

Date Issued: July 14, 2020

File: CS-001385

Indexed as: UBCIC obo Indigenous persons v. BC Ministry of Health and others, 2020 BCHRT 144

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

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

BETWEEN:

Union of British Columbia Indian Chiefs on behalf of
Indigenous persons denied a liver transplant in British Columbia

COMPLAINANT

AND:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the
Ministry of Health and Provincial Health Services Authority and BC Transplant Society and
Vancouver Coastal Health Authority

RESPONDENTS

SCREENING DECISION

Tribunal Chair:

Diana Juricevic

Counsel for UBCIC:

Jason Gratl

I INTRODUCTION

[1] On June 17, 2020, the Union of British Columbia Indian Chiefs [**UBCIC**] filed a representative human rights complaint on behalf of Indigenous persons who have been denied a liver transplant in British Columbia [**Representative Complaint**].

[2] This complaint challenges the lawfulness of a policy that requires persons to abstain from alcohol use for a period of six months in order to be eligible for liver transplants [**Abstinence Policy**]. This complaint alleges that the Abstinence Policy has a discriminatory impact on Indigenous persons who suffer from disproportionately higher rates of alcohol use disorder by limiting their access to vital and necessary healthcare. The complaint alleges that there is little or no scientific support for the Abstinence Policy which puts the health of Indigenous persons at risk, potentially fatally, by delaying access to liver transplants and is an affront to their dignity, respect, and self-worth.

[3] This complaint has been filed against the Ministry of Health, the Provincial Health Services Authority, the British Columbia Transplant Society, and the Vancouver Coastal Health Authority [together, the **Respondents**] in the area of services on the grounds of race, ancestry, and physical disability contrary to s. 8 of the *Human Rights Code* [**Code**]. The Tribunal has interpreted the grounds of race and ancestry to encompass a person's Indigenous identity: *Smith v. Mohan (No. 2)*, 2020 BCHRT 52. As such, I refer to Indigenous identity in this decision.

[4] The issue that I need to decide is whether to accept this Representative Complaint for filing. This is a screening decision.

II SCREENING THRESHOLD

[5] The task before me on a screening decision is to determine whether this complaint sets out facts which, if proven, could violate the *Code*: *Gichuru v. Vancouver Swing Society*, 2019 BCSC 402 [**Gichuru**]. This screening threshold applies to all of the human rights complaints that have been filed at this Tribunal. It is an assessment based on the complainant's allegations,

without considering any information from the respondent: *McCulloch v. British Columbia (Human Rights Tribunal)*, 2019 BCSC 402 at para. 41.

[6] This complaint has been filed on behalf of a class of Indigenous persons who have been deemed ineligible for liver transplants. A class complaint involves special considerations. In particular, I must be satisfied that the class is defined appropriately and that the representative is able to effectively represent the class.

[7] These are matters which need to be determined at some stage of the proceedings. The Tribunal has determined that the most appropriate stage is during the screening process. Accordingly, the Tribunal has set out in several decisions, including *C.S.W.U. Local 1611 v. SELI Canada and others (No. 3)*, 2007 BCHRT 423 [*SELI*], what it will need to receive from a representative complaint before the complaint can be accepted for filing. Those requirements have been confirmed in *Citizens for Safe Technology Society obo others v. BC Hydro*, 2012 BCHRT 300 [*Citizens*] at para. 12:

- a. The class is defined, or is capable of definition, by clear parameters or characteristics;
- b. The alleged contravention is similar for all members of the class, and, in particular, there are issues in common for all of the individuals in the class; and
- c. Proceeding with the complaint is in the best interest of the class on behalf of which the complaint is made.

[8] The Tribunal may also consider whether:

- a. The representative has notified the class members of the complaint, or has proposed a method of doing so;
- b. The representative has proposed a method for keeping the members of the class informed of the progress of the complaint;
- c. The representative has notified the class members of a right to opt out of the complaint, or has proposed a method for doing so; and
- d. There is a potential conflict between the members of the class and the representative.

[9] This screening assessment is important because it defines those issues of which the Tribunal has jurisdiction.

III ANALYSIS AND DECISION

[10] I have decided to accept this Representative Complaint for filing. These are the reasons for my decision.

A. Complaint alleges a possible contravention of the *Code*

[11] To start, I am satisfied that the complaint has set out facts which, if proven, could be discrimination in services under s. 8 of the *Code* on the grounds of Indigenous identity and physical disability.

[12] The Representative Complaint sets out the following facts:

- Liver transplants are a service customarily available to the public.
- The Abstinence Policy has a discriminatory impact on Indigenous persons with alcohol use disorder who are disabled by their disease.
- To be eligible to receive a liver transplant, an applicant with a history of alcohol use disorder must adhere to a mandatory six-month abstinence policy before being considered for placement on the liver transplant waitlist.
- Indigenous persons suffer disproportionately high rates of alcohol use disorder due to historic and ongoing oppressive and colonialist policies.
- Contributing factors to the higher rates of alcohol use disorder include a lack of genetic protective factors (metabolizing enzyme variants) combined with genetically mediated factors (externalizing traits, consumptive drive, drug sensitivity/tolerance) that combine with key environmental factors (trauma exposure, early age onset use, and environmental hardship/contingencies).
- The Abstinence Policy lacks a reasonable or scientific justification for its continued use as exclusion criteria for a liver transplant.
- This policy delays or prevents Indigenous persons from receiving necessary and life saving medical treatment. It places their health at risk and is an affront to their dignity, respect, and self-worth.

[13] If proven, these facts could be discrimination in services on the grounds of Indigenous identity and physical disability in breach of s. 8 of the *Code*.

[14] These are not the kind of extensive and wide-ranging allegations of a general nature contemplated in *Gerd'son obo others v. University of Victoria and another*, 2011 BCHRT 235 where it did not further the purposes of the *Code* to proceed with a complaint that may, at the end of the day, be impossible to hear and decide.

[15] Here, there is a “unifying core around the allegations stated to be discriminatory”: *Gerd'son* at para. 94. This enables the Tribunal to provide a just and timely resolution of this complaint and offer an efficient and responsive human rights process. One of the purposes of the *Code* is to identify and eliminate persistent patterns of inequality: *Code*, s. 3(d). The very nature and purpose of a complaint of systemic discrimination is to provide a way for examining larger patterns of behaviour through policies and practices that have a discriminatory impact. I am satisfied that this complaint can be fully addressed in a single hearing.

B. Appropriate class complaint

[16] Turning to the special considerations of class complaints, the Tribunal applies the general principles established in class action litigation to representative complaints in a manner that best furthers the purpose of the *Code*: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38; adopted in the human rights context in *Vorley v. BC (Ministry of Solicitor General)*, 2005 BCHRT 219 at paras. 29-30. A purposive approach may entail relaxing some of the strict requirements established in class action litigation: *Cole v. Northern Health Authority*, 2014 BCHRT 26 [**Cole**] at para. 94. Notwithstanding, the class must be sufficiently defined to enable the respondents to know the case they must meet, which is a fundamental rule of procedural fairness: *Kirchmeier and others v. University of British Columbia (No. 2)*, 2017 BCHRT 186 [**Kirchmeier**] at paras. 24-25.

1. Class description

[17] I am satisfied that the class is clearly defined such that the Respondents know the case they must meet. This complaint has been filed on behalf of a class of Indigenous persons who have been deemed ineligible for liver transplants. There are common issues of fact and law arising from this complaint. I understand that class description to be:

“Indigenous persons who have been adversely impacted by the Abstinence Policy”

[18] This is a class complaint, rather than a group complaint, because not all of the complainants are identifiable. With one exception, UBCIC has not yet identified any other member of the class. UBCIC identified David Dennis who filed a human rights complaint making substantially similar allegations on August 13, 2019 with complaint no. 19643 [**Dennis complaint**]. Mr. Dennis passed away on May 29, 2020. UBCIC wants to join this Representative complaint with the Dennis complaint, or alternatively, to intervene in the Dennis complaint with full rights of a party to the complaint. The parties are making submissions on these applications in the Dennis complaint, and as such, I do not consider them further here.

[19] I am, however, satisfied that there are other members of the class who can be identified and are willing to participate in this complaint. UBCIC has heard from individuals directly affected by the liver transplant Abstinence Policy and others whose relatives have been adversely affected. UBCIC has indicated that there are members of the class who are willing to participate in this complaint.

[20] I recognize that the Tribunal must be thoughtful when setting requirements for proceeding with a 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”: *SELI* at para. 101. Notwithstanding that most of the complainants have not yet been identified, I am satisfied that proceeding with the complaint is in the best interest of the class on behalf of which the complaint is made: *Citizens* at para. 12.

[21] Indigenous people are disproportionately underrepresented in complaints to this Tribunal: *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 at para. 5. The reluctance of individuals to pursue a human rights complaint can be a good reason for a complaint to proceed as a class complaint. In *Pivot Legal Society v. Downtown Vancouver Business Improvement Assn*, 2009 BCHRT 229 [**Pivot**], the Tribunal recognized that where the complainant class is comprised of vulnerable and marginalized individuals, they may face

barriers in attempting to enforce their human rights. The Tribunal should not erect additional barriers in the course of evaluating the appropriateness of a class complaint: *Pivot* at para. 43.

2. Class representative

[22] A person or organization representing the class has special responsibilities. Those responsibilities include communicating with the class about the complaint and acting at all times in the best interests of the class.

[23] I am satisfied that UBCIC will be acting in the best interests of this class. The UBCIC is a non-profit society that represents First Nations communities in British Columbia and advocates on behalf of issues that affect Indigenous Peoples. A challenge to the Abstinence Policy is within the mandate of UBCIC which includes the elimination of discrimination and improving the health, dignity, and well-being of Indigenous persons and communities. Given that their interests align with the class, I do not foresee any potential conflict between the members of the class and its representative in these circumstances.

[24] That UBCIC is not a member of the class is not, on its own, a bar to the complaint proceeding. Section 21(4) of the *Code* clearly states that a complaint may be filed on behalf of a class of persons, regardless of whether the person filing the complaint is a member of the class: *Pivot* at para. 34. What it does mean is that UBCIC will not be able to give direct evidence about a critical piece of harm that UBCIC says the class suffered. This is a matter for the hearing. It is not a factor that weighs against accepting this complaint for filing at a screening stage.

3. Communication plan

[25] I am satisfied that UBCIC has a plan for how it will communicate with the class as the complaint proceeds. UBCIC plans to communicate directly with members of this class through electronic means to keep them apprised of developments, get their input on how to proceed, and give them a chance to opt out of the complaint.

[26] UBCIC has already communicated with members of the class through a media release shared with its constituency and through the press and social media coverage regarding the

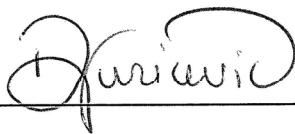
Dennis complaint and the discriminatory impact of the Abstinence Policy. Through that process, UBCIC has heard from individuals directly affected by the liver transplant Abstinence Policy and others whose relatives have been adversely affected.

[27] UBCIC will continue to disseminate information regarding the proceeding to its constituency through numerous established channels. These include the UBCIC website, press releases, announcements, emails, social media, and other means. UBCIC will be providing opt-out options to members of the class should they so desire.

[28] For all these reasons, the special considerations of class complaints are satisfied. I have applied the general principles established in class action litigation to this complaint in a manner that best furthers the purpose of the *Code*. I am satisfied that the class is sufficiently defined to enable the respondents to know the case they must meet, and that UBCIC will communicate with the class about the complaint and act at all times in the best interests of the class.

IV CONCLUSION

[29] The Representative Complaint has been accepted for filing.



Diana Juricevic, Tribunal Chair