HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B 4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: THE APPELLANT, DOWNTOWN VANCOUVER BUSINESS IMPROVEMENT ASSOCIATION (THE "ASSOCIATION"), SUCCESSFULLY APPEALED A DECISION FROM A CHAMBERS JUDGE IN THE SUPREME COURT OF BC. THE CHAMBERS JUDGE HAD GRANTED AN APPLICATION FOR JUDICIAL REVIEW MADE BY THE RESPONDENT, VANCOUVER AREA NETWORK OF DRUG USERS (THE "NETWORK"), IN RELATION TO A BC HUMAN RIGHTS TRIBUNAL DECISION. IN THE RESULT, THE BC COURT OF APPEAL REINSTATED THE EARLIER DECISION OF THE BC HUMAN RIGHTS TRIBUNAL, WHICH HAD DISMISSED THE NETWORK'S COMPLAINT AGAINST THE ASSOCIATION.

Administrative law – Decisions reviewed – Human Rights Tribunal – Discrimination – Race – Judicial review – Appeals – Standard of review – Correctness – Reasonableness

Vancouver Area Network of Drug Users v. British Columbia (Human Rights Tribunal), [2018] B.C.J. No. 644, 2018 BCCA 132, British Columbia Court of Appeal, April 11, 2018, H. Groberman, D.C. Harris and L. Fenlon JJ.A.

The Respondent, Vancouver Area Network of Drug Users (the "Network"), is an organization aimed at assisting active and former drug users. VANDU made the initial complaint to the B.C. Human Rights Tribunal on behalf of a class of persons described, in shorthand, as "street homeless".

The Appellant, Downtown Vancouver Business Improvement Association (the "Association"), is a community association designed to represent the collective interests of business and commercial property owners in downtown Vancouver. The Association is funded by property taxes levied on commercial property and businesses in the downtown area.

The Association created a program called the Downtown Ambassadors Program (the "Program"). The Program had many facets including an effort to keep people from loitering or sleeping in areas in front of businesses and in a Vancouver park. The ambassadors were trained to press people to move on from those places. Most of the people affected by this effort were homeless people. The City of Vancouver provided funding for the Program for one year from September 2008 – August 2009.

The Network (along with the Pivot Legal Society) made a complaint to the BC Human Rights Tribunal alleging the Program violated section 8(1) of the Human Rights Code. Specifically, the Network argued that (1) the Program adversely affected the street homeless population, and (2) persons with mental and physical disabilities, and Aboriginal persons, are over-represented in the street homeless population. Therefore, the Network argued the Program was discriminatory.

In 2012, the Tribunal found the first two elements of the *prima facie* test of discrimination were met. However, the Tribunal found the third element of the test was not met. Specifically, the evidence did not establish a link between membership in a protected group and the adverse treatment experienced. The Tribunal dismissed the complaint.

The Network applied for judicial review to the Supreme Court. The Network argued the Tribunal erred in its interpretation and application of the *prima facie* test for discrimination.

In 2015, the Chambers Judge of the Supreme Court accepted the Network's argument. The Chambers Judge emphasized that the protected grounds need only be a factor in the adverse treatment and found the Tribunal ought to have adopted a more "contextual and nuanced approach". The Chambers Judge allowed the appeal and quashed the Tribunal's dismissal of the complaint.

The Association initiated an appeal to the Court of Appeal. The Court of Appeal had to consider two issues:

1. Whether the Tribunal identified the correct test for establishing a *prima facie* case of discrimination, specifically with regards to the required connection between the adverse treatment and the protected characteristics of class members; and
2. Whether the Tribunal erred in failing to find the necessary connection between the adverse treatment suffered by class members and their membership in protected groups.

The first question was a question of law and reviewed on a correctness standard. The second question was a question of fact and reviewed on a reasonableness standard.

With respect to the first question, the Court of Appeal held the Tribunal had not incorrectly stated the test. The Tribunal correctly described the test as requiring the protected grounds to be a factor in the adverse treatment. There was no basis for the Chambers Judge to conclude that the Tribunal improperly imported a requirement of strict "but for" causation into its analysis.

With respect to the second question, the Tribunal had accepted that the Program had an adverse impact on street homeless, and that certain protected groups were over-represented among the street homeless population. However, the root causes of homelessness were accepted as being complex and multi-dimensional. The Court of Appeal held that, before the Tribunal, the Network did not seek to provide an explanation of the connection between street homelessness and Aboriginal background or between physical and mental disabilities and homelessness. In the absence of evidence or any articulated theory, the Tribunal found the statistical correlations were insufficient to demonstrate that prohibited grounds of discrimination were "a factor" for the purposes of establishing *prima facie* discrimination. The Court of Appeal held the Tribunal did not act unreasonably in making such a decision based on the evidence.

The Court of Appeal allowed the appeal and re-instated the Tribunal's decision to dismiss the complaint.

This case was digested by Scott J. Marcinkow, and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Scott Marcinkow at smarcinkow@harpergrey.com.