



David M. Aaron

Barrister & Solicitor

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By Facsimile

British Columbia Human Rights Tribunal
1170 - 605 Robson Street
Vancouver, BC
V6B 5J3

Attention: Enid Marion, Tribunal Member

Dear Sirs / Mesdames:

**Re: Citizens for Safe Technology Society, Una St. Clair and others v. B.C.
Hydro -and- Corix Utilities - Case Number 9854**

I am legal counsel for both Una St. Clair and the Citizens for Safe Technology Society and I am authorized to file the instant submission on their behalf.

This submission is being made in accordance with the Tribunal's directions as set out in its Memorandum of January 13, 2012, following the conference call between the parties of that day.

Since filing the complaint on September 14, 2011, ("the Complaint") my clients have had the opportunity to retain and consult counsel. Having done so, my clients seek to refine and clarify the manner in which the representative complaint is brought and to do so by way of amendment and/or leave of the Tribunal where required.

A. Parties

The Complaint is brought by the Citizens for Safe Technology Society ("the Complainant" or "the Society") in a representative capacity on behalf of a class of individual persons.

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Box 479, Nelson, British Columbia, Canada V1L-5R3

Tel: 250.551.6840 Fax: 866.685.7376

david@legalmind.ca

Una St. Clair is the executive director of the Citizens for Safe Technology Society. She is also a member of the proposed class on whose behalf the Complaint is brought.

As the Complaint is framed, it is the Society, and not Ms. St. Clair in her individual capacity, that is the proposed representative of the class, although the distinction is not a major one because Ms. St. Clair is the controlling mind behind the Society and, in our submission, either of the Society or Ms. St. Clair would be adequate representatives of the Class for the purpose of this proceeding.

The representative function of the Society lies in the fact that it is being used by the Class membership as a tool for:

- pooling individual resources;
- effecting participatory governance with respect to representational matters;
- effecting communication with respect to representational matters; and
- administering the prosecution of the Complaint.

The Complaint is brought against a single respondent, the British Columbia Hydro and Power Authority (“BC Hydro”), which is an agent of the Crown.

The Complaint is hereby discontinued against Corix Utilities.

B. Nature of Complaint

The Complaint is a representative complaint in accordance with s. 21 of the *Human Rights Code* [RSBC 1996] Ch. 210 (“the Code”), which states, in part:

- (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.
...
- (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.

C. The Class

The Complaint is brought on behalf of a class of individual persons (“the Class”).

The Class consists of a number of individuals who can be described by reference to the following characteristics:

1. The individual is a resident of British Columbia.
2. The individual resides in a residence and/or a residential complex that gets its electricity from the respondent, BC Hydro.
3. The individual has been advised, in writing, by a physician licensed to practice medicine in all or part of Canada, to avoid -for reason of illness and/or disability- residing in a residence and/or a residential complex at which a wireless smart meter device is operating.
4. The individual, on his/her own behalf or by way of a representative, has requested accommodation from BC Hydro; that is, that BC Hydro commit in writing, without conditions, to refraining from installing and/or operating a wireless smart meter at the individual’s place of residence and/or residential complex.
5. Within three weeks from making the above-referenced request for accommodation, the individual has not received an unconditional written commitment from BC Hydro that BC Hydro will refrain from installing and/or operating a wireless smart meter at the individual’s place of residence and/or residential complex.

(“the Defining Characteristics”)

D. Class v. Group

The Complaint is brought on behalf of a “class” of persons who meet the Defining Characteristics rather than on behalf of a “group” of identifiable individuals.

The distinction between a class and group was articulated by the Tribunal in *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada) Local 111 v. Coast Mountain Bus Company (No. 7)*, 2005 BCHRT 478 (“*Coast Mountain Bus Company*”), at paragraphs 17 - 18:

The parties have referred throughout their submissions to the representative "group". As noted above, s. 21(4) of the Code provides that a complaint may be filed on behalf of a "group" or "class" of persons. The distinction between a representative group and a representative class is important.

A group of persons is a number of individuals who are identifiable, or who, with relative ease, could be identified by name for the dates relevant to the complaint. On the other hand, a "class" of persons is a number of individuals who can be described by characteristics for the dates relevant to the complaint but cannot necessarily be individually named.

While the Complainant intends, by way of example, to produce evidence to identify dozens of individuals who can be described by reference to the Defining Characteristics, we take the position that it is not necessary that every member of the Class be named or known.

We submit that any person may claim membership in the Class (and a corresponding entitlement to any remedy granted by the Tribunal in that regard) as long as that person can be described by reference to the Defining Characteristics.

In support of this approach to an *open* Class membership, we rely on the Supreme Court of Canada’s decision in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (“*WCS*”) at paragraph 38:

While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational

relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: ...

[emphasis added]

E. Identified Class members

The Class includes a number of individuals whose identities and particulars are unknown.

The Class includes the following individuals whose identities and particulars are known and documented:

	The individual has been advised, in writing, by a physician licensed to practice medicine in all or part of Canada, to avoid -for the following reason- residing in a residence and/or a residential complex at which a wireless smart meter device is operating
1	Highly electro-hypersensitive (“EHS”)
2	Occupational exposure induced EHS
3	EHS
4	EHS
5	Angioedema
6	MCS and EHS
7	MCS and EHS
8	Genetic Cardiomyopathy / Defibrillator
9	Unspecified medical conditions
10	Unspecified medical condition and EHS
11	Unspecified medical conditions
12	EMF Hypersensitivity

The following individuals have identified themselves to the Complainant as having an interest in joining the Class, and the Society anticipates that it will soon be in a position to confirm that their respective documents qualify them for inclusion in the Class.

	The individual expects to be been advised, in writing, by a physician licensed to practice medicine in all or part of Canada, to avoid - for the following reason- residing in a residence and/or a residential complex at which a wireless smart meter device is operating
1	Cardio myopathy
2	EHS
3	EHS
4	EHS
5	Brain Tumor condition, EHS
6	EHS, Skin Condition
7	EHS
8	Heart Condition, EHS
9	EHS
10	Caratacts, unspecified medical condition
11	Severe EHS
12	EHS, MCS, Chronic Fatigue, Fibromyalgia
13	EHS
14	Diabetic, EHS
15	MCS
16	Sudden onset EHS
17	Fibromyalgia, Chronic Fatigue
18	Heart Condition
19	Chronic Fatigue, sudden onset EHS
20	Environmental sensitivities, EHS
21	Complex Reg. Pain Syndrome, Fibro, MCS
22	Sudden onset EHS
23	EHS, MCS
24	MCS, Compromised Immune System
25	Cerebral Palsy, Seizures
26	Heart Condition
27	Unspecified medical condition
28	Non-Hodgkin's Lymphoma

29	Multiple Sclerosis
30	Heart Condition
31	Breast Cancer
32	Cancer
33	Environmental sensitivities, EHS

The Complainant requests that the Tribunal and respondent refrain from publication of the names of the above-referenced individuals until privacy protocols can be established in that regard.

F. The Disability

The claimed disability in this case is articulated as follows: an environmental sensitivity resulting in an inability to be well while residing in a residence and/or residential complex in which a wireless smart meter has been installed and/or is operating (“the Disability”).¹

Whereas the specific medical circumstances of each Class member varies, we submit that each class member has medical circumstances which give rise to the common Disability.

A disability must be analyzed in terms of an individual’s accommodation needs rather than their specific medical circumstances.² For example, persons in a wheelchair may have different medical circumstances which cause them to be in a wheelchair, but they all have a common disability in relation to curb sides; that is the inability to access raised curb sides.

In all cases, the disability must be characterized in terms of:

- the impediment that it raises to accessing the public service; and
- the resulting need for accommodation.

¹ To the extent that the September 14, 2011, Complaint forms contain a different description of the claimed disability, the Complaint is hereby amended so as to describe the claimed disability in accordance with the instant submissions.

² *Accommodation for Environmental Sensitivities: Legal Perspective* at page 9.

One of the various medical conditions that gives rise to the claimed Disability in this case is electro-hypersensitivity (“EHS”). EHS is referenced in a report entitled *The Medical Perspective on Environmental Sensitivities*, which is posted on the Canadian Human Rights Commission website at:

http://www.chrc-ccdp.ca/pdf/envsensitivity_en.pdf

The report at page 3 states:

The term “environmental sensitivities” describes a variety of reactions to chemicals, electromagnetic radiation and other environmental factors at exposure levels commonly tolerated by many people.

“Environmental sensitivities” does not describe a single, simple condition with a universal cause. Environmentally sensitive individuals link their symptoms to aspects of their environment such as being in a particular place or being exposed to one or more factors such as chemicals, biological materials or electromagnetic phenomena.

[emphasis added]

The report goes on, at page 3, table 1, to list “names used for aspects of environmental sensitivities” including “electromagnetic (hyper)sensitivities / intolerance” and “radiowave sickness”.

At page 17, table 6, the report lists “electromagnetic radiation” as a typical agent that triggers reactions in susceptible individuals (and may contribute to initiation of environmental sensitivities). The table makes specific reference to “radiowaves and microwaves”, which characterizes the electromagnetic radiation emitted from BC Hydro’s wireless smart meters.

At page 24, the report states:

The high prevalence of neurological symptoms in people with environmental sensitivities led to interest in “kindling” within the nervous system. Kindling is a phenomenon whereby repeated low level exposures to chemicals, or electromagnetic currents or fields eventually cause symptoms at levels previously tolerated. In this process, neurochemical, behavioural, endocrine and/or immunological responses are amplified.

[emphasis added]

At page 39, the report states:

The World Health Organization (WHO) acknowledges the condition of electromagnetic sensitivity, and published a 2006 research agenda for radio-frequency fields. The WHO recommends that people reporting sensitivities receive a comprehensive health evaluation. It states: “Some studies suggest that certain physiological responses of EHS individuals tend to be outside the normal range. In particular, hyperactivity in the central nervous system and imbalance in the autonomic nervous system need to be followed up in clinical investigations and the results for the individuals taken as input for possible treatment.” Reduction of electromagnetic radiation may ameliorate symptoms in people with chronic fatigue”.

At page 41, the report states:

Use of alternative technologies (wire or fibre data transmission) is the most straightforward, feasible and effective measure to accommodate workers with electromagnetic sensitivities.”

A second report relied on by the Complainant is *Accommodation for Environmental Sensitivities: Legal Perspective* which is posted on the Canadian Human Rights Commission website at:

http://www.chrc-ccdp.ca/pdf/legal_sensitivity_en.pdf

At page 8 the report states:

The triggering environmental agents are prevalent throughout the built environment and include electromagnetic fields and the chemicals found in building materials, furniture, cleaning and copying products, fragrances, and pesticides.

...

While this paper uses the term “environmental sensitivities,” numerous other terms refer to the same or similar conditions, including “multiple chemical sensitivity (MCS),” “chemical injury,” “sick building syndrome,” “environmental illness,” “environmental hypersensitivity,” “electromagnetic field (EMF) sensitivity,” “Gulf War syndrome,” “environmental sensitivity disorder,” “20th century disease” and “environmental allergies.” Because of the variation in triggers and symptoms, it is preferable to refer to sensitivities in the plural, rather than the singular.

[emphasis added]

At page 9 the report states:

International approaches to definitions of disability in human rights protection vary in their reliance on medical diagnoses and symptoms. At one end of this spectrum are the Canadian and Australian approaches, in which a very broad definition of disability is adopted. As a result of this, complainants are required to provide minimal medical evidence to establish that they qualify as persons with a disability, and individuals with environmental sensitivities do not need to prove the veracity of their condition. In fact, the courts have specifically held that the inability of the medical community to diagnose a condition or identify its cause does not affect whether an individual has a disability, so long as its triggers can be identified. Instead, the analysis is meant to focus on the individual's accommodation needs and the behaviour of the employer or service provider.

Each of the above-referenced reports is linked to the Commission's policy page on environmental sensitivities at:

http://www.chrc-ccdp.ca/legislation_policies/policy_envIRON_politique-eng.aspx

G. Remedy requested

The propriety of the representative manner of proceeding must be determined by reference to the nature of the Complaint. One of the most defining features of the Complaint is the remedy sought by the Complainant.

The sole remedies sought by way of the Complaint are as follows:

1. A declaration that BC Hydro has discriminated against each person in the Class by failing to provide each person in the Class with an unconditional written commitment that BC Hydro will refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex.
2. An order that BC Hydro cease and desist forthwith from the said discrimination by offering to refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex.

We emphasize that the remedy, if granted, would not result in an outcome that is binding on any person within the Class. Rather, the remedy, if granted, would merely make an *offer* available to individual members of the Class. In the event that an individual had chosen to opt out of the Complaint or otherwise reject the outcome of the Complaint, that *offer* could always be rejected by that member.

This permissive feature of the remedial nature of the Complaint may be relevant to the Tribunal's consideration of the nature of the Complaint as it reflects on the desirability of an "opt-out" right in favour of individual members of the Class.

H. An effective means of addressing discrimination

All members of the Class are alleged to have experienced discrimination on the basis of disability when accessing services customarily made available to the public by BC Hydro.

The representative manner of proceeding provides the Tribunal with an effective means of addressing this kind of discrimination. As stated by the Tribunal in *Construction and Specialized Workers' Union Local 161 v. SELI Canada Inc. (No. 3)*, 2007 BCHRT 423 ("*SELI*") at paragraph 101:

Representative complaints filed on behalf of a group provide the Tribunal with an effective means of addressing systemic discrimination where all members of a group are alleged to have experienced discrimination. 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.

I. Interpretive principles

We submit that, given the special nature of human rights legislation, the Tribunal would be correct in adopting a broad and liberal approach to determining whether the Complaint has been properly brought as a representative proceeding. As stated by the Tribunal in *Coast Mountain Bus Company* at paragraph 22:

As noted above, the Tribunal has not had many opportunities to consider the composition of representative groups or classes, or much experience with representative complaints under the direct access model. The Tribunal's approach to such complaints must, in these circumstances, be flexible and

influenced by the underlying purposes of the Code, and nature of the direct access system.

The purposes of the Code are set out in s. 3. They include:

- ...
- (c) to prevent discrimination prohibited by this Code;
 - (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
 - (e) to provide a means of redress for those persons who are discriminated against contrary to this Code. ...

The “special nature” of human rights legislation as summarized in *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, was considered by the Tribunal in *SELI* in the context of determining the propriety of a representative complaint. As stated by the Tribunal in *SELI* at paragraph 60:

Human rights statutes have been repeatedly recognized by all Canadian courts and human rights tribunals as having special qualities which require a broad and purposive interpretation of their provisions. As the Supreme Court of Canada has said, human rights codes are not ordinary law; they are fundamental laws which declare public policy:

J. WSC Conditions

The four conditions for certification of a class action set out by the Supreme Court of Canada in *WSC* are as follows:

1. the class is capable of clear definition;
2. there are issues of fact or law common to all class members;
3. success for one class member means success for all; and
4. the class representative must adequately represent the class.

In determining whether a representative complaint has been properly brought, the Tribunal has avoided a rigid application of the Supreme Court of Canada’s jurisprudence with respect to approval of class certifications in the civil context. As stated by the Tribunal in *SELI* at paragraph 90:

In the handful of cases in which the Tribunal has been asked to consider the process applicable to a group or class complaint, the Tribunal has referred to the *Dutton* [*WCS*] conditions as providing guidance to the Tribunal. However, the Tribunal has repeatedly stated that those conditions should not be applied rigidly:....

The Tribunal in *SELI*, at paragraph 104, enumerated three (3) factors that may be considered in determining the propriety of a representative complaint.

Second, the Tribunal must determine whether the complaint as framed is appropriate for a group or class complaint. Here the factors the Tribunal may consider include whether:

- i) the group or class is defined, or is capable of definition, by clear parameters or characteristics;
- ii) the alleged contravention is similar for all members of the group or class, and, in particular, there are issues in common for all of the individuals in the group or class;
- iii) proceeding with the complaint is in the interest of the group or class on behalf of which the complaint is made.

The Tribunal in *SELI*, at paragraph 105, went on to reference four (4) additional considerations:

Third, the Tribunal may consider whether:

- i) the representative has notified the group or class members of the complaint, or has proposed a method for doing so;
- ii) the representative has proposed a method for keeping the members of the group or class informed of the progress of the complaint;
- iii) the representative has notified the group or class members of a right to opt out of the complaint, or has proposed a method for doing so; and
- iv) there is a potential conflict between the members of the group or class and the representative.

K. Class definition

The first condition, as articulated by the Supreme Court of Canada in *WCS*, is that:

...the class is capable of clear definition;

The corresponding factor for consideration, as articulated by the Tribunal in *SELI*, is:

...the group or class is defined, or is capable of definition, by clear parameters or characteristics;

The Complainant submits that the Class in this case is defined by the Defining Characteristics in a manner which is clear. The Defining Characteristics constitute clear and objective parameters which can be used to determine whether or not any given individual falls within the Class.

In particular, it can be objectively determined whether any given individual:

1. is a resident of British Columbia;
2. resides in a residence and/or a residential complex that gets its electricity from the respondent, BC Hydro;
3. has been advised, in writing, by a physician licensed to practice medicine in all or part of Canada, to avoid -for reason of illness and/or disability- residing in a residence and/or a residential complex at which a wireless smart meter device is operating;
4. has requested, on his/her own behalf or by way of a representative, accommodation from BC Hydro; that is, that BC Hydro commit in writing, without conditions, to refraining from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex.
5. has failed to received, within three weeks from making the above-referenced request for accommodation, an unconditional written commitment from BC Hydro that BC Hydro will refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex.

We submit that there is no ambiguity with respect to the clear definition of the Class by objective criteria which can be easily applied to determine whether any individual is a member of the Class.

L. Common issues

The second condition, as articulated by the Supreme Court of Canada in *WCS*, is that:

...there are issues of fact or law common to all class members;

The corresponding factor for consideration, as articulated by the Tribunal in *SELI*, is:

...the alleged contravention is similar for all members of the group or class, and, in particular, there are issues in common for all of the individuals in the group or class;

The Court in *WCS* defined this criterion at paragraph 39:

... It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues ... However the class members' claims must share a substantial common ingredient.

Each of the respective Class members in this case may have medical circumstances which give rise to the need to be free from wireless smart meters in their domestic environments; and each member has been advised by his or her medical doctor to avoid, for reason of illness and/or disability, residing in a residence and/or a residential complex at which a wireless smart meter device is operating. On the basis of that need, each member has requested accommodation from BC Hydro and, in each case, BC Hydro has failed to commit to accommodating the member. These are the substantial common ingredients shared by each member of the Class.

Whereas the specific medical circumstances of each class member varies, we submit that each class member has a common physical disability; that is an environmental sensitivity resulting in an inability to be well while residing in a residence and/or residential complex in which a wireless smart meter has been installed and/or is operating.

The contravention of the Code, as alleged, is identical with respect to each member

of the Class; that is, BC Hydro's discrimination on the basis of physical disability and failure to accommodate the request for accommodation.

M. Success for one is success for all

The third condition, as articulated by the Supreme Court of Canada in *WCS*, is that:

...success for one class member means success for all.

Although the Tribunal in *SELI* did not adopt this condition in explicit terms, we submit that the propriety of the representative proceeding in the current case is affirmed by the fact that the remedy sought by the Complainant would apply equally to each member of the Class. It could truly be said that success for any one member of the Class would be success for all members of the Class.

N. Is the proposed representative appropriate and adequate?

The fourth condition, as articulated by the Supreme Court of Canada in *WCS*, is that:

...the class representative must adequately represent the class.

In *WCS*, the Court stated at paragraph 41 that "the court should be satisfied ... that the proposed representative will vigorously and capably prosecute the interests of the class".

This condition is reflective of the following factors as articulated by the Tribunal in *SELI*, as to whether:

- i) the representative has notified the group or class members of the complaint, or has proposed a method for doing so;
- ii) the representative has proposed a method for keeping the members of the group or class informed of the progress of the complaint;
- iii) the representative has notified the group or class members of a right to opt out of the complaint, or has proposed a method for doing so; and
- iv) there is a potential conflict between the members of the group or class and the representative.

The proposed representative, the Complainant, is a Society and not an individual. As such it is not a member of the Class.

The Complaint very well could have been brought by way of Ms. St. Clair, on her own behalf and on behalf of the Class, as it is our submission that she would be an adequate representative of the Class. However, the Complaint has been styled so as to advance the Society as the Complainant and representative of the Class for reason that the Society is an ideal tool for:

- pooling individual resources;
- effecting participatory governance with respect to representational matters;
- effecting communication with respect to representational matters; and
- administering the prosecution of the Complaint.

Section 21(4) of the *Code* makes it clear that a representative filing a complaint on behalf of a class need not be a member of the proposed group or class. It expressly authorizes the Tribunal to accept complaints made on behalf of a class, whether or not the person making the complaint is a member of that class.

The Complainant Society and representative of the Class is vastly networked amongst a vast community of British Columbians opposed to BC Hydro's installation and operation of wireless smart meters. It is through this network that the Complainant is ideally situated to effectively communicate with members of the Class for the purpose of notifying Class members of the Complaint and the progress of the Complaint.

It is notable that all known members of the Class are persons who approached the Society with an interest in participating in the Complaint.

With respect to the adequacy of the proposed representative, it is notable that the Citizens for Safe Technology Society is under the executive directorship of Una St. Clair, who worked as a paralegal and law office administrator for 15 years. She was also the Humane Education Coordinator for the BC Humane Education Society for two years. She currently holds certification as a relationship and communications counselor.

We submit that the Society is in an outstanding position to effectively communicate with the Class membership with respect to the existence and progress of the Complaint. We submit that the standard of communication that can be expected of the Society in that regard far exceeds that which the Tribunal has required of representatives claimants. As stated in *SELI*:

80 While it may be necessary for a representative to provide notice to members of a group or class of a complaint filed on their behalf, as well as ongoing information about the complaint and its status, the nature and scope of those obligations will depend on the individual circumstances in any complaint.

...

86 While it is arguable that the Union could have done more to communicate with the members of the Complainant Group, the Tribunal will not hold representatives to a standard of perfection. To do so would undermine the ability of representative complaints to proceed, which would be contrary to the purposes of the *Code*.

It can be anticipated that the Society will take sufficient steps to keep the members of the Class advised about the nature of the Complaint, its filing, and its status.

O. No conflict of interest

A factor for consideration, as articulated by the Tribunal in *SELI*, is whether there is a potential conflict between the members of the group or class and the representative. In this case, there is no such potential. The Society is active in resisting BC Hydro's imposition of wireless smart meters on BC residents in the absence of consent. There is no position that the Society has taken in that regard that is inconsistent with the assertions contained in this Complaint or otherwise inconsistent with the interests of the members of the Class.

P. Complaint is in the interests of the Class

There can be no question that the Complaint is in the interests of the members of the Class. Each member of the Class has requested the identical accommodation from BC Hydro and each member of the Class has a common interest in effecting that accommodation. The Complaint is simply in furtherance of that common interest.

The Complainant does not bear the burden of proving that the members of the Class wish to proceed with the Complaint. As stated by the Tribunal in *SELI*:

70 In the panel's view, under s. 21(5)(b), the question the Tribunal must determine is whether the complaint is in the interest of the group or class. The panel accepts that the wishes of the members of the group or class, in so far as they may be ascertained, may be relevant to that question. They are not, however, necessarily determinative, as the question of the interest of the group

or class must be answered in light of the purposes of the Code.

71 ...the burden is not upon the representative to establish that members of the group or class wish to proceed or that the complaint is in the interest of the group or class. The burden is on the person who alleges the contrary.

Each known member of the Class has executed a written document (“Form 2 – Representative Complaint Form – Individual”) declaring that the individual wants to proceed with the Complaint.

Q. Authorization

The Complainant submits that it is not required to establish that it has obtained the authorization of Class membership. In the alternative, the Complainant submits that it is authorized to advance the Complaint on behalf of the Class membership.

The authorization factor was addressed by the Tribunal in *SELI* in the following terms:

72 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). Regarding a representative complaint filed on behalf of a group, the member has discretion not to accept the complaint where proceeding with it is not in the interest of the group: s. 21(5)(b).

73 As noted above, human rights legislation creates fundamental public policy. Discrimination is not only an offence vis-à-vis the individual affected, but is also an offence to society at large. Requiring every member of a group or class to authorize the filing of a representative complaint on their behalf would weaken the public policy aspect of human rights legislation by treating a representative complaint as nothing more than a consolidation of several individual complaints which the Tribunal has decided to deal with together under s. 21(6).

74 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.

As noted above, all known members of the Class are persons who approached the Society with an interest in participating in the Complaint.

Furthermore, each known member of the Class has executed a written document (“Form 2 – Representative Complaint Form – Individual”) declaring that the individual wants to proceed with the Complaint.

There is no basis for the Tribunal to exercise its jurisdiction under s. 21(5)(a) of the Code to reject the Complaint on the basis that the members do not wish to proceed with the Complaint. The burden lies with BC Hydro to advance a case to the contrary.

R. The right to opt out

The Tribunal in *Corren*, at paragraph 73, considered the circumstances applicable to the determination as to whether an opt-out option must be available for group or class members on whose behalf a representative complaint is brought.

In *SELI*, the Tribunal considered circumstances in which it would be appropriate to impose an obligation on a representative complainant to provide notice to members of the group and to advise them of the right to opt out. The factors outlined by the Tribunal in this regard included: the nature of the complaint; the nature, size, and vulnerability of the class; the nature of the remedies sought; the stage of the proceedings; and any indication the Tribunal may have that members of the class do not want to participate.

These considerations were applied by the Tribunal in *SELI*:

89 There is no obligation in the Code that a member of a complainant group be advised about opting out.

...

96 Further, the panel is of the view that, if after hearing the evidence on the merits, this complaint is found to be justified, all members of the Complainant Group stand to benefit. Should any members of the

Complainant Group wish not to receive any monetary remedy the Tribunal might order in the event the complaint is found to be justified, they will be free to elect not to do so.

We submit that the same circumstances apply in the present case. The remedy sought by the Complainant would merely present itself as an option to any person within the Class. Should any member of the Class wish not to exercise that option in favour of accommodation, he or she will be free to decline the remedy.

S. *Prima facie* determination of the propriety of the representative Complaint

The Tribunal at this point is engaging in a *prima facie* determination as to whether the Complaint, as framed, is appropriately brought as a representative proceeding on behalf of a Class of individual persons. For the purposes of such a determination, the facts pled by the Complainant must be assumed to be true. Alternatively, if the facts asserted by the Complainant are questioned, the Complainant should be entitled to the opportunity to adduce evidence in support of the facts asserted.

T. Alternative to dismissal

We respectfully submit that, in the event that the Tribunal finds there to be deficiencies in the manner in which the representative Complaint is brought, then those deficiencies should be addressed by way of amendment to the Complaint rather than by dismissal. Such was the approach taken by the Tribunal in *Corren v. Abbotsford School Board District No. 34* 2010 BCHRT 32 (“*Corren*”), as illustrated by the following excerpts from that decision;

75 With respect to the respondent's application under s. 27(1)(d)(i), I find that the group as identified is overbroad and not appropriate. However, I decline to exercise my discretion to dismiss the complaint under s. 27(1)(d)(i).

76 Instead, I order as follows:

1. The complainants have until March 19, 2010 to file an amended complaint identifying, in particular, an appropriate group;
2. The Tribunal will schedule a pre-hearing conference after the filing of the amended complaint to discuss with the parties any issues arising.

U. Amendments to the Complaint

The Complainant hereby amends the Complaint as follows:

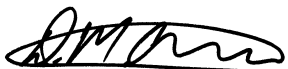
The “Form 2 – Representative Complaint Form – Group or Class” is amended in its entirety and replaced with the attached “Form 2 – Representative Complaint Form – Group or Class”, which is duly executed on behalf of the Complainant.

The “Form 2 – Representative Complaint Form – Individual” is not being relied on to frame the manner in which the representative proceeding is being brought. To be clear, the representative proceeding, as framed, is being brought on behalf of a Class rather than on behalf of one or more individuals. Nevertheless, the Complainant has used the “Form 2 – Representative Complaint Form – Individual” as a means of confirming, from each known member of the Class, authorization by way of a declaration that the individual wants to proceed with the Complaint as brought by the Complainant. We are currently holding each of these executed “Form 2 – Representative Complaint Form – Individual” documents on file and are willing to produce them upon request.

To the extent that the September 14, 2011, Complaint forms are inconsistent with the instant submissions, the Complaint is hereby amended so as to be framed and pleaded in accordance with the instant submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sincerely,



DAVID M. AARON

Encl.

cc: Shelley-Mae Mitchell
Counsel for the Respondents

cc: clients