

File No. S-2013768  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF THE  
*HUMAN RIGHTS CODE*, R.S.B.C. 1996, C. 210 (AS AMENDED) AND THE  
*JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, C. 241 (AS AMENDED)**

**AND IN THE MATTER OF A DECISION MADE BY THE BRITISH COLUMBIA  
HUMAN RIGHTS TRIBUNAL ON NOVEMBER 3, 2020**

BETWEEN:

**GIBRALTAR MINES LTD.**

PETITIONER

AND:

**LISA HARVEY –AND- BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL**

RESPONDENTS

**NOTICE OF APPLICATION**

**Name of applicant: BC's Office of the Human Rights Commissioner**

To: Gibraltar Mines Ltd., Petitioner  
Roper Greyell LLP  
1850 – 745 Thurlow Street  
Vancouver, BC V6E 0C5  
Attention: Brandon I. Hillis and James D. Kondopoulos

And to: Lisa Harvey, Respondent  
c/o PortaLaw  
300 – 225 West 8<sup>th</sup> Avenue  
Vancouver, BC V5Y 1N3  
Attention: Paula Krawus

And to: British Columbia Human Rights Tribunal, Respondent  
1270 – 605 Robson Street  
Vancouver, BC V6B 5J3  
Attention: Katherine Hardie

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street on April 30, 2021 at 9:30 a.m. for the order(s) set out in Part 1 below.

9:45am

**PART 1: ORDER(S) SOUGHT**

1. The Human Rights Commissioner for B.C. (the “Commissioner”) is granted intervenor status in this proceeding.
2. The Commissioner may file written submissions not exceeding 20 pages in length.
3. The Commissioner may make oral submissions at the hearing of the Petition.
4. The Commissioner will not be entitled to costs from any party nor will she be liable for costs to any party.

**PART 2: FACTUAL BASIS**

**The Complaint**

1. The Petitioner, Gibraltar Mines Ltd. (“Gibraltar”), operates a mine (the “Mine”) located approximately 60 kilometers from Williams Lake, B.C.
2. The Respondent, Ms. Lisa Harvey, is employed by Gibraltar at the Mine. Ms. Harvey’s husband is also employed by Gibraltar at the Mine.
3. In the Fall of 2016, Ms. Harvey became pregnant. At the time, both she and her husband worked the same 12-hour shift at the Mine (the “A/C Shift”).
4. At all relevant times, the Mine utilized three shift schedules relevant to Ms. Harvey:
  - the 12-hour A/C shift consisted of a group of welders and a group of electricians that worked a pattern of days on and days off and typically worked one set of nights per month;
  - the 12-hour B/D shift consisted of a group of welders and a group of electricians who worked a pattern of days on and days off that was opposite to those worked by the A/C shift; and
  - the J shift, where employees worked from 7 a.m. to 4 p.m. from Monday to Friday with Earned Days Off every second Friday.
5. Although Ms. Harvey and her husband both worked the A/C Shift, sometimes they worked different night shifts.
6. Following the birth of their child, and as Ms. Harvey prepared to return to work after her maternity leave, Ms. Harvey and her husband requested that one of them be permitted to work a different shift schedule so they could access child care.

7. In particular, Ms. Harvey and her husband proposed either that they be permitted to work 8 hour shifts on the A/C pattern (rather than the usual 12 hour shifts) or that one of them be permitted to work the J shift.
8. Gibraltar declined the request to change one of either Ms. Harvey or her husband's shift schedules.
9. Following Gibraltar's denial, Ms. Harvey filed a human rights complaint (the "Complaint") with the British Columbia Human Rights Tribunal (the "Tribunal") alleging that Gibraltar discriminated against her regarding employment on the basis of family status, marital status, or sex contrary to s. 13 of the British Columbia *Human Rights Code*, R.S.B.C. 1996 c. 210 (the "*Code*").
10. At around the same time as the Complaint was filed, Ms. Harvey's union filed a grievance alleging that Gibraltar discriminated against Ms. Harvey and her husband by failing to accommodate their request for a modified work schedule (the "Grievance").
11. The relevant provisions of s.13 of the *Code* are as follows:
  - 13 (1) A person must not
    - (a) refuse to employ or refuse to continue to employ a person, or
    - (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

...
  - (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.
12. After the Complaint and Grievance were filed, Gibraltar proposed that Ms. Harvey be moved to the B/D shift to ensure that one of Ms. Harvey or her husband would always be off work to pick up or drop off their child at daycare. This proposed solution was rejected by Ms. Harvey's union on the basis that putting Ms. Harvey and her husband on completely opposite shifts would have a significant negative effect on their family life.
13. Gibraltar alternately proposed that Ms. Harvey be temporarily moved to the B/D shift and then returned to the A/C shift when childcare needs could be better arranged. Ms. Harvey's union rejected this alternative.

14. In December 2018, well after the Complaint had been filed, Ms. Harvey's husband applied for a position on the J shift. Gibraltar permitted Ms. Harvey's husband to work temporarily in that position until he formally accepted an offer to work on the J shift in March 2019.

### **The Application to Dismiss**

15. Gibraltar brought an application to dismiss the Complaint in its entirety pursuant to subsections 27(1)(b), (c), and (d)(ii) of the *Code* (the "Application to Dismiss") which provide as follows:

27 (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 that member or panel determines that any of the following apply:

...

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

...

(ii) further the purposes of this Code;

16. Gibraltar's primary argument in the Application to Dismiss was that the facts alleged could not meet the test for family status discrimination in employment.
17. Specifically, Gibraltar argued that to make out *prima facie* discrimination in family status cases, a complaint must allege that an employer imposed a change to a term or condition of employment which resulted in a serious interference with a substantial parental obligation. Gibraltar argued that, since there was no dispute in this case that it did not impose a change to Ms. Harvey's terms and conditions of employment, there could be no contravention of the *Code* and there was no reasonable prospect the Complaint would succeed.
18. Gibraltar further argued that the Complaint should be dismissed: in relation to the allegations of discrimination based on sex and marital status pursuant to s. 27(1)(b), (c), and (d)(ii), and; in its entirety pursuant to s.27(1)(c) because, if Ms. Harvey were to establish *prima facie* discrimination, Gibraltar's conduct was justified on the basis that Ms. Harvey was seeking a perfect accommodation when what she was entitled to, and had been offered, was a reasonable accommodation.

### The Decision Under Review

19. By decision issued on November 3, 2020 (the “Decision”), the Tribunal granted Gibraltar’s application to dismiss the allegations based on marital status and sex under 27(1)(c) of the *Code* but declined to dismiss the remainder of the Complaint at this preliminary stage. Put simply, the Tribunal allowed the Complaint of family status discrimination to proceed to a hearing because the findings of fact necessary to resolve the Complaint could not be made on the evidence before it.
20. The Commissioner seeks to intervene solely on the question of the proper test to be used in determining whether there has been *prima facie* discrimination on the basis of family status regarding employment. Accordingly, the Commissioner summarizes the Decision solely with respect to the Tribunal’s analysis on that issue.
21. First, considering the Application to Dismiss under s. 27(1)(b) of the *Code*, the Tribunal determined that in order to be successful at hearing Ms. Harvey would need to make out the well-established test for *prima facie* discrimination affirmed by the Supreme Court of Canada in *Moore v. British Columbia (Minister of Education)*, 2012 SCC 61 at para. 33, namely that:
  - a. she has a characteristic protected under the *Code*;
  - b. she has experienced adverse treatment regarding her employment with Gibraltar Mines; and,
  - c. her protected characteristic was a factor in that adverse treatment.
22. The Tribunal reviewed the decisions of the British Columbia Court of Appeal in both *Health Sciences Association of BC v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (“*Campbell River*”) and *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 (“*Envirocon*”), cited respectively as the leading and most recent appellate decisions on family status discrimination regarding employment in B.C.
23. The Tribunal acknowledged *Campbell River*’s finding that, in the usual case, a complaint of *prima facie* discrimination will be made out “when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee”: Decision at para. 24, citing *Campbell River* at para. 39.
24. The Tribunal further noted that in *Envirocon* the Court of Appeal was asked to consider whether discrimination on the basis of family status required the complainant to demonstrate “a serious interference with a substantial parental or other family duty or obligation”: Decision at para. 24.
25. The Tribunal acknowledged that the Court of Appeal in *Envirocon* affirmed that *Campbell River* remains good law in that a complainant must show a serious interference with a substantial parental or other family duty or obligation in order to make out a *prima facie* case of discrimination on the basis of family status: Decision at para. 24.

26. The Tribunal then went on to review how its own jurisprudence has interpreted and applied *Campbell River*, citing a handful of the many Tribunal decision concluding that *Campbell River* did not purport to “exhaustively map out what circumstances could be sufficient to meet [the *Campbell River*] test”: Decision at para. 25 citing *Miller v. Northern Health Authority and Prince George Regional Health Hospital*, 2006 BCHRT 284 at para. 48.
27. In particular, the Tribunal noted that it has held in previous cases that a change in a term or condition of employment is not the only circumstance that can result in a serious interference with a substantial parental or family duty or obligation: Decision at para. 25.
28. The Tribunal concluded that *Campbell River*, *Envirocon* and its own jurisprudence do not support the proposition that a change to a term or condition of employment is the only circumstance that may give rise to family status discrimination: Decision, at para. 27.
29. Considering the unique circumstances of Ms. Harvey’s case, namely:
  - a. that both Ms. Harvey and her husband worked 12-hour shifts;
  - b. that both Ms. Harvey and her husband worked for Gibraltar;
  - c. that Ms. Harvey asserts that she made all possible efforts to find childcare during the hours she and her husband worked (without success);
  - d. that Ms. Harvey and her husband were forced to take vacation time or family leave so one of them would be able to care for their child or take their child to daycare; and,
  - e. that Ms. Harvey and her husband live and work in a part of the province where childcare options may be limited,

the Tribunal found it could not conclude, at such a preliminary stage, that the test for *prima facie* discrimination could not be met: Decision at paras. 32-34.

30. Under s. 27(1)(c) of the *Code*, the Tribunal considered whether there was no reasonable prospect that Ms. Harvey would be able to show that Gibraltar’s failure to approve her request for a change to her or her husband’s shifts seriously interfered with her substantial parental obligations and determined that it could not conclude that Ms. Harvey’s complaint had no reasonable prospect of success: Decision at paras. 39 and 44.

### **The Petition**

31. Gibraltar brings this Petition for Judicial Review seeking to quash the Tribunal’s Decision declining to dismiss the Complaint on the basis of family status. The Respondent Ms. Harvey has not filed a response to the Petition and is not expected to participate in these judicial review proceedings.

32. Gibraltar argues that the Tribunal's interpretation and application of the test for discrimination in employment on the basis of family status was incorrect and that this error rendered its decision not to dismiss the Complaint patently unreasonable.
33. The Petition for judicial review raises a number of issues, including:
  - a. Is the judicial review premature?
  - b. What is the applicable standard of review for each of the alleged errors made by the Tribunal in the Decision?
  - c. Did the Tribunal err in its interpretation and application of the law applicable to discrimination on the basis of family status; specifically, *Campbell River*?
  - d. Did the Tribunal err in its assessment of Gibraltar's obligations to accommodate Ms. Harvey to the point of undue hardship, based on the evidence before it?
34. The Commissioner seeks leave to intervene in these proceedings to make submissions solely with respect to the third issue listed above: the correct interpretation of the law respecting discrimination on the basis of family status regarding employment under s. 13 of the *Code*.

### **PART 3: LEGAL BASIS**

#### **The Test for Granting Intervenor Status**

35. The well-known principles governing applications for leave to intervene were set out in *British Columbia v Imperial Tobacco Canada Ltd*, 2016 BCCA 203 (Chambers) rev'd on other grounds, 2016 BCCA 363 ("*Imperial Tobacco*").
36. Simply put, the court may grant intervenor status either where the applicant has a direct interest in the proceeding or where the proceeding raises public law issues that legitimately engage the applicant's interests and the applicant brings a different and useful perspective to those issues that will be of assistance to the Court: *Imperial Tobacco* at para. 8.
37. Two further considerations are the nature of the proposed intervenor and the nature of the issue: *Imperial Tobacco* at para. 9.
38. An intervenor's role is not to support the position of a particular party or to make submissions on the outcome of the proceeding. Rather, the role of an intervenor is to make principled submissions on pertinent points of law: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28.
39. Submissions from intervenors should not broaden the *lis* between the parties, expanding the scope of the litigation: *Imperial Tobacco* at para. 10.
40. Although developed by the British Columbia Court of Appeal, the above-referenced test for granting intervenor status is also used by the Supreme Court of British Columbia: see, for

example, *British Columbia (Forest, Lands and Natural Resource Operations) v. Forest Appeals Commission*, 2014 BCSC 2534 at para. 7.

41. The present Petition primarily concerns the identification and interpretation of the test for discrimination on the basis of family status under s. 13 of the *Code*. It is well-established that the *Code* is quasi-constitutional legislation. The appropriate test for discrimination on the basis of family status regarding employment under the *Code* is therefore an issue of public law.
42. As discussed further below, this issue of public law clearly engages the Commissioner's statutory mandate and interests and is one in relation to which she can bring a different and useful perspective that will be of assistance to the Court.

### **The Commissioner's Mandate and Interest**

43. From 1992 until 2019, B.C. was without a Human Rights Commission or Commissioner. In 2017 the provincial government announced its intention to re-establish a human rights commission for B.C. and tasked Mr. Ravi Kahlon, Parliamentary Secretary for Sport and Multiculturalism, with making recommendations for re-establishing a commission.
44. PS Kahlon conducted extensive stakeholder engagements and a scan of human rights commissions in other jurisdictions before making recommendations in his report to the Attorney General, dated December 11, 2017, and entitled *A Human Rights Commission for the 21<sup>st</sup> Century: British Columbians talk about Human Rights* (the "Kahlon Report"): Affidavit #1 of Kasari Govender, Exhibit "A".
45. Among other things, the Kahlon Report recommended that the Commissioner should have the power to intervene in disputes involving "human rights matters with a systemic aspect": Affidavit #1 of Kasari Govender, Exhibit "A" at page 33.
46. On November 27, 2018, Bill 50 (the *Human Rights Code Amendment Act*, 2018) was passed amending the *Code* to, amongst other things, establish the role of Human Rights Commissioner as an independent officer of the Legislature: *Code*, s. 47.01. The legislative amendments made to create and empower the Commissioner closely reflected the recommendations made in the Kahlon Report, including its recommendations concerning the Commissioner's powers to intervene.
47. Pursuant to s. 47.12 of the *Code*, the Commissioner is responsible for protecting and promoting human rights in B.C. The breadth of this statutory mandate requires equally broad powers. Accordingly, the legislation expressly sets out the following means by which the Commissioner can pursue her mandate:
  - a. identifying, and promoting the elimination of, discriminatory practices, policies and programs;
  - b. developing resources, policies and guidelines to prevent and eliminate discriminatory practices, policies and programs;



- c. publishing reports, making recommendations or using other means the commissioner considers appropriate to prevent or eliminate discriminatory practices, policies and programs;
- d. developing and delivering public information and education about human rights;
- e. undertaking, directing and supporting research respecting human rights;
- f. examining the human rights implications of any policy, program or legislation, and making recommendations respecting any policy, program or legislation that the commissioner considers may be inconsistent with this Code;
- g. consulting and cooperating with individuals and organizations in order to promote and protect human rights;
- h. establishing working groups for special assignments respecting human rights;
- i. promoting compliance with international human rights obligations;
- j. intervening in complaints under s. 22.1 and in any proceeding in any court;
- k. approving a program or activity under s. 42; or
- l. initiating inquiries under sections 47.14 and 47.14.

[Emphasis added.]

- 48. The Commissioner's mandate does not extend to adjudicating complaints alleging a breach of the *Code*. Adjudication of complaints under the *Code* remains the jurisdiction of the Tribunal and, in the case of unionized employees alleging discrimination by their employer, labour arbitrators.
- 49. Notably, the Commissioner's power to intervene as reflected in s. 47.12(j) of the *Code* includes the power to intervene both in complaints before the Tribunal (as of right per s. 22.1 of the *Code*) and in any proceeding before any court.
- 50. Intervening in legal proceedings respecting the interpretation of the *Code*, both before the Tribunal and the courts, is a crucial part of the Commissioner's ability to fulfill her statutory mandate. As noted in the Commissioner's Strategic Plan "Reimaging human right in B.C.: Strategic Plan 2020/21-2024/25" (the "Strategic Plan"):

The core purpose of BCOHRC is to ensure the rights of everyone in our province—particularly those guaranteed by B.C.'s Human Rights Code—are protected and respected.

We all have the right to be free from discrimination in employment and housing, when accessing services and in union membership and in publications. Under the Code, we are protected from discrimination on the basis of a number of grounds

such as gender, race and disability. Dismantling or restructuring the laws, policies and practices that create and sustain such discrimination as a regular part of many people's lives is foundational to the work of the Office.

Affidavit #1 of Kasari Govender, Exhibit "C" at page 30.

51. This judicial review will address the correct identification and application of the test for discrimination on the basis of family status under s. 13 of the *Code*. The test for discrimination on the basis of family status under s. 13 of the *Code* is, in the Commissioner's respectful submission, an area of human rights law in which the quasi-constitutional principles enshrined in the *Code*, and the human rights jurisprudence established by the Supreme Court of Canada, are not reflected in the approach being applied by employers and decision makers alike.
52. In order to fulfil her statutory mandate, the Commissioner thus seeks leave to intervene in these proceedings to ensure that the *Code*'s protection against discrimination in employment on the basis of family status is given the broad and purposive interpretation the Supreme Court of Canada's jurisprudence demands.
53. This is the Commissioner's first application for leave to intervene since her office was established and she assumed the position of B.C.'s Human Rights Commissioner in 2019: Affidavit #1 of Kasari Govender at para. 28.

#### **The Commissioner's Proposed Submissions**

54. The Commissioner seeks to intervene in these proceedings to make the following arguments:

- a. *Campbell River* does not limit family status discrimination to circumstances where an employer has imposed upon an employee a change to their terms or conditions of employment. Rather, *Campbell River* happened to arise out of such a circumstance.

In this context, the Court of Appeal noted, at para. 39 of *Campbell River*, that, while the question of whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case, "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee." Nothing in *Campbell River* (or *Envirocon*) suggests the Court intended that discrimination on the basis of family status could be made out only in circumstances where an employer has imposed a change to a term or condition of employment.

- b. Any interpretation of the test for family status discrimination which limits *prima facie* discrimination on the basis of family status to circumstances where an employer has changed a term or condition of employment:

- i. is inconsistent with the plain language of s. 13 of the *Code* which protects British Columbians from discrimination “regarding employment or any term or condition of employment”;
- ii. is inconsistent with the broad and purposive approach to be taken to the interpretation of quasi-constitutional legislation like the *Code*;
- iii. is inconsistent with the well-established unified analytical approach to direct and adverse effect discrimination post- *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”); and
- iv. is arbitrary, and therefore contrary to the rule of law.

55. The question of how the Tribunal and courts are to interpret the test for family status discrimination under s. 13 of the *Code* thus raises a significant issue of public law clearly engaging the Commissioner’s statutory mandate and role. The Commissioner’s submissions, as described above, will be of assistance to the Court and will neither duplicate the submissions of others nor expand the *lis* between the parties.

#### **Costs**

56. The usual rule is that intervenors are not entitled to, or liable for, costs associated with a proceeding: see, for example, *Faculty Association of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56 at para. 4 (Chambers). The present case presents no reason to depart from the usual rule and the Commissioner accordingly seeks an order that costs be neither awarded for or against her both with respect to this application for leave to intervene and with respect to the Petition.

#### **PART 4: MATERIAL TO BE RELIED UPON**

1. Affidavit No. 1 of Kasari Govender, made on April 13, 2021.

The applicant estimates that the application will take one (1) hour.

This matter is within the jurisdiction of a master.

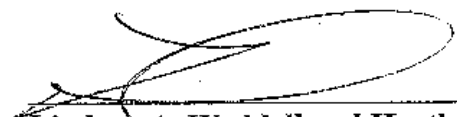
This matter is not within the jurisdiction of a master.

**TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION:** If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,
- b) file the original of every affidavit, and of every other document, that

- i. you intend to refer to at the hearing of this application, and
  - ii. has not already been filed in the proceeding, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
- i. a copy of the filed application response;
  - ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: April 13, 2021

  
**Lindsay A. Waddell and Heather D. Hoiness**  
 Counsel for the Applicant,  
 British Columbia's Office of the Human Rights Commissioner

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*To be completed by the court only:*

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application  
 with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
 Signature of  judge  Master

**APPENDIX****THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above