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Indexed as: Pivot Legal Society v. Downtown Vancouver Business Improvement Association and another, 2009 BCHRT 229

IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

**BETWEEN:**

Pivot Legal Society and VANDU on behalf of individuals who are, or appear to be, street homeless and/or drug addicted

**COMPLAINANTS**

**AND:**

Downtown Vancouver Business Improvement Association and City of Vancouver

**RESPONDENTS**

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**REASONS FOR PRELIMINARY DECISION  
APPLICATIONS TO DISMISS**

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Tribunal Member:	Tonie Beharrell
Counsel for the Complainant:	Laura Track
Counsel for the Respondent, the Downtown Vancouver Business Improvement Association:	George Cadman, Q.C.
Counsel for the Respondent, the City of Vancouver:	David Hill

## I INTRODUCTION

[1] The Pivot Legal Society ("Pivot") and the Vancouver Area Network of Drug Users Society ("VANDU") filed a complaint on behalf of a class of persons described as "individuals who are or appear to be street homeless and/or drug addicted and engage in rough sleeping, sitting or lying down in public spaces, panhandling, vending, begging or binning, or other behaviours related to those personal circumstances, within the geographical jurisdiction of the Downtown Vancouver Business Improvement Association ("DVBLA")" (the "Class").

[2] Pivot and VANDU allege that the respondents, the DVBLA and the City of Vancouver, doing business as Project Civil City ("PCC"), are discriminating against these individuals with respect to a service customarily available to the public, namely, access to public space, such as sidewalks; on the basis of race, colour, ancestry, and physical and mental disability, contrary to s. 8 of the *Human Rights Code*. The complaint relates, in particular, to a program funded by the City and the DVBLA known as the Downtown Ambassadors Program. The complainants argue that the policies and practices of this program have a disproportionately adverse impact on Aboriginal persons and people with disabilities.

[3] The respondents deny any discrimination, and apply to dismiss the complaint. The DVBLA applies pursuant to ss. 27(1)(b), (c), (d) and (e) of the *Code*, while the City applies to dismiss the complaint pursuant to ss. 27(1)(b), (c) and (d) of the *Code*. The relevant sections provide:

A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of a complaint if that member or panel determines that any of the following apply:

...

- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
- (c) there is no reasonable prospect that the complaint will succeed;
- (d) proceeding with the complaint or that part of the complaint would not:

- (i) benefit the person, group or class alleged to have been discriminated against; or
- (ii) further the purposes of this Code
- (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith.

[4] In addition, both respondents argue that Pivot and VANDU are not appropriate representatives for the identified Class, and PCC states that it has not been appropriately named as a respondent.

[5] I will consider each of the respondents' arguments in turn. First, however, I will outline some of the factual and procedural background to the complaint. In doing so, I am not making any findings of fact.

**II FACTUAL BACKGROUND**

*1. The Parties*

[6] Pivot is a non-profit legal advocacy group located in Vancouver's Downtown Eastside. Pivot's focus is to advance the interests, and improve the lives, of marginalized people through law reform, legal education and strategic legal action. Pivot states that it is in contact with and hears from street homeless people and drug users on a regular basis, concerning issues that affect Vancouver's homeless population.

[7] VANDU is a non-profit, peer driven organization that brings together people who use heroin and cocaine. Its focus is on improving the lives of drug users, their families and communities through education and harm reduction initiatives in a non-judgmental atmosphere.

[8] The DVBIA is a non-profit society funded, in part, by commercial property taxes in a 90 block area of downtown Vancouver (not including the Downtown Eastside). The DVBIA operates a program known as the Downtown Ambassadors Program (the "Ambassadors"). Under the program, which began in May 2000, the Ambassadors perform a variety of tasks in the DVBIA area, including patrolling public sidewalks and streets. Initially, the program was fully funded by DVBIA members through a levy process, and services were provided from 7:00 in the morning to 10:30 at night.

[9] Project Civil City was an initiative of the City of Vancouver, which had four goals: increasing housing opportunities and eliminating homelessness, with at least a 50% reduction by 2010; eliminating the open drug market on Vancouver's streets, with at least a 50% reduction by 2010; eliminating the incidence of aggressive panhandling, with at least a 50% reduction by 2010; and increasing the level of public satisfaction with the City's handling of public nuisance and annoyance complaints by 50% by 2010. The initiative was led by the Project Civil City Commissioner, Geoff Plant (the "Commissioner"). The formal initiative came to an end in February 2009.

### *2. Expansion of the Ambassadors Program*

[10] The complainants allege that, at the urging of the Commissioner, Vancouver City Council approved an expansion of the Ambassadors program. In particular, in December 2007, City Council adopted a resolution approving in principle an expansion of the Ambassadors Program in the DVBIA area.

[11] The respondents state that, in April 2008, City Council adopted a resolution instructing City staff to negotiate and enter into a contract with the DVBIA to expand the Ambassadors Program, as contemplated in the December 2007 resolution.

[12] On August 29, 2008, pursuant to the resolution, the City and the DVBIA entered into a Services Agreement to expand the Ambassadors program. The Services Agreement provides for an extension of the Ambassadors program, from its previously limited hours to 24 hours a day, seven days a week. The expanded program went into effect on September 2, 2008.

### *3. The Services Agreement*

[13] The respondents state that the services to be provided by the Ambassadors are described in general terms in the Services Agreement. None of the parties provided me with a copy of the Services Agreement, and so the precise wording relating to the services to be provided is not before me. The respondents did, however, outline those provisions of the Services Agreement which they argue are pertinent to their applications.

[14] The Services Agreement requires that the personnel who deliver the Ambassadors Program be employees of the DVBIA or approved subcontractors. DVBIA has sub-

contracted the provision of Ambassador services to Genesis Security Inc. Genesis employees work as Ambassadors. The DVBLA states that those who are employed, or who have previously been employed, as Ambassadors are extremely ethnically diverse, and represent a large range of life experiences.

[15] The respondents note that, in addition to the activities conducted on city streets and sidewalks within the DVBLA area, 111 property owners within the DVBLA area have given the DVBLA and Genesis express authority to conduct activities on their private property.

[16] The Services Agreement requires that all personnel supplied by the DVBLA be qualified, competent and properly trained and instructed to perform the duties of Ambassadors. It is a term of the Services Agreement that all Ambassadors receive a Human Rights training course satisfactory to the City. Pursuant to this requirement, the Ambassadors receive human rights training from the Hastings Institute, an initiative operated by the City's Equal Employment Opportunities Program. The DVBLA states that this training is supplemental to the basic Ambassador training program, which includes clear and specific training as to the scope of legal responsibility and restrictions under which Ambassadors operate, including the *Code*.

[17] It is also a term of the Services Agreement that training for the Ambassadors may include awareness training that addresses community sensitivity and cultural diversity. In addition, pursuant to the Services Agreement, the Ambassadors are trained to provide street people with information regarding free food locations, shelter, and referrals to various agencies. Finally, the activities of the Ambassadors include working with special interest groups and outreach workers to assist street people in need.

#### *4. Allegations relating to the activities of the Ambassadors*

[18] The complainants argue that the polices of PCC and the DVBLA, through the Ambassadors program, discriminate against those with disabilities, including drug addiction, and have disproportionate adverse effects on Aboriginal and disabled persons by limiting these populations' access to public space. The complainants allege that no provision was made to ensure that the program would not have adverse effects on protected groups.

[19] The complainants state that the Ambassadors patrol the public areas of the 90-block downtown area, targeting “problem areas”, and “suspicious activities” including drug users and individuals who are apparently homeless. The complainants note that “suspicious activities” include sitting or sleeping on sidewalks or panhandling.

[20] The complainants identify a number of tactics which they say are used by the Ambassadors, which they allege are objectionable. These tactics include:

- 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 those people to move along, regardless of location or circumstance;
- 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;
- f) Following or staring at individuals identified as undesirable; and
- g) Taking photographs and notes in order to collect information about people on the street, which has the effect of harassing and humiliating the individuals photographed and “observed”.

[21] The complainants argue that each of these tactics has the effect of humiliating and shaming homeless people who have equal legal access to public spaces, including sidewalks and back lanes.

[22] The respondents do not specifically deny that the Ambassadors use some or all of these tactics, but they strenuously deny that the Ambassadors’ activities, or the policies and procedures governing those activities, constitute a systemic practice of discrimination.

**III ANALYSIS AND DECISION**

[23] As outlined above, the respondents apply to have the complaint dismissed on a number of different grounds. Below, I will first address that part of the application which relates to whether Pivot and VANDU are appropriate representatives of the Class.

I will then consider whether PCC is appropriately named as a respondent. Finally, I will address the remaining issues raised in the application to dismiss.

*A. Are Pivot and VANDU appropriate representatives?*

[24] In order to place the respondents' arguments about the appropriateness of the representatives in context, some procedural background is necessary. The complaint was initially filed by Pivot, VANDU and the United Native Nations ("UNN"). The UNN is an Aboriginal organization representing the socio-economic and cultural interests of the off-reserve Aboriginal peoples of British Columbia, both rural and urban. Prior to the complaint being served on the respondents, the UNN withdrew from it. After the complaint was served, the parties participated in some unsuccessful settlement discussions, and the respondents filed applications to dismiss, the UNN sought to rejoin the complaint. The Tribunal ruled that, if the UNN wished to participate in the complaint, it must file its own complaint. The Tribunal would then deal with that complaint in the normal course, including addressing any applications the parties may make, including an application to join that complaint with the present complaint. The Tribunal issued that ruling on March 6, 2009. UNN has not, to date, filed such a complaint.

[25] The respondents argue that Pivot and VANDU do not have the authority to represent the Class. In this regard, the respondents note that the UNN is the only one of the organizations initially involved in the complaint that "claimed a specific interest in or representation of Aboriginal people". The respondents argue that, to the extent that the complaint concerns alleged discrimination against Aboriginal people, it ought to be dismissed on the basis that neither of the named complainants has the authority to act on behalf of that part of the Class.

[26] In addition, the DVBI notes that, while Pivot claims a particular interest in residents of the Downtown Eastside, the area patrolled by the Ambassadors does not include this part of Vancouver.

[27] In their reply submission, the City also argues that the complainants have not provided any demonstrable evidence to show that the Class wishes the complaint to proceed.

[28] Pivot and VANDU state that, as groups advocating for homeless persons and current and former drug users in Vancouver, they act as resource centres for the members of the Class, and are appropriate representatives. In this regard, they note that many members of VANDU are of aboriginal ancestry. In 2002, VANDU created a sub-group called the Western Aboriginal Harm Reduction Society ("WAHRS"), an all-Aboriginal group run by people of Aboriginal ancestry. Further, Pivot's work as an advocacy organization working on behalf of marginalized and vulnerable individuals makes the organization well-suited to speak to issues that affect Aboriginal persons.

[29] Section 21 of the *Code* sets out who may make a complaint, including a representative complaint, in the following terms:

(1) Any person or group of persons that alleges that a person has contravened this *Code* may file a complaint with the tribunal in a form satisfactory to the tribunal.

[(2) and (3) repealed]

(4) Subject to subsection (5), a complaint under subsection (1) may be filed on behalf of

- a. Another person, or
- b. A group or class of persons whether or not the person filing the complaint is a member of that group or class

(5) A member or panel may refuse to accept, for filing under subsection (1), a complaint made on behalf of another person or a group or class of persons if that member or panel is satisfied that

- a. The person alleged to have been discriminated against does not wish to proceed with the complaint, or
- b. Proceeding with the complaint is not in the interest of the group or class on behalf of which the complaint is made.

[30] Thus, pursuant to s. 21(5), the Tribunal may refuse to accept a representative complaint for filing if it is satisfied that the person alleged to have been discriminated

against does not wish to proceed with the complaint, or that proceeding with the complaint is not in the interest of the Class. In addition, the Tribunal, as master of its own proceedings, can determine whether a proposed representative is appropriate.

[31] The Tribunal has dealt with the issue of who constitutes an appropriate representative in a number of decisions. See, for example, *Construction and Specialized Workers' Union Local 1611 v. SELI Canada Inc*, 2007 BCHRT 423 ("CSWU"); *National Automobile, Aerospace, Transportation and General Workers of Canada, Local 111 v. Coast Mountain Bus Co. (No. 7)*, 2005 BCHRT 478; and *Koehler v. Carson*, 2006 BCHRT 50. In doing so, the Tribunal has been mindful of the policy rationale for permitting the filing of a representative complaint. For example, in *CSWU*, the Tribunal noted:

While there may be many other reasons for filing a representative complaint, it is clear that one reason is that it provides a means of redress for members of a vulnerable group on whose behalf a representative alleges discrimination contrary to the *Code*. (para. 68)

[32] And further:

The Tribunal must exercise care when setting requirements necessary for proceeding with a group or class complaint to ensure that it does not make the requirements so onerous that the purposes, efficiency and advantages gained from proceeding with a representative complaint are nullified (para. 101)

[33] As noted above, part of the respondents' argument with respect to the appropriateness of the representatives is that neither Pivot nor VANDU claim a specific interest in, or representation of, Aboriginal people.

[34] Section 21(4) clearly provides that a complaint may be filed on behalf of a group or class of persons, whether or not the person filing the complaint is a member of that group or class. The fact that neither Pivot nor VANDU has a constituency that is primarily directed to Aboriginals, or the issues of Aboriginal homelessness, does not, by that reason alone, make them inappropriate representatives.

[35] In any event, as noted by the complainants, many members of VANDU are of Aboriginal ancestry, and, since 2002, VANDU has had a sub-group, WAHRS, run by Aboriginal people.

[36] Similarly, Pivot's mandate is to use the law in a strategic way to advance the interests of Vancouver's most vulnerable and marginalized, particularly those on the Downtown Eastside. This population contains a significant proportion of Aboriginal individuals. In this regard, the complainant cites a recent analysis of Downtown Eastside demographics undertaken by the Globe and Mail newspaper showing that one seventh of the population is Aboriginal, seven times higher than for Vancouver as a whole.

[37] Further, the fact that Pivot has a particular interest in residents of the Downtown Eastside, while the area served by the DV BIA does not include the Downtown Eastside, does not undermine their appropriateness as a representative. The areas are in close geographical proximity to each other, and it is likely that many members of the Class are also residents of the Downtown Eastside. Further, the members of the Class are certainly among the most marginalized and vulnerable of Vancouver residents, which is Pivot's larger focus and interest.

[38] I find that both Pivot and VANDU have a significant interest in matters affecting the Class, and in the matters raised by the complaint. The two organizations are clearly dedicated to the interests of the homeless in Vancouver, including the members of the Class.

[39] With respect to the respondents' submissions that the complainants have not brought forward any demonstrable evidence to show that the Class wishes the complaint to proceed, I note the following.

[40] First, the initial application was not squarely directed towards this issue but related, instead, to the respondents' concerns that Pivot and VANDU were not appropriate representatives of any Aboriginal members of the Class.

[41] Second, the *Code* does not require that the members of a Class authorize the filing of a representative complaint. The policy rationale behind this was articulated by the Tribunal in *CSWU* :

The *Code* does not require that the members of a group or class authorize the filing of a representative complaint on their behalf, nor does it require the representative to canvas all members of the group or class with respect to their interest in proceeding. In this regard, it is important to note that, even with respect to representative complaints filed on behalf of an

individual, authorization is not required. Rather, by the use of the word “may” in s. 21(5), the member has discretion not to accept the complaint where the person alleged to have been discriminated against does not wish to proceed with the complaint: s. 21(5)(a).

...

Requiring a representative to obtain authorization from, or canvas, members of a vulnerable group would likely act as a deterrent to their participation in a representative complaint. Further, it would clearly not be an efficient, or in some cases even a viable, way of proceeding, for example, where the group is large or the complaint is filed on behalf of a class. (para. 72-74)

[42] Third, there is no information before me which would indicate that the members of the Class do not wish to proceed with the complaint.

[43] The concerns articulated by the Tribunal in *CSWU* are also pertinent in this complaint. The complainant class is comprised of extremely vulnerable and marginalized individuals. Such individuals would face many barriers in attempting to enforce their human rights in any forum. It would not be in the public interest, or in conformance with the purposes set out in s. 3 of the *Code*, to erect additional barriers to the participation of such individuals.

[44] I therefore dismiss that part of the respondents’ applications which relate to the appropriateness of Pivot and VANDU as representatives of the Class.

***B. Is PCC correctly named as a respondent?***

[45] Again, the application in this regard requires a review of some of the procedural background to the complaint.

[46] The Complaint Form filed by Pivot and VANDU initially named the DV BIA and “Geoff Plant, Project Civil City Commissioner”. The Tribunal wrote to the complainants stating that it would not proceed against Mr. Plant in his personal capacity, and indicating that the respondent was properly named as “The City of Vancouver Operating as Project Civil City”. The complainants filed an Amendment Form implementing this suggestion. The City, on behalf of PCC, now argues that the complaint against PCC should be dismissed, as it has no reasonable prospect of success. It states that, in the alternative, the

complaint should be amended to name the City as the respondent, and that all allegations against PCC should be struck.

[47] The City denies that it is “operating as Project Civil City”. Rather, it states that it operates only as the City of Vancouver, and that any actions that have been taken are those of the City Council, or actions taken at the direction or instruction of the City Council.

[48] In particular, the City states that the decision to enter into negotiations with DV BIA to extend the Ambassador program was made by City Council. The Services Agreement was negotiated by the City’s Legal Services Department and other City staff. Council’s resolution authorized a contract on terms acceptable to the General Manager of Community Services, not the Project Civil City Commissioner.

[49] It appears that Project Civil City is no longer funded and has been disbanded.

[50] The complainants argue that “the City of Vancouver operating as Project Civil City” is the appropriate respondent, and oppose the application to substitute the City of Vancouver.

[51] In *Petersen v. Kinsmen Retirement Centre and others*, 2007 BCHRT 129, the complainant named the Ministry of Forest and Range, Housing Registry as a respondent. The Ministry applied to substitute B.C. Housing for it, and B.C. Housing consented to this substitution. The complainant opposed the substitution, although she then amended her complaint to also include allegations against B.C. Housing. The Tribunal stated:

A complainant is entitled to name the respondent(s) to her complaint and to generally frame her complaint: *Matuszewski v. Min. of Competition, Science and Enterprise*, 2004 BCHRT 46 at para. 31. If the incorrect respondent is named, then that respondent may bring an application to dismiss the complaint against it. If the complainant has failed to name the correct respondent, then the result might be that her complaint is dismissed, either on a preliminary basis or at the hearing.

Respondents to a complaint are not entitled to determine which respondents are the appropriate respondents. A respondent cannot remove itself from liability under the *Code*, by suggesting that another party is the more appropriate party to the complaint.

Although I accept that, in the circumstances of this complaint, BC Housing may be the appropriate respondent, I am not prepared to substitute it for

the Ministry of Forest in the circumstances of this case. I am not persuaded that a change in the respondent's name is a mere technicality contemplated by s. 45 of the *Code*, where a change might be appropriate. (paras. 17 – 19)

[52] In my view, the circumstances in this complaint can be distinguished from those in *Peterson*. Here, the City submits that the appropriate manner in which to name the respondent in this complaint is as the "City of Vancouver". In my view, this relates to the appropriate legal manner to name the same respondent, rather than to the identity of the respondent.

[53] On the basis of the submissions before me, I am satisfied that the appropriate manner in which to name the respondent in this matter is as the "City of Vancouver". It was the City that created and funded PCC, not as a separate entity, but as a City initiative. The style of cause has been amended to reflect this decision.

[54] This decision is not a finding, however, that the allegations made by the complainants against PCC are "irrelevant and misleading", as suggested by the City. Rather, the allegations made with respect to the role of PCC form part of the background to the complaint and may be relevant to the information that was before the City at the time it made any decisions.

***C. Section 27(1)(b): Do the acts or omissions alleged not contravene the Code?***

[55] The questions which the Tribunal must address on applications under s. 27(1)(b) is whether the complaint, on its Face, alleges acts or omissions that, if proven, could contravene the *Code*. The analysis in this regard is based solely on the allegations contained in the complaint form: *Bailey v. B.C. (Min. of Attorney General)*, 2006 BCHRT 168.

[56] The respondents argue that the complaint should be dismissed under s. 27(1)(b), because the Class is not a group protected by the *Code*. In particular, the respondents argue that neither homelessness, nor any similar ground such as place of residence, economic status or social condition, is a prohibited ground of discrimination.

[57] The complainants do not dispute that homelessness, poverty, place of residence, economic status or social condition are not protected grounds under the *Code*. Rather,

the complainants note that a disproportionate number of the street homeless are Aboriginal and/or suffer from physical and mental disabilities, including but not limited to addiction. As a result, in allegedly targeting drug users and the street homeless, the respondents are engaged in discrimination on the basis of race, ancestry, colour and physical and mental disability: all grounds that are protected under the *Code*.

[58] In this regard, the complainants note the following.

[59] First, drug users, if addicted, are disabled within the meaning of the *Code*.

[60] Second, the Tribunal has found in previous decisions that both Aboriginal people and disabled people, particularly those in the Downtown Eastside, are more likely than the general population to live in poverty: *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302, para. 571.

[61] Third, the complainants point to a number of studies which indicate that people of Aboriginal ancestry are disproportionately represented among the homeless population of Canada. With respect to Vancouver in particular, a 2005 Report on the Homeless in Greater Vancouver identified 34% of the street homeless population in Vancouver as Aboriginal, whereas Aboriginals make up only 2% of the GVRD population as a whole.

[62] Fourth, the same study identified that 74% of the homeless population have one or more chronic health conditions, and, in particular, 53% of the street homeless population suffer from addiction. The study reported that 21% have a mental illness and 25% have a physical disability separate from simple addiction.

[63] The respondents do not necessarily dispute the proposition that Aboriginal and disabled people are disproportionately represented among the homeless, but argue that such a fact does not make homelessness a protected ground under the *Code*, nor does it mean that every individual who is "street homeless" falls within a protected ground under the *Code*.

[64] Clearly, not all of the street homeless are Aboriginal, or mentally or physically disabled. The complainants have, however, provided information which indicates that they are disproportionately so. The complainants then go on to allege that, given their

disproportionate representation in the Class, the actions of the Ambassadors have a differential impact on such individuals.

[65] The complainants provide information that supports their argument that the Class is disproportionately comprised of Aboriginal individuals and those suffering from disabilities. This assertion is also consistent with the Tribunal's finding in *Radek*.

[66] It is a well-established proposition of human rights law that a standard or program which is neutral on its face, but which disproportionately impacts on individuals on the basis of one or more of the prohibited grounds of discrimination under the *Code*, may be discriminatory. Thus, for example, the U.S. Supreme Court found that an employment standard that required a high school education or the passing of a general intelligence test was discriminatory, given that the standard was not significantly related to job performance, and, at the time, the proportion of Blacks who had completed high school was significantly lower than that of whites: *Griggs v. Duke Power Co.*, (1981), 401 U.S. 424. High school graduation, or level of education, was not a prohibited ground of discrimination under the Equal Employment Opportunity part of the *Civil Rights Act*, but race was.

[67] Similarly, in *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449 (C.H.R.T.), the Canadian Human Rights Tribunal found that a height requirement imposed on applicants for pilot positions had a disproportionate impact on women, because they were less likely to meet that standard: height was not a prohibited ground of discrimination under the Canadian *Human Rights Code*, but sex was.

[68] Further, in *Bitonti v. British Columbia (Ministry of Health) (No. 3)*, (1999), 36 C.H.R.R. D/263, the B.C. Council of Human Rights held that a rule of the B.C. College of Physicians and Surgeons, which set a less onerous requirement for registration in B.C. for doctors trained in Canada, the U.S., Great Britain, Ireland, Australia, New Zealand or South Africa, than that which applied to doctors trained in other countries, was discriminatory. Although the differential standard was, on its face, related to place of education, which is not a prohibited ground under the *Code*, the Council found that the standard had a disproportionate impact on applicants from other countries based on place of origin.

[69] Finally, in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (“*Meiorin*”), the Supreme Court of Canada found that an aerobic fitness standard that was a condition of a forest firefighter’s job had a disproportionate and discriminatory impact on women. Aerobic fitness is not a prohibited ground of discrimination under the *Code*; sex is.

[70] Similarly, in this case, homelessness is not a prohibited ground of discrimination under the *Code*, but race, ancestry, colour, and disability are. If the complainants are able to establish the alleged disproportionate impact of the Ambassadors program on these groups, the allegations could, if proven, establish discrimination contrary to the *Code*.

[71] I therefore dismiss the respondents’ application under s. 27(1)(b) of the *Code*.

***D. Section 27(1)(c): Is there no reasonable prospect that the complaint will succeed?***

[72] In considering applications under s. 27(1)(c), the Tribunal has said that:

[t]he role of the Tribunal, on an application, is not to determine whether the complainant has established a prima facie case of discrimination, nor to determine the bona fides of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet. Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the information available to it. (*Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, paras. 11 and 12)

[73] The Tribunal’s approach was affirmed by the Court of Appeal in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, paras. 9 and 27.

[74] The initial basis of the City’s application to dismiss the complaint under s. 27(1)(c) of the *Code* related to the appropriate naming of the respondent. I have addressed that issue above.

[75] Although not put forward in the initial applications, the DV BIA argued in its reply submissions that there is no reasonable prospect that the complaint will succeed, because the complainants have failed to provide any evidence of systemic discrimination or disproportionate adverse impact.

[76] In my view, this argument was not appropriately advanced by the DV BIA, who raised it as a new argument in their reply. Nevertheless, I note the following.

[77] First, the DV BIA argues in its submission that “the onus rests with the complainants to bring forward evidence of the alleged systemic discrimination sufficient to meet at least the threshold test established by the Tribunal applicable in this case”. This is incorrect. At any eventual hearing of the matter, the onus will be on the complainants to establish a *prima facie* case of discrimination. On an application to dismiss, however, the onus is on the respondents to persuade the Tribunal that it should exercise its discretion to dismiss the complaint. Thus, for the purposes of an application under s. 27(1)(c), the onus is on the respondents to establish that there is no reasonable prospect that the complaint will succeed: *Taylor v. Selkirk College*, 2007 BCHRT 146, para. 469.

[78] Second, in the complaint form, and as set out in some detail in paragraph 20, above, the complainants allege that the Ambassadors engage in a range of activities, or tactics, which have the effect of targeting the Class. For the most part, the respondents do not deny that the Ambassadors engage in such activities. They do note that the Ambassadors have a much wider role, including checking for stolen cars, responding to requests for information from the public, meeting with businesses, checking on the health of street people, and handing out warm clothing and food to the homeless. The respondents also deny that the Ambassadors “target” the activities of street people.

[79] The complainants allege that activities that they object to primarily affect members of the Class, and because of the make-up of the Class, will have a disproportionate effect on Aboriginals and those suffering from physical or mental disabilities. They have provided studies and statistics which support the proposition that these groups are disproportionately represented within the Vancouver homeless

population. At this point in the process, the respondents have not disputed that proposition.

[80] Thus, as it relates to the complaint against the DV BIA, key issues before the Tribunal include the nature of the activities performed by the Ambassadors, the impact of those activities on the Class, and whether, in light of the activities and the impact, discrimination has been established. In my view, questions of this nature are best determined at a full hearing of the complaint, where the parties can fully present and test the evidence before the Tribunal.

[81] On the basis of the information before me, I cannot find that there is no reasonable prospect that the complaint will succeed. I therefore dismiss the DV BIA's application pursuant to s. 27(1)(c) of the *Code*.

***E. Section 27(1)(d)(i): Would proceeding with the complaint not benefit the class alleged to have been discriminated against?***

[82] The City argues that proceeding with the complaint as against it would not benefit the Class, as, even assuming that there has been any discrimination (which it denies), the City would not be able to provide the remedies sought by the complainant. In this regard, the City points to the following remedies outlined by the complainants in their Representative Complaint Form:

- a) A cease and refrain order;
- b) A declaration of discriminatory conduct;
- c) Payment of \$20.00 to each member of the Class as nominal compensation and recognition for injury to their dignity, feelings and self respect, to a maximum of 1,000 Class members;
- d) Payment of any portion of hearing-related expenses associated with retaining experts;
- e) Systemic remedies, including orders that the respondents:
  - i) ensure that the training processes and policies of any security service provider they retain are non-discriminatory;
  - ii) require that all security personnel employed by any security service provider to patrol public areas receive appropriate anti-discrimination training, including anti-racism and disability awareness components;

- iii) amend all policies to explicitly prohibit discriminatory tactics as identified by the Tribunal;
- iv) ensure that there is an appropriate procedure in place for receiving and responding to complaints the public may make about the practices and conduct of security personnel;
- v) communicate the decision of the Tribunal to every Business Improvement Association in Vancouver.

[83] The City notes that the actions complained of are those of employees of a security company, contracted to the DBVIA, with whom the City has a contract. Similarly, if any policy is found to be discriminatory, it is not a City policy. It therefore argues that it does not have the ability to provide the systemic remedies sought by the complainants: in particular, without altering or breaching the terms of the contract between itself and the DVBIA, the City does not have the ability to require service providers to undergo further training or to amend policies.

[84] The City argues that, in the circumstances of this case, it is either Genesis or the DVBIA that has the ability to provide any remedy, and not it. In these circumstances, proceeding with the complaint against it would not benefit the class named in the complaint, and the complaint ought to be dismissed pursuant to s. 27(1)(d)(i).

[85] The City has provided me with little evidence with respect to the relationship between itself and the DVBIA with respect to the circumstances surrounding the negotiation or the implementation of the Services Agreement. Essentially, they provide legal argument, with no factual foundation. Clearly, the circumstances involving the entering into of the Services Agreement, the information the City had before it at the time, and the decisions it made based on that information are relevant factors to consider in this complaint. While the City's arguments under this section may provide them with a defence at any eventual hearing of this matter, I am not able, on the basis of the information before me, to conclude that proceeding with the complaint would not be in the interests of the Class.

***F. Section 27(1)(d)(ii): Would proceeding with the complaint not further the purposes of the Code?***

[86] In *Williamson v. Mount Seymour Housing Co-operative*, 2005 BCHRT 334, the Tribunal discussed its jurisprudence under s. 27(1)(d)(ii), and the bases on which proceeding with a complaint may not further the purposes of the *Code*. In particular, the Tribunal noted:

... complaints have been dismissed on the basis of s. 27(1)(d)(ii) in a number of circumstances. For example, where a complaint has been settled, the Tribunal has stated that proceeding with it would not further the purposes of the *Code*. ... The Tribunal has also held that it would not further the purposes of the *Code* to proceed with a complaint where the complainant has engaged in misconduct in the course of the complaint, for example, by repeatedly failing to comply with Tribunal *Rules* and orders ... The Tribunal has also stated that a complaint may be dismissed under s. 27(1)(d)(ii) where it duplicates the substance of an existing complaint by the same complainant before the Tribunal ... In addition, the Tribunal has dismissed complaints under s. 27(1)(d)(ii) where the respondent has responded appropriately to the complaint ...

A number of common threads can be discerned underlying these decisions. One has to do with efficiency and avoiding the duplication of resources: it may not further the purposes of the *Code* to proceed with a complaint where to do so would result in the unnecessary duplication of the Tribunal's or the parties' resources. Another has to do with fairness to the respondent: it may not further the purposes of the *Code* to proceed with a complaint where the complainant has failed to act appropriately, as for example, by failing to comply with Tribunal *Rules* and orders. A third has to do with encouraging parties to comply with their obligations under the *Code* without recourse to the Tribunal. It may not further the purposes of the *Code* to proceed with a complaint where the underlying dispute has been settled or the respondent has already taken appropriate action to remedy the problem. (paras. 10-11)

[87] Both the City and the DV BIA have applied to dismiss the complaint under this section of the *Code*. I will address the arguments of each in turn.

***1. City's application under s. 27(1)(d)(ii)***

[88] The City argues that the complaint against it should be dismissed under s. 27(1)(d)(ii) because, first, it has acted to remedy any alleged discrimination and taken steps to prevent further discrimination; and second, that the matter has already been appropriately dealt with.

[89] The City argues that it has taken those steps available to it, through imposing training requirements as part of the Services Agreement, to ensure that the Ambassadors are trained and educated with respect to human rights. The City states that it does not directly provide the services, or contract for the services offered by the Ambassadors, and that it has taken the measures available to it as a contracting party to ensure the protection of human rights.

[90] In particular, the City states that it determined that it would only enter into an agreement with the DV BIA to extend the Ambassador Program, if the Ambassadors were required to undergo human rights training in order to attempt to prevent any discrimination in the provision of the services contemplated in the contract. The Services Agreement contains such a provision, and the training of Ambassadors is currently underway and being provided by the Hastings Institute.

[91] The City makes the same argument with respect to other provisions of the Services Agreement: the provision that Ambassador training “may” include awareness training that addresses community sensitivity and cultural diversity, and the fact that Ambassador training includes training to provide street people with information regarding free food locations, shelter and referrals to various agencies.

[92] In this regard, the City also points to the actual activities of the Ambassadors pursuant to the Service Agreement, which includes working with special interest groups and outreach workers to assist street people in need.

[93] In addition, the City argues that, considering the full context of the complaint, the matter has been appropriately dealt with. It argues that the “full context” includes its efforts to ensure professionally delivered human rights training, sensitivity training, and cultural awareness training to the Ambassadors, to the extent it was able in the context of a commercial contract.

[94] As outlined above, on an application to dismiss, the onus is on a respondent to establish that the complaint should be dismissed. In the circumstances of this case, the City has not persuaded me that it would be appropriate to exercise my discretion to dismiss the complaint under s. 27(1)(d)(ii). I say this for the following reasons.

[95] First, while the City argues that the complaint against it should be dismissed because of the terms of the Services Agreement, it has not provided a copy of the Services Agreement in support of its application to dismiss.

[96] Second, there is no evidence before me with respect to any City monitoring of the terms contained in the Services Agreement, or the extent of any control or enforcement powers the City may have under that agreement.

[97] Third, I have no information about what information was before the City at the time the decision was made to expand the Ambassadors program and to negotiate the Services Agreement with respect to that expansion. In the absence of such information it is not possible to come to any conclusions about whether the terms of the Services Agreement, standing on their own, provide a full and appropriate response to any potential discriminatory impact of the program.

[98] Fourth, and most crucially, the complainants clearly allege that, whatever the requirements of the Services Agreement are, the actions of the Ambassadors “on the ground” amount to discriminatory conduct. In this regard it should be noted that complaints of systemic discrimination relate not only to written policies and procedures on their face, but also the way that those policies and procedures are implemented in practice.

[99] The leading case on systemic discrimination remains the decision of the Supreme Court of Canada in *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (better known as “*Action Travail des Femmes*”). In that case, the Court adopted the following description of systemic discrimination contained in the 1984 *Report of the Commission on Equality in Employment* by Judge Rosalie Abella (as she then was):

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting and 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.

That is why it is important to look at the results of a system ... (para. 34)

[100] Thus, in order to determine a case alleging systemic discrimination, it is necessary for the Tribunal to have evidence both with respect to the nature of the policies and procedures in issue, and with respect to the implementation of those policies and procedures in practice.

[101] In this regard, while the provisions of the Services Agreement are certainly relevant to the issue of whether the complainant's allegations of discrimination are well founded, relying on them in a factual background is not helpful.

*2. DVBIA's application under s. 27(1)(d)(ii)*

[102] In its initial application, the DVBIA argued that it has taken all reasonable steps to ensure that there is neither systemic discriminatory activity nor individual discriminatory conduct by the Ambassadors. In this regard, the DVBIA adopted the analysis in the City's application, supplemented by some additional factual background.

[103] The DVBIA states that as part of the guidelines under which the Ambassadors operate, there is a service matrix which sets out specifically what steps are to be taken depending on the nature of the incident, occurrence, or assistance which may be required by particular individuals at particular points in time. The DVBIA relies on this service matrix, as well as the Ambassador's training manual, and has provided copies of both in support of its application.

[104] The DVBIA argues that the systemic remedies sought by the complainant with respect to training processes and policies, and with respect to communication, already form part of the standard practices and procedures implemented by the DVBIA. The DVBIA also argues that these protections have, in addition, been augmented by the requirements imposed by the City under the Services Agreement.

[105] The DVBIA argues that it is clear that the training it provides has been effective, given the lack of any previous complaints, and the support and assistance the Ambassadors provide to the homeless of Downtown Vancouver.

[106] In its reply submissions, the DVBIA put forward additional arguments in support of its proposition that it would not be in the public interest to continue with the complaint.

In particular, the DVBIA notes that, since the filing of the initial application, it has worked on a consultative basis with Pivot to make changes to the Manual, and to develop a protocol and a complaint process.

[107] For reasons similar to those set out above with respect to the City's application, I find that the DVBIA has not established that it would not further the purposes of the *Code* to continue with the complaint. In particular, I reiterate that the complaint before me relates to both the policies governing the Ambassadors, and the practices of the Ambassadors on the ground.

*3. Conclusion with respect to applications under s. 27(1)(d)(ii)*

[108] I cannot find, on the basis of the information before me, that proceeding with the complaint would not further the purposes of the *Code*. Indeed, proceeding with the complaint has the potential to further each of the purposes outlined in s. 3 of the *Code*. I therefore deny this part of the respondents' applications to dismiss.

*G. Section 27(1)(e): Was the complaint filed for an improper purpose or in bad faith?*

[109] A complainant may be found to have filed a complaint for improper motives or in bad faith where, for example, the complainant is motivated by a purpose not consistent with the *Code*, or the complaint was not prompted by an honest belief that a contravention of the *Code* has occurred, but by some ulterior, deceitful, vindictive, or improper motive. The question of bad faith or improper motive must be judged by an objective standard, since it will seldom be possible to know the mind of the complainant. Further, given that the Tribunal does not investigate complaints, the Tribunal must have sufficient information before it to make such a finding.

[110] In this case, the DVBIA argues that the complainants have brought the complaint for an improper motive. In particular, the DVBIA argues that the complaint is a politically-motivated attack on Project Civil City and the Services Agreement, and was lodged as part of a political campaign by the complainants against the private security industry and, in particular, the use of private security in the City.

[111] The DVBIA alleges that, subsequent to filing the complaint, counsel for the complainants engaged in a media campaign designed to target the use of private security

including, but not limited to, the Ambassadors. This included an article published in the WestEnder, appearances on CKNW, a press conference called at the offices of Pivot Legal, emails sent to representatives of all Business Improvement Associations in the Vancouver area, handing out flyers soliciting evidence against the Ambassadors and attempting to create “a confrontation with a Downtown Ambassador in a staged event”.

[112] Although the City did not file an application pursuant to s. 27(1)(e), it is apparent that it supports the DVBIA’s submissions in this regard. In particular, the City states, in its reply, that:

... the complainant organizations’ true intention is to draw attention to the homeless. As laudable as this goal may be, we submit that they should not be permitted to do so on the shoulders of the Tribunal’s scarce resources. We submit that the Tribunal should carefully guard its process from being enlisted in aid of a public relations exercise, and accordingly should dismiss the complaints.

[113] The fact that the complaint is a representative one, filed by Pivot and VANDU on behalf of the complainant class, on the one hand, and the fact that Pivot, in particular, engages in a number of political and advocacy activities, on the other, does not lead to the conclusion that the complaint was filed for improper motives or in bad faith.

[114] In particular, the fact that the complainants have a stated position with respect to the use of private security does not lead to the conclusion that they are motivated by a purpose inconsistent with the *Code*, or not prompted by an honest belief that a contravention has occurred. The fact that Pivot is politically active around this issue, without more, does not provide me with a basis on which to dismiss the complaint under s. 27(1)(e).

[115] The DVBIA, however, argues that there is more. They point to an incident involving legal counsel for Pivot and an Ambassador. As outlined in a written report attached to the affidavit of Charles Gauthier, the Executive Director of the DVBIA, that incident is as follows:

On Tuesday December 9, 2008, at approximately 17:30 hours, I ... observed an unknown Caucasian male ... sitting against the brick wall of the Seven Eleven Store located at, 310 Robson Street. The male had a newspaper beside him with change on top. [I] approached the male and

informed him that he was loitering on private property and asked him to leave. The male told [me] that he would leave in a few minutes. [I] said "okay" in acknowledgement of his proposal and then [I] moved away from the male. At this point, the male said, "I read that thing in the paper. I can't wait until you Ambassadors lose your jobs!" [I] waited for approximately two minutes before the male got up and approached [me]. The male came inches away from [my] face and shouted angrily that "if I have to leave the private property then so do you". [I] remained composed and repeated [my] request that the male leave.

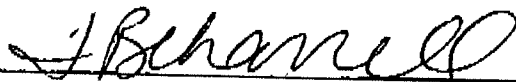
Suddenly, a Caucasian woman (later identified as [Laura Track, counsel for the Complainants]) ... approached [me] and announced that she was a lawyer from Pivot Legal Society. TRACK asked [me] what was happening here. At this point, the male backed away from [me]. [I] told TRACK that [I] had a Letter of Authorization from the owner authorizing [me] to ask anyone trespassing on the property to leave. ... TRACK asked [me] where the private property extended to. [I] said that it was approximately one meter from the wall of the business. TRACK said that TRACK would review the Safe Streets and Trespass Act. TRACK asked if the male was okay sitting one meter away from the business. [I] said okay and moved on. (reproduced as written)

[116] In my view, this interaction does not establish that the complaint was filed for improper motives or in bad faith. I therefore deny this part of the DVBLA's application to dismiss.

#### IV CONCLUSION

[117] For the reasons outlined above, I have decided as follows:

- a) The City of Vancouver is substituted for the City of Vancouver, operating as Project Civil City, as a respondent to this complaint; and
- b) The respondents' applications to dismiss are denied in their entirety.



\_\_\_\_\_  
Tonie Beharrell, Tribunal Member