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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

B E T W E E N:

Murray Corren and Peter Corren on behalf of the students and parents of the  
Abbotsford School District generally, and in particular, gay, lesbian, bisexual,  
and transgendered students and parents

**COMPLAINANTS**

A N D:

Abbotsford School Board, District #34

**RESPONDENT**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS: Section 21, Section 27(1)(c) and (d)**

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Tribunal Member:

Tonie Beharrell

Counsel for the Complainants:

Lindsay Waddell

Counsel for the Respondent:

Eric Harris

## I INTRODUCTION

[1] Murray and Peter Corren, on behalf of the students and parents of the Abbotsford School District generally, and in particular gay, lesbian, bisexual and transgendered students and parents, filed a complaint in which they allege that the Abbotsford School District has discriminated against the complainants with respect to a service customarily available to the public, on the basis of sexual orientation, contrary to s. 8 of the *Human Rights Code*. The respondent denies discriminating and applies to dismiss the complaint under s. 21 and ss. 27(1)(c) and (d) of the *Code*.

[2] Section 21 of the *Code* provides, 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 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 was made.

[3] Under s. 21, the respondent argues both that the group or class on whose behalf the complaint is filed is not appropriate, and that the representatives are not appropriate.

[4] Section 27 of the *Code* provides:

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

...

- (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.

[5] The respondent argues, under s. 27(1)(d)(i), that the complaint would not benefit the group or class alleged to have been discriminated against. This argument is related to their argument under s. 21. The respondent also argues that, in any event, there is no reasonable prospect that the complaint will succeed (s. 27(1)(c)), and that proceeding with the complaint would not further the purposes of the *Code* (s. 27(1)(d)(ii)).

## **II STRUCTURE OF THE DECISION**

[6] In this decision, I will first outline some of the factual background to the complaint as set out in the complaint, response, and the parties' submissions, and provide information relevant to the representative nature of the complaint and the representative status of the complainants. In doing so, I am not making any findings of fact with respect to the merits of the complaint.

[7] I will then first consider the respondent's application under ss. 27(1)(c) and (d)(ii) of the *Code*, followed by the application relating to s. 21 and 27(1)(d)(i) of the *Code*.

## **III BACKGROUND TO COMPLAINT AND APPLICATION**

[8] The representative complainants are a married gay couple, who advocate on behalf of the gay, lesbian, bisexual and transgendered community in British Columbia. They successfully concluded a settlement with the Ministry of Education in April 2006, amended in July 2007, based on a previous human rights complaint in which they argued

that the BC school curriculum discriminated against gay, lesbian, bisexual and transgendered people by failing to include any information about them in provincial curricula (the “Settlement”). Part of the Settlement provided for the creation by the Ministry of an elective course called Social Justice 12 (the “Course”).

[9] The Course involves mature and challenging subject matter. It deals generally with complex issues of social justice, including concepts ranging from hegemony and economic liberalization to speciesism. Sexual orientation and gender identity are among the issues that may be considered within the Course in relation to social justice. The Course involves students examining and challenging their own beliefs, and classroom activities may include discussion and debate of a variety of potentially contentious subjects. The Course also examines issues of conflict between belief systems.

[10] After the Settlement was entered into, the respondent received a number of written complaints, from parents and members of the public in the district. One of the concerns outlined in these complaints was with the teaching of homosexuality in the schools, and the perception of a “gay friendly” curriculum. In addition, the respondent received complaints and concerns at Board meetings which included concerns with references to homosexuality or sexual orientation in the classroom, and concerns with the rights of parents to opt-out of certain components of the curriculum.

[11] In about August 2007, the Ministry issued a draft Integrated Resource Package, or “IRP” for the Course, and invited responses to the draft. In December 2007, the respondent submitted a response, expressing its comments and concerns regarding the draft IRP. These concerns included the complex and challenging course material, and the need to ensure that teachers were qualified in terms of the requisite legal knowledge and the skills to present the material in a manner sensitive to the beliefs of all students. The respondent also noted the importance of respecting family culture, values and beliefs in presentation of the course material, and a concern that religious beliefs be addressed in a balanced way, and not as merely a negative influence of social justice concerns.

[12] The respondent did not receive a response from the Ministry regarding its comments. The respondent considered that, in light of the concerns it had expressed, it

would need to review the final IRP prior to deciding whether to offer the Course within schools in the District. This IRP was not issued until August 26, 2008.

[13] Planning for each school year's course offerings occurs during the prior Spring, and students at the secondary school level make their course selections for the following year primarily during the months of February through May. During the Spring of 2008, principals were notified that prior to the Social Justice 12 elective being offered in the District, the final IRP would need to be reviewed by the School Board.

[14] However, one of the secondary schools in the District, W.J. Mouat Secondary School ("Mouat"), offered the Course to its students. Mouat's principal had not been present at a principals' meeting where the status of the Course had been discussed. Over 90 students signed up for the Course.

[15] The respondent states that it was not notified of the Course being offered until July 2008. At that time, since the Course had not been reviewed, the respondent withdrew the Course, and made arrangements for another course to be available to the Mouat students who had expressed interest in the Course.

[16] In the result, an alternate course, "Global Studies and Active Citizenship", was offered at Mouat as an Independent Directed Studies course.

[17] The complainants allege that at least part of the reason for the withdrawal of the course was the complaints the Board had received from some parents in the District objecting to the Course's controversial content, and in particular issues dealing with sexual orientation, gender identity, homophobia and heterosexism. The complainants argue that curriculum is a service customarily available to the public, and that the withdrawal of the Course discriminates on the basis of sexual orientation. Further, the complainants note that it was not clear whether the alternative course would be accepted by post-secondary institutions as credit for entrance into those institutions. In any event, the complainants describe Global Studies and Active Citizenship as a "watered down" alternative, which is strikingly similar to the Course, but has removed all content relating to sexual orientation, gender identity, homophobia and heterosexism.

[18] In particular, the complainants point to an e-mail exchange between the respondent's Director of Instruction and Ministry staff relating to the overlap between the two courses. In the e-mail exchange, the Director states that the Board "will not sanction the teaching of the Social Justice course because of some of the content. That's why we rewrote this."

[19] The respondent states that the Course is an elective, and that Boards of Education are responsible for determining what elective courses will be offered within their school districts. The respondent had not had the opportunity to decide whether the Course would be offered at secondary schools until its Education Committee had an opportunity to review the finalized IRP for the course. The final IRP was not issued by the Ministry until August 26, 2008, which was too late for review prior to the 2008/09 school year. As a result, another course was offered to students at Mouat pending review of the final Course curriculum.

[20] The respondent notes that the Course was also not offered in the 2008/09 school year in other Districts, including Vancouver, Surrey and Mission.

[21] The Education Committee did subsequently review the Course, and in February 2009, the respondent decided to offer the Course at schools within the District, provided that students had informed their parents of their intended participation and parents had confirmed their child's participation by signing their consent. During the current (2009/10) school year, the Course is being offered at Mouat and in the Abbotsford Continuing Education program at the Bakerview Centre for Learning.

[22] The complainants allege that the consent requirement is related to the controversial Course content, and is also discriminatory.

[23] In response, the respondent states that, under the *School Act*, parents play an important role in the education of their children and have a right to be consulted regarding their children's educational program. Students at the senior level have a variety of choices as to the elective courses that they pursue. The choices that students make have an impact on their future career planning and goals, and parents are expected to play an active role in the direction of their children's educational program during this time.

[24] The respondent states that, recognizing that the Course is new and involves complex and challenging issues and subjects, which may be controversial, it is important for parents to be well-informed regarding the Course so they can participate in the decision as to whether their child will include this elective in their studies. The respondent argues that this does not constitute discrimination, but is rather a recognition of the role that parents play in the education of their children.

#### **IV ANALYSIS AND DECISION**

[25] As outlined above, this complaint was filed by the representative complainants on behalf of a group or class which they describe as:

The students and parents of the Abbotsford School District generally, and, in particular, gay, lesbian, bisexual, and transgendered students and parents. (the “Class”)

[26] In its application to dismiss, the respondent raises issues both with respect to whether the Class and the representatives are appropriate; and with respect to the substantive issues raised in the complaint.

[27] In *Construction and Specialized Workers’ Union Local 161 v. SELI Canada Inc.* (No. 3), 2007 BCHRT 423 (“*SELP*”), the Tribunal outlined the process it follows upon the filing of a representative complaint, as follows:

Upon the filing of such a complaint, there are three matters of concern to the Tribunal. First, as is the case with respect to all complaints, the Tribunal considers whether the complaint alleges facts which, if proven, could amount to a breach of the *Code*. This assessment is important because it defines those issues over which the Tribunal has jurisdiction.

Second, the Tribunal must determine whether the complaint as framed is appropriate for a group or class complaint. (paras. 103 and 104)

[28] Thus, the first issue is whether the complaint, as filed, constitutes a complaint of discrimination under the *Code*. As a result, in this decision, I will first consider the respondent’s arguments under s. 27(1)(c) and (d)(ii) of the *Code*. I will then consider the respondent’s arguments relating to the appropriateness of the Class and representative.

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

[29] The role of the Tribunal on an application to dismiss under s. 27(1)(c) of the *Code* was set out in *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134 (“*Wickham*”):

The 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 that 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 complainant will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is certainty that the complaint will succeed, which would be 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. (paras. 11-12)

[30] In order to establish a *prima facie* case of discrimination at a hearing, the complainants must show that they were treated adversely in the provision of a service customarily available to the public, and that such adverse treatment was based, in part, on a prohibited ground of discrimination.

[31] The respondent argues that, regardless of how the Class is defined, there is no nexus between the adverse effects alleged in the complaint and any protected ground under the *Code*. In particular, the respondent states that it did not withdraw the Course in the 2008-2009 school year for any discriminatory reason, and another course was offered to students at Mouat. Further, the respondent’s concerns regarding the draft IRP were pedagogical concerns given the mature nature of the Course.

[32] The complainants, on the other hand, submit that there is a reasonable prospect that they would be able to establish such a nexus. They point to the following:

- a) The correspondence received by the respondent expressing concern for the impact of the Settlement, including the perceived “gay friendly” curriculum;
- b) The respondent’s decision not to offer the Course;



- c) The respondent's decision to instead offer the Global Studies course which bears a strong similarity to the Course, with the deletion of any reference to sexual orientation or sexual identity; and
- d) The e-mail between the respondent's Director of Instruction and the Ministry in which the Director stated that the respondent would not sanction the teaching of the course "because of some of the content".

[33] Second, the respondent argues that there is no reasonable prospect that the complainant will be able to establish a nexus between the requirement for parental consent and any prohibited ground of discrimination. In particular, the respondent argues that parental consent is sought for a number of activities and courses within the District, including:

- a) Participation in sports teams;
- b) Participation in sports academies, which are programs in which students receive an educational program which includes a special concentration in a particular sport;
- c) Participation in an educational program with a special concentration in the fine arts, offered at the Abbotsford School of Integrated Arts;
- d) Registration in career training courses and programs, in which students receive an educational program which includes training towards trades, technology or health science/human services careers;
- e) Participation in field trips and other activities requiring travel; and
- f) Access to the District's computer and internet system.

[34] The respondent also submits that it is expected that parents will participate in students' decisions on course selection generally. Course selection practices are school-based. Some schools utilize course selection forms, while in other schools, course selection is performed on-line.

[35] Where paper forms are in use, signatures are required. Some schools require signatures from both the student and the parent, other schools require students to confirm by their signature that they have discussed their course plan with their parent or guardian. Parental involvement in course selection is also an expectation at schools where course selections are performed on-line.

[36] The respondent also notes that, at Mouat, for course selections involving on-line courses, students are required to provide separate confirmation of parental consent for the course. The form used identifies the nature of on-line courses and maturity and

independence required of students. The respondent states that all of these examples are consistent with the requirement for informed parental consent for courses offered that demand a level of maturity.

[37] In response, the complainants argue that none of the examples given are analogous to the requirement that parents consent before a student will be permitted to take a single Ministry approved and developed course, in school, as an elective. The fact that the School District uses consent forms in entirely different circumstances, does not bolster the respondent's argument that the requirement for parental consent as a prerequisite to participation in the Course is not discriminatory.

[38] At a hearing before the Tribunal, the onus would be on the complainant to establish a *prima facie* case of discrimination. On this application, the onus is on the respondent to establish that there is no reasonable basis that the complaint will succeed. On the basis of the information before me, the respondent has not met that onus. There is competing information before me relating to the background to the decision taken by the respondent not to offer the Course in the 2008-2009 school year, the reasons for that decision, the process undertaken by the respondents in formulating the curriculum for the Global Studies course, and the concerns and rationale underlying the development of that course. There is incomplete or competing information before me relating to the process through which the respondent developed the parental consent requirement with respect to the Course, the rationale for that requirement, the way in which that requirement compares to the treatment of other course decisions by students, and the impact of the removal of the requirement on parents as it relates to religious and other beliefs. All of these issues are best addressed and determined after a full hearing, where the parties have the opportunity to call all necessary evidence and test the evidence provided by the other parties.

[39] For these reasons, I dismiss the respondent's application under s. 27(1)(c) of the *Code*.

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

[40] The respondent also argues that proceeding with the complaint would not further the purposes of the *Code*, and thus that the complaint should be dismissed under s. 27(1)(d)(ii). In this regard, the respondent notes that the Course is, in fact, being offered to students within the School District as of the 2009-10 school year. Thus, the issue raised in the complaint has been resolved and proceeding with the complaint would not further the purposes of the *Code*.

[41] The complainants submit that the respondent's actions have not resolved the issues raised by the complaint. Rather, the resolution constitutes a further act of discrimination, in that it limits student access to the Course for reasons relating to one of the prohibited grounds of discrimination, sexual orientation.

[42] In *Williamson v. Mount Seymour Park Housing Co-operative and others*, 2005 BCHRT 334, the Tribunal outlined a range of circumstances in which it may not further the purposes of the *Code* to proceed with a complaint. One of those circumstances is where a respondent has responded appropriately to the complaint. The Tribunal went on to discuss the underlying rationale: that it may not further the purposes of the *Code*

A number of common threads can be discerned underlying these decisions. ... 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. As time goes on and the Tribunal continues to develop its case law, other circumstances and considerations relevant to the application of s. 27(1)(d)(ii) will doubtless be identified. (para. 11)

[43] In this case, the respondent argues that the issue raised in the complaint has been resolved as a result of the fact that it now offers the Course in the District. However, the terms on which the Course is offered, and specifically the requirement of informed parental consent prior to taking the Course, are alleged by the complainants to constitute further discrimination. Above, I have denied the respondent's application to dismiss the complaint on the basis that it has no reasonable prospect of success. In particular, I have denied the application to dismiss the part of the complaint relating to the parental consent

requirement, as the respondent has not established that there is no reasonable prospect that that aspect of the complaint will succeed. Given that determination, I cannot find that proceeding with the complaint would not further the purposes of the *Code*.

[44] I therefore dismiss the respondent's application under s. 27(1)(d)(ii).

### **3. Representative status of Complaint and Complainants**

[45] In its application, the respondent argues both that the proposed class is not appropriate and that the proposed representatives are not appropriate. For the reasons which follow I find that the representative complainants are appropriate representatives. However, I find that the proposed class is overbroad.

[46] In their submissions on these issues, both parties relied on the decision of the Tribunal in *SELI*, and for ease of reference I will summarize that case in some detail. I will then consider the respondent's application with respect to whether the proposed representatives are appropriate, and then with respect to whether the Class is appropriately defined.

#### **A. *SELI* Decision**

[47] The *SELI* case involved a representative complaint filed by a Union, on behalf of a group of workers that it was certified to represent. In the complaint, the Union alleged discrimination in employment on the grounds of race, colour, ancestry and place of origin, contrary to s. 13 of the *Code*. The respondent employer imported and employed foreign workers from Latin America to assist in the construction of the Canada Line tunnel in Vancouver. The Union alleged that the terms and conditions of employment of the Latin American workers were significantly different and less beneficial than those of their non-Latin American (and, in particular, European) co-workers, performing the same or similar work.

[48] In *SELI*, the respondent employer challenged the capacity or standing of the Union as a representative in the complaint. The respondent employer argued that the Union did not represent the interests and wishes of all members of the group. The

respondent further argued that, in determining who or what constitutes an adequate representative under the *Code*, the Tribunal should consider whether:

- i) The representative has the authorization of each member of the group to proceed ...
- ii) All members of the group are informed about the issues in the complaint;
- iii) Each member of the group has been provided with a timely opportunity to opt out of participation in the complaint;
- iv) There is a conflict, or a potential conflict, between the interests of the representative and the group; and
- v) The representative has communicated effectively with the members of the group on an ongoing basis. (para. 51)

[49] In determining that the Union was an appropriate representative, the Tribunal first noted as follows:

In the case of a group complaint, the screening includes whether proceeding with the complaint would not be in the interest of the group on whose behalf the complaint is made. The focus is on the interests of the group as it is defined in the representative complaint and not on the interests of each individual member of the group. (para. 67)

[50] The Tribunal then considered the requirements put forward by the respondent. First, with respect to the wishes of the members of the complainant group, the Tribunal noted again that the issue before it was whether the complaint was in the interest of the group or class. 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. Further, the burden is on the person who alleges that the complaint is not in the interest of the group or class.

[51] On the issue of authorization, the Tribunal noted that 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. The Tribunal noted:

... human rights legislation creates fundamental public policy. Discrimination is not only an offence *vis-a-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).

Requiring a representative to obtain an authorization form, 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. (paras. 73-74)

[52] The Tribunal agreed that there may be circumstances in which the Tribunal would be concerned about a representative's ability to represent the interests of the group and where, as a result, the Tribunal might consider directing the representative to obtain the authorization of the members of the group. On the circumstances in *SELI*, however, the Tribunal opted not to do so.

[53] With respect to the requirement for notice and ongoing communication, the Tribunal held that the nature and scope of such obligations would depend on the individual circumstances in any complaint. On the circumstances in *SELI*, the Tribunal was satisfied that the Union took sufficient steps to keep the members of the group advised about the nature of the complaint, its filing and its status. The Tribunal noted that it would not hold representatives to a standard of perfection, as to do so would undermine the ability of representative complaints to proceed, which would be contrary to the purposes of the *Code*. (para. 86)

[54] With respect to the right to opt out, the Tribunal noted that there is no obligation in the *Code* that a member of a complainant group be advised about the right to opt out. The Tribunal nevertheless found that it may be appropriate in some circumstances to impose an obligation on a representative complainant to provide notice to members of the right to opt out of the complaint. The Tribunal stated:

A number of factors may be relevant to the determination of whether such an obligation should be imposed. While not intended to be an exhaustive list, these may include: the nature of the complaint; the nature of the group or class, including its size and vulnerability; the nature of the remedies sought; any notice received by the Tribunal that a member of the group or class does not wish to be part of the group or class; and the stage of the proceeding at which the issue arises. The panel notes that requiring notice

to a vulnerable group that its members may opt out could serve as a deterrent to participation in the complaint in the same manner that requiring authorization to proceed could. (para. 93)

[55] The panel found, on the circumstances before it, that it was not prepared to impose an obligation on the Union to notify the members of the complainant group of a right to opt out.

[56] The panel found that the Union was a proper representative to proceed with the complaint on behalf of the group, stating as follows:

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 the 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)

[57] The Tribunal then went on to provide guidelines regarding the filing of a representative complaint on behalf of a group or class, and stated that 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.

Third, the Tribunal may consider whether:

- iv) the representative has notified the group or class members of the complaint, or has proposed a method for doing so;
- v) the representative has proposed a method for keeping the members of the group or class informed of the progress of the complaint;
- vi) 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

vii) there is a potential conflict between the members of the group or class and the representative. (para. 106)

***B. Are the proposed representatives appropriate?***

[58] The respondent argues that the complainants are neither parents nor students in the School District, have no personal interest in the complaint, and are therefore not appropriate representatives. However, s. 22(4) makes it clear that a representative filing a complaint on behalf of a group or a class need not be a member of the proposed group or class. The representative complainants were involved in the development of the Course, and as such have an interest in its implementation: see also *Pivot Legal Society v. DVBLA and another*, 2009 BCHRT 229.

[59] The respondent also argues that the proposed representatives are not appropriate in that their proposed method of communicating with the Class in question is not adequate, and that there are potential conflicts of interest between the proposed representatives and the Class. In my view, these issues relate primarily to the definition of the Class, and issues arising as a result of the current definition, rather than the appropriateness of the representatives. It is to a consideration of the issues relating to the appropriateness of the Class that I now turn.

***C. Is the Class appropriate?***

[60] The respondent outlines a number of bases on which it asserts that the Class is not appropriate. I am persuaded by the respondent's argument that the Class is not clearly defined in relation to the issue in dispute. The Class as currently defined is extremely broad, consisting of approximately 19,000 students and their parents.

[61] Further, the broad class definition bears no rational relationship to the subject matter of the complaint. The complaint relates to the respondent's withdrawal of the Course during one school year, and the offering of the Course the following year with a requirement for specific parental consent.

[62] The complainants seek to justify the broad definition of the Class by stating that the negative effects of discrimination, particularly in an educational setting, are not limited to individuals directly affected, but extend to society at large. Be this as it may, I



cannot find that this constitutes a justification for the extremely broad definition of the Class. The definition of the Class must relate more specifically to the alleged discrimination in any particular case.

[63] In my view, the broad definition of the proposed Class gives rise to the second concern identified by the respondent, which is that members of the Class as presently defined will almost certainly have conflicting interests with respect to the offering of the Course and the requirement for parental consent. A more narrow definition of the Class may ensure that such potential conflicts are minimized and, in particular, that the alleged contravention would be similar for all members of the class, and there are issues in common.

[64] In the complaint as originally filed by the complainants, the central issue was the failure of the respondent to offer the Course for the 2008-2009 school year. In particular, the complaint highlighted that the Course had initially been offered at Mouat, that 90 students had registered for the Course, and that the respondent, on becoming aware that the Course had been offered, withdrew it and offered a different course in its place. The initial complaint also noted that the alternative course was very similar to the Course, with the exception of the exploration of issues around sexual orientation and identity.

[65] In the complaint as amended, the complainants included an allegation that, when the Course was subsequently offered in the 2009-2010 school year, the respondent imposed a requirement of informed parental consent.

[66] Given these allegations, it is my view that the Class, as currently defined, “students and parents of the Abbotsford School District generally, and in particular gay, lesbian, bisexual and transgendered students and parents”, is overbroad and not appropriate for a group complaint.

[67] I am confirmed in this view by the statements made by the complainants on their representative complaint form. In that form they answer questions relating to their attempts to communicate with the group in order to advise them of the complaint. The complainants do not list any attempts to communicate with the group as framed in the complaint, that is, students and parents of the District generally. Nor do they list any attempts to communicate specifically with the narrower group, that is, “in particular, gay,

lesbian, bisexual and transgendered students and parents”. Rather, they list their attempts to contact those 90 students who initially registered for the Course in the Spring of 2008 and who, presumably, were given the opportunity to register instead in the alternative course, when the Course was withdrawn. Specifically, the complainants state that they have made concerted efforts to contact the students originally registered in the Course to inform them of the representative complaint and their intention to represent them. As at January 28, they had specifically received the consent of ten students. They intend to keep these students informed by telephone or email as to the progress of the complaint. They have informed these students of their right to opt out of the complaint at any time.

[68] I note that this information was filed before the amendment to the complaint. My comments above should not be taken as a finding that the appropriate group is comprised only of the students initially registered for the Course, but only as a finding that the Class as currently described is overbroad.

[69] The respondent submits that the result of such a finding is that the complaint should be dismissed under s. 27(1)(d)(i) of the *Code*, as proceeding with the complaint would not benefit the group or class alleged to have been discriminated against. For the following reasons, I decline to exercise my discretion to dismiss the complaint on this ground.

[70] Above, I have found that the Class, as currently proposed, is overbroad and not appropriate. However, with respect to the substantive matters at issue in the complaint, I have denied the respondent’s application under s. 27(1)(c) and (d)(ii). In doing so, I have found that the respondent has not established that there is no reasonable prospect that the substance of the complaint will succeed, and has not established that it would not further the purposes of the *Code* to continue with the substance of the complaint. In coming to my conclusion that the Class, as currently framed, is not appropriate, I am not finding that there is not an appropriate group or class on whose behalf the complaint could be filed. In particular, I note the complainants’ statements that they have received authorizations from ten of the students initially registered in the Course.

[71] Given these competing concerns, I have decided not to exercise my discretion to dismiss the complaint as a result of the finding that the group is not appropriate. Instead,

I will provide the representative complainants until March 19, 2010, to amend the complaint identifying what they say is an appropriate group or class. The Tribunal will then schedule a pre-hearing conference with the parties to discuss any issues arising from the amendment.

[72] In its submissions, the respondent also raised a concern that, given the manner in which the complaint is framed, it is not feasible for individuals to opt out of the complaint. The relief sought in the complaint is, in part, that there be no requirement for parental consent for a student to take the Course. If the relief were granted, it would remove the ability of any parent within the District to argue that such consent be required, regardless of whether or not they chose to opt out of the complaint.

[73] 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. In my view, issues relating to what should be required of the representative complainants in relation to communicating with the Class are best addressed after the Class is appropriately defined.

## **V CONCLUSION**

[74] For the reasons outlined above, I deny the respondent's application under ss. 27(1)(c) and (d)(ii) of the *Code*.

[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:

- a) The complainants have until March 19, 2010 to file an amended complaint identifying, in particular, an appropriate group;

- b) The Tribunal will schedule a pre-hearing conference after the filing of the amended complaint to discuss with the parties any issues arising.

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Tonie Beharrell, Tribunal Member