefore, women are clearly adversely effected when the employer set the 50 VO_2 max standard which, although neutral on its face, has a discriminatory effect on women, one of whom was the grievor.

[95] Here again nothing beyond the statistical relationship of aerobic capacity to sex was needed to prove that a person's sex was a factor in experiencing the adverse impact. Neither *Chapdelaine* nor *Meiorin* required "something more" to satisfy the nexus requirement of the *prima facie* test. Both relied on statistical evidence.

[96] In my view, the Tribunal misapplied the law by applying an unduly strict standard of evidence to the third stage of the *prima facie* test for discrimination, and it misapplied *Chapdelaine* and *Meiorin*.

[97] The Association claims the evidence accepted by the Tribunal in this case for the first two steps of the *prima facie* test do not establish a nexus or connection between the adverse treatment and the protected grounds. Leaving aside that the test only requires that the protected grounds be "a factor", the reasoning in *Radek* also makes clear that other sources of evidence and methods of proof are acceptable, such as inferences drawn from facts, judicial notice and common sense. This was affirmed by the Court of Appeal in *James v. Silver Park Campsites Ltd.*, 2013 BCCA 292 at para. 37. In my view, in concluding there was no evidence to prove the third step, the Tribunal applied the wrong legal test, thus falling into error.

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

[99] Dr. Miller opined that the Program's training manual emphasized ambassadors must be "role models" and "good citizens" evidenced by certain attributes such as being clean shaven, using deodorants, having fresh breath, wearing pressed and odour-free clothing, having an appealing personality, positive attitude, neat appearance and high school diploma or equivalent. Equating those attributes with good citizenship sent the message that "street-entrenched people, who are unable to attain the standards, [are] something less than 'good citizens'."

[100] Dr. Miller also commented on parts of the manual that directed ambassadors to interact with as many street people as possible using the art of "charismatic persuasion to encourage compliance with city by-laws and program standards set down by the Program and DVBIA" and to move street people along. He pointed out that many incident reports referred to the people with whom ambassadors interacted as "suspects". In the same vein, the manual required ambassadors to assist with "surveillance and intelligence" and look for "suspicious activity".

[101] In Dr. Miller's opinion, these directions hold significant implications for Aboriginal people and for people with disabilities for a number of reasons. Aboriginal people constitute about one third of the homeless population and even some Aboriginal people who are not homeless and who live in the city of Vancouver may be the "targets of Ambassador activities". At para. 524 of the Decision, the Tribunal summarized some of Dr. Miller's evidence on this point:

> The notion of suspiciousness creates the grounds for biased, ethnocentric, and stereotyped interpretations. Further, the vagueness and broad interpretive range of the guidelines creates the conditions under which one

> might reasonably expect Aboriginal peoples to be differentially engaged by Ambassadors. Dr. Miller writes that it is reasonable to expect that the Ambassadors will actively attempt to perform their job: that is, exclude some of those wishing to enter and use city resources, and to do so in light of existing stereotypes regarding Aboriginal peoples.

[102] The Tribunal noted that Dr. Miller explained how the ambassadors' practice of "meeting and greeting" seemed benign but would not be seen that way by Aboriginals:

> [534] In his direct examination, Dr. Miller expanded on some of the themes outlined in his report. For example, in response to a question relating to the impact of the interaction between the Ambassadors and Aboriginal individuals, he notes that the Ambassador practice of "meeting and greeting" may be thought of as benign by the Ambassadors, but it would not be regarded that way by Aboriginals. They are aware that they are being surveyed and regarded negatively, and that they are being singled out for attention for that reason.
>
> [535] In this regard, Dr. Miller was directed to an excerpt from the Training Manual entitled "Organizing your Message":
>
> > Another important aspect of information sequencing is when dealing with street people. Do not ask a person to move from private property first, then offer them information about free resources and alternate places to go. First greet them, offer them information, and lastly ask them to move after you've given them options. It looks bad to the public and will be more likely to anger the street person if you immediately tell them to go abruptly.
> >
> > Remember, if you anger the street people regularly they will just be harder to move along the next day. You will have to deal with the same people over and over again. So the more effectively you communicate with them, the easier they will be to deal with the following times.
>
> [536] Dr. Miller noted that, for Aboriginals, the provision of the "options" outlined is just another form of intimidation, and would not be regarded as benign or favourable. Again, they are aware that someone in uniform is monitoring them, and using the provision of information as a tool. Further, repeatedly being moved by the same individual with the same message is a source of frustration and is identified as intimidation and surveillance.

[103] Dr. Miller also reviewed the affidavits prepared by Pivot interns. Those interns analyzed electronic data that ambassadors recorded about their interactions with people. He concluded that data confirmed and provided support for his conclusions. For instance, one affiant counted 518 removals of "SPs", "DUs", "PHs" and

squeegee people from public areas and a great number of removals of “sleepers” (at para. 537). Earlier in the Decision, the Tribunal described that these abbreviations identify street persons, drug users and panhandlers (at paras. 182 and 194). The words “crazy”, “smelly”, “deaf”, “native “and “filthy” were used to describe some individuals with whom the ambassadors interacted.

[104] The bottom line of Dr. Miller’s evidence is that the behaviours on which the Program focussed are behaviours that co-exist with members of the Class. It would be unreasonable and naïve to suggest that sleeping on public property or aggressive panhandling (or other behaviours thought to contravene the *Safe Streets Act*, S.B.C. 2004, c. 75, or the *Trespass Act*, R.S.B.C. 1996, c. 46) are behaviours that any member of the public is likely to engage in. It is understood that such behaviours are associated with people that we assume are street homeless.

[105] In its reasons at paras. 645 and 660, the Tribunal found:

> [645] … [T]he evidence before me establishes that, given the demographic composition of the street homeless population, the Ambassadors Program could potentially have a discriminatory impact on protected groups: that is, could lead to adverse treatment in relation to grounds prohibited by the Code. What is largely absent, however, is actual evidence of such an outcome or impact. …
>
> …
>
> [660] … I note that the evidence in relation to Portal Park raises the potential that the Ambassadors were not acting solely on the basis of illegal behaviour, but were also targeting certain types of individuals. I also note that the removal of individuals under the purported authority of Authorizations is, intuitively, much more likely to occur with respect to individuals who are or appear to be members of the Class than with other members of the public. …
>
> [Emphasis added.]

[106] Despite these observations, the Tribunal found insufficient evidence to prove a *prima facie* case of discrimination. In my view, not only did the Tribunal err in setting a standard of proof for *prima facie* discrimination that was too onerous, it also erred in concluding there was no evidence to meet the third step.

[107] Remembering it is important that “evidentiary requirements … be sensitive to the nature of the evidence likely to be available” (*Radek* at para. 509), the Tribunal

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

[108] Whether employing common sense or drawing a reasonable inference, the petitioners have proven the third step in the *prima facie* test for discrimination. The findings of fact made by the Tribunal about the activities that constituted adverse treatment (for example, waking up individuals sleeping in public parks and next to buildings) combined with the demographics of the street homeless population viewed in the context of the data collected by ambassadors and Dr. Miller's evidence, does demonstrate that the personal characteristics of Class members was a factor in their suffering adverse treatment. There is no need for "something more".

B. Did the Tribunal Err in its Characterization of the Comparative Analysis?

[109] In this case, the Tribunal made a finding that the Class consisted of a skewed percentage of members of groups whose characteristics are protected from discrimination on the grounds set out in the *Code,* when compared to the general population. The Tribunal said the claim failed because it needed, but did not have, evidence that within the Class, those members who had characteristics aligned with protected grounds under the *Code* were disproportionally impacted. But that evidence is not a necessary element to proving *prima facie* discrimination.

[110] In my view, the Tribunal has made the same error that the majority of the Court of Appeal made in *Moore*. At para. 648 of the Decision the Tribunal stated:

> [648] In this case, in contrast, there is no evidence that the actions of the Ambassadors selectively target individuals of Aboriginal ancestry, viewing them as suspicious. For example, there is no evidence that Ambassadors are more likely to attempt removals of Aboriginal, as opposed to non-Aboriginal, individuals, in similar circumstances. [Emphasis added.]

[111] This language of "in similar circumstances" is telling. It indicates that the Tribunal viewed the relevant comparison as between (i) Aboriginal Class members and Class members with physical or mental disabilities, and (ii) non-Aboriginal Class members and Class members without physical or mental disabilities, despite the fact that public spaces are meant to be available to all of society. This is akin to the error made by the majority in the Court of Appeal in *Moore*, comparing children with dyslexia who are receiving special education to children without dyslexia who are receiving special education, despite the fact that public education is meant to be available to all children.

[112] I find the Tribunal's reliance on *Chapdelaine* and *Meiorin* is based on the same flawed comparisons. In *Chapdelaine*, evidence was presented that 82% of women were less than 5' 6" tall (the minimum height to apply to be a pilot) while only 11% of men did not meet that standard. The evidence also showed that of 525 pilots hired, only five were women. In *Meiorin*, 65% to 70% of male applicants could meet the aerobic standard whereas only 35% of female applicants could do so. Of the 800 to 900 forest fire fighters employed by the government, only 100 to 150 were female. The Tribunal summarized its perception of the nexus in those cases as follows at para. 643:

> [643] In the above cases, the disproportionate impact on protected groups was established largely by statistical evidence which demonstrated the differential impact of a standard in relation to the protected ground.

[113] The Association said that in *Chapdelaine* and *Meiorin*, there were two separate bodies of evidence adduced to establish "the differential impact" on women: (i) evidence to show an adverse impact on women (the statistics about the

percentage of men and women that can meet the minimum aerobic capacity and height requirement); and (ii) evidence that demonstrated the impact did occur (employment records that showed the proportion of men and women pilots and fire fighters). The Association says that both bodies of evidence were needed to meet the *prima facie* test of discrimination.

[114] When applying that analysis to the facts of this case, the Tribunal concluded it had evidence that a disproportionate percentage of Aboriginal people and people with mental or physical disabilities were among the members of the Class as compared to the general population, but that evidence did not demonstrate the differential impact of the Program in relation to race, ancestry or disability, the prohibited grounds.

[115] But if the Tribunal's analysis is applied to the facts in *Chapdelaine*, it would have produced the opposite result. It is clear that the Tribunal in that case treated both the hiring and height evidence as statistical evidence of disproportionate impact. It then reasonably inferred that the impact was "related to" sex. There was no evidence to show that the percentage of women hired was disproportionate to the percentage of women applicants. In other words, there was no "other" specific evidence of a nexus between the protected grounds and the adverse treatment. The Tribunal was able to draw a reasonable inference on the basis of the available statistical evidence.

[116] That was the correct approach. The comparator groups cannot be defined by the adverse treatment alleged to differently impact people whose characteristics fall within the grounds of prohibited discrimination. That is the lesson from *Moore*. The SCC said that the appropriate comparison was not between two groups (dyslexic and non-dyslexic) within those children who needed special education; it was between dyslexic children as compared to the general public school population.

[117] Similarly, *Chapdelaine* and *Meiorin* did not focus on membership within the group of applicants (proportion of women hired as compared to proportion of women who applied); it was between those who were hired and the general population. Had

the reasoning in *Meiorin* and *Chapdelaine* compared two populations within the group of applicants, that would have resulted in the situation the prohibition of preventing systemic discrimination addresses, as was described in *Action Travail* at 1139 and 1141:

> … [S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged. …
>
> …
>
> … It bears repeating that the Tribunal had found that at the end of 1981 only 0.7 per cent of blue-collar jobs in the St. Lawrence Region of Canadian National were held by women. The Tribunal found furthermore that the small number of women in non-traditional jobs tended to perpetuate exclusion and, in effect, to cause additional discrimination. …
>
> [Emphasis added.]

[118] I conclude that, in this case, the proper comparison is between Class members who experience adverse treatment and the general population which has unrestricted access to downtown Vancouver. The Tribunal erred by mischaracterizing the analysis as a comparison between Class members falling within groups whose characteristics are protected by the grounds listed in the *Code*, and Class members outside the protected grounds at issue. This error is an error of law and vitiates the Tribunal's conclusion that *prima facie* discrimination had not been proven.

[119] I turn next to the issue of whether the Tribunal's analysis had the effect of importing an element of intention into the analysis.

C. Did the Tribunal Err by Importing an Intention Requirement?

[120] The petitioner submits that the Tribunal erred by importing an element of intention into the *prima facie* test by requiring the complainants to establish that the

respondents “systemically targeted” (at para. 655) or “selectively target[ed]” (at para. 648) Aboriginal people or people with mental or physical disabilities. Section 2 of the *Code* explicitly states that an intention to discriminate is not required to find a violation of the *Code*. This has consistently been a feature of discrimination jurisprudence since its inception.

[121] The Association and the City claim the Program and the actions of the Ambassadors are targeted at behaviours and, therefore, the Program cannot be discriminatory. The Association emphasizes that the Tribunal did not find that the ambassadors “identify particular individuals as undesirable” (at para. 591) and similarly did not find “that the actions of Ambassadors selectively target[ed] individuals of Aboriginal ancestry” (at para. 648).

[122] I understand and accept that the Association’s intentions with the Program were not intentionally discriminatory. But that fact is of minimal, if any, relevance. The fact that an intent to discriminate is unnecessary to prove discrimination also means that the lack of intent to discriminate does not eliminate the possibility of discrimination occurring.

[123] In this case, the use of the phrases “systemically targeted” and “selectively targeted” is unfortunate. Targeting implies a conscious decision to “aim” at something or intent to affect certain things. The Association does not dispute that it “targeted” certain behaviours and, thus, the language of the Decision is consistent with the Association’s position. For reasons discussed above, I have found that the Tribunal erred by misstating and misapplying the correct legal test for *prima facie* discrimination. In my view, the use of words such as “targeting” is simply another manifestation of the same error. The discrimination analysis in this case must be focused on the impact of the Program, not on its intent, design or goals. In my view, the Tribunal’s error in requiring stricter evidence of disproportionate impact resulted in it focussing on the wrong aspect of the Program. This had the effect of importing an element of intention into the analysis which is an error of law.

D. Is the Tribunal's Analysis Internally Consistent?

[124] Finally, there is some incongruity in the Decision between the finding that members of the Class suffered adverse treatment and the conclusion that there was no evidence to support a finding that the adverse impact disproportionately affected Class members.

[125] The Tribunal accepted all of the following assertions:

a. There are proportionately more people with protected characteristics among the Class than the general population.

b. A high proportion of removals occurred when ambassadors were trying to seek compliance with the *Safe Streets Act*, the *Trespass Act* or the *Criminal Code*, R.S.C. 1985, c. C-46.

c. Ambassadors were under the mistaken understanding that the *Trespass Act* authorized them to seek removal of anyone within one meter of the exterior wall of a building (at para. 591).

d. There was no law in place to justify the actions of the ambassadors in waking up and removing sleepers from Portal Park (at para. 591).

[126] These findings establish that removals sometimes took place without a perceived violation of the legislation (at para. 591). In my view, the only reasonable inference from these facts is that those people's behaviour was <u>not</u> a factor in the ambassadors interacting with them. That creates a high probability that people were being removed because of personal characteristics. In my view, even under the legal test articulated by the Tribunal (which as I have discussed, is a stricter articulation of the *prima facie* test than *Moore* requires), this may have been sufficient to meet the third step. It is certainly difficult to reconcile those findings of fact with the Tribunal's conclusion that the *prima facie* test had not been satisfied.

E. The Importance of Context

[127] It is clear from the case law that discrimination must be analyzed contextually (*Radek* at para. 490). What that means in practice, rather than mere invocation of

the phrase, is that the true circumstances of the parties before the Tribunal must be considered in applying the legal test to the facts.

[128] The Tribunal's approach to this case did not give sufficient weight to the social context of this case. The people on whose behalf the claim was brought are some of the most marginalized, vulnerable and poor members of society. This is not persuasive or determinative to any legal issue but it should be taken into account when conducting the legal analysis, particularly assessing the nature and impact of the Program and the nature of the adverse impact. It is of more relevance when determining what evidence is necessary to prove all elements of the *prima facie* test.

[129] One other factor that was important to this case, and not sufficiently accounted for in the Decision, is that the Association chose which pieces of legislation it directed ambassadors to "enforce" (no issue was raised as to the ability of the Association to hire a private security firm to enforce laws relating to public space). The Association chose to focus on the *Safe Streets Act* and the *Trespass Act*. The ambassadors were not searching for potential violations of traffic laws, municipal bylaws or any of the other numerous laws or regulations which govern activity in public space. Instead, they focused on two pieces of legislation that -- and this point was not contested -- were enacted for the purpose of addressing aggressive panhandling on public or private property. The Association also says it was targeting open drug use, which is a criminal offence, but, of course, that is only one of numerous other criminal offences that could occur in any public space in Vancouver.

[130] In other words, the Program focussed on the same behaviours that are the focus of legislation aimed at the street homeless. At the very least, that raises a presumption that the Program would affect street homeless more than other members of the population. In my view, this is a crucial contextual consideration missing from the Decision.

F. The Remaining Issues

[131] The above analysis answers the first two errors alleged in the petitioner's written submissions but two other issues remain.

[132] In its written submissions, the petitioner challenges the decision on the basis that the Tribunal only considered discrimination in respect of public facilities under s. 8(1)(b) and with regard to the "denial of access" to public facilities under s. 8(1)(a).

[133] I decline to address this third error alleged by the petitioner as it is not necessary to do so. Moreover, the parties devoted virtually no time to that issue in this Court and the Tribunal did not consider it.

[134] Finally, I address the City's arguments that the case against it is moot. The City says no live dispute exists between it and the petitioner because the contract which funded the overnight operation of the Program was not renewed, meaning the relief being sought against it (to stop funding the Program) has already been achieved.

[135] The petitioner responds by saying it is sufficient that funding was provided for one year and there is no legal barrier to the City funding the Program in the future.

[136] The City and the Association are separate legal entities. The City did not initiate or create the Program. The City's connection to the Program is the one year contract the City had with the Association to allow the Program to operate from 10 p.m. to 7 a.m. I have some question in my mind whether liability for discrimination could be founded merely on financial contribution.

[137] However, as the Tribunal discussed at paras. 227, 239, 264 - 265, the City did more than financially contribute to the Program. It was supportive of it and viewed it as consistent with its "Project Civil City" (paras. 217 – 219 and 249 - 253). That support was based on a thorough staff review of the Program, thus the City was apprised of all aspects of the Program. The City promoted the Program to other business improvement associations. It went even further and provided some training

(ironically, about the applicable human rights legislation). Lastly, the City owned the data collected by the ambassadors (para. 254).

[138] What is most persuasive, however, is the fact that the City's funding was provided for the express purpose of operating the Program overnight. The funding was, therefore, directly responsible for interactions between ambassadors and street homeless people that took place during the night when it is reasonable to assume there would be more people rough sleeping on the streets.

[139] The City says no relief should be granted against it, relying on the principle of mootness which dictates that a court will decline to hear a case if the resulting decision could have no practical effect on the rights of the parties: *Borowski v. Canada (Attorney General*), [1989] 1 S.C.R. 342. Mootness is rooted in the notion that it is undesirable for the court to engage in analysis and granting of remedies for an abstract proposition of law.

[140] The issues between the City and the petitioner are not abstract. There is no dispute that for one year the City funded, promoted and was involved in some aspects of the Program. The funding it provided contributed directly to the ambassadors' actions that occurred during the night. On that basis, a finding of discrimination can stand against the City, but only for the one year period it funded the Program.

VI. SHOULD THE CASE BE REMITTED TO THE TRIBUNAL?

[141] It is open for this Court to end the analysis here, send the case back to the Tribunal and direct the Tribunal to reconsider the evidence in light of the above analysis and conclusions. I exercise my discretion and chose not to do so in relation to the application of the *prima facie* test.

[142] Given the circumstances of this particular case, this Court is in as good a position as the Tribunal to conduct the *prima facie* analysis on the facts because no party challenges the Tribunal's findings of fact. I also find that the nature of the evidence and legal issues would make it difficult for the Tribunal to untangle and

reassess the case. I am also mindful of the length of time that has passed since the original claim was started and the extra time and expense that would be incurred by sending the case back to the Tribunal for all purposes.

[143] For all the reasons discussed above, I do find that the evidence before the Tribunal established all three steps of the *prima facie* test for discrimination. Therefore, the Tribunal made an error of law in dismissing the complaint on the basis that the *prima facie* test had not been met.

[144] However, I accept the Association's alternative position that no analysis should be conducted on the second stage of the discrimination test. Because the Tribunal did not embark on the *bona fides* justification analysis, there is nothing for this Court to judicially review and it would be improper to engage in that analysis. Therefore, the case is remitted to the Tribunal for it to determine whether the discriminatory conduct is justified.

VII. CONCLUSION

[145] For all these reasons, I find that the Tribunal committed an error of law by misapplying the *prima facie* test for discrimination to the facts it found. I exercise my discretion and conclude that the facts found by the Tribunal, when analyzed under the correct legal test, do constitute *prima facie* discrimination. I also find that relief is available against the City for the one year period it funded the Program.

[146] I make no other findings so the case is remitted to the Tribunal for the purpose of determining if the *prima facie* discrimination is justified.

VIII. COSTS

[147] The petitioner is entitled to its costs payable by the Association and the City. I make no costs awards in favour of or against the Tribunal, the Attorney General or the Intervener.

"Sharma J."