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Indexed as: Female Softball Players (by Michael Sharpe) v. City of Victoria, 2023 BCHRT 112

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

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

BETWEEN:

Female Softball Players (by Michael Sharpe)

COMPLAINANTS

AND:

City of Victoria

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(b), (c) and (d)(ii)

Tribunal Member:	Devyn Cousineau
Counsel for the Complainant:	John S. Heaney
Counsel for the Respondent:	Thea Hoogstraten

I INTRODUCTION

[1] The Beacon Hill Baseball & Softball Association provides baseball and softball programs for children in the City of Victoria. It contracts with the City to use parks for its programming. In 2016, the Association decided to focus its softball program in Pemberton Park. It asked the City to approve and support work to change the baseball field at Pemberton Park into a softball field, and to upgrade the facilities. After phase one of those upgrades was completed, the process stalled at phase two. At this phase, the Association's priority was to install a "skinned infield" and a batting cage. The City did not initially approve this work. For the 2019 and 2020 seasons, softball players played at Pemberton Park without a skinned infield and batting cage.

[2] All the Association's softball players are girls. On February 10, 2020, Michael Sharpe – then the Association's Secretary and a parent of a softball player – filed this human rights complaint on behalf of a class of people now defined as:

> all female softball players registered with the Beacon Hill Baseball Softball Association who have played at Pemberton Park since the start of the 2019 season and/or currently play at Pemberton Park [the **Players**]

Mr. Sharpe alleges that the City's conduct in response to the Association's requests related to Pemberton Park deprives the Players of opportunities to play softball at a competitive level and develop in a sport where Canadian women excel internationally. He says the conduct stands in contrast with the City's approvals for upgrades and facilities used for baseball, a sport for which 96% of the Association's players are boys. He alleges that the disparities, and the impacts on the Players, are discrimination based on sex, in violation of s. 8 of the *Human Rights Code.*

[3] The City denies discriminating. It says that it is the Association, and not the City, that has chosen to focus its softball program at Pemberton Park. It says there are other softball fields in the City that the Association could apply to use, and/or that the Association could run its softball program at the same park as its baseball program, as it had done before 2016. It says that its decisions about Pemberton Park were made according to its usual processes, accounting for all the diverse needs of the community. It asks the Tribunal to dismiss the complaint without a hearing.

[4] This is a gatekeeping decision about whether this complaint warrants the time and expense of a hearing and decision on its merits. The onus is on the City to show that the complaint should be dismissed. Based on the City's arguments, the issues I must decide are:

a. whether the complaint sets out facts that, if proven, could establish that the City is responsible for any sex-related adverse impact experienced by the Players: Code, s. 27(1)(b).

b. whether, based on the evidence submitted by the parties, the Players have no reasonable prospect of proving that the Players suffered a sex-related adverse impact in services customarily provided by the City: Code, s. 27(1)(c).

c. whether it furthers the purposes of the Code to proceed when the City says it was not responsible for any alleged discrimination and in any event has acted promptly and appropriately to address the Association's concerns: *Code,* s. 27(1)(d)(ii).

[5] For the following reasons, I deny the application to dismiss the complaint.

II BACKGROUND

[6] This background is based on the material filed by the parties. I have considered all that material, but only refer to what is necessary to explain my decision. I make no findings of fact.

[7] The City has over 100 parks and open spaces across its 13 neighbourhoods. All its parks are intended to be multi-use, meaning that they include a range of amenities to serve the diverse needs of the City's population. Local sports associations can apply for license agreements and/or field permits to use the City's parks and facilities. The City allocates its fields annually. It is then up to the sports association to decide how to use the field (in compliance with the agreement).

[8] At the relevant time, the Association had successfully applied for license agreements to use three parks for its baseball, softball, and t-ball programs: Hollywood Park, Pemberton Park,

and Brooke Street Park. The City did not direct the Association to apply to use those parks, or restrict how it could use the parks for its programming.

[9] A primary difference between a baseball field and a softball field is the infield. In baseball, the infield includes an elevated pitcher's mound with a rubber, where the pitcher must place their toe or foot when pitching. In softball, the infield is level to allow pitchers to pitch from flat ground at the same grade as home plate. The infield is a single grade, typically of finely crushed rock and sand. This is called a "skinned infield".

[10] Before 2016, the Association operated its softball program at the Hollywood Diamond. This is a baseball field, with an elevated pitcher's mound and infield of mixed grass and dirt at various grades. In 2016, the Association decided it wanted its female softball players to play at a "regulated" softball field. Mr. Sharpe says this decision was based on the Association's concerns that:

> a. playing softball on the Hollywood Diamond was not providing an actual regulation softball experience to its softball players;
>
> b. playing on the Hollywood Diamond with the elevated mound and different infield grades of dirt and grass material would not prepare the players for play, particularly in the effective fielding of ground balls, against other youth softball teams on the South Island – all of whom play on regulation softball fields with a 'skinned infield' …
>
> c. as the Association did not have a regulation softball field, it had significantly diminished chances of providing its softball players with opportunities available to softball players on teams in other South Island municipalities, including hosting teams from other municipalities, including in tournament play;
>
> d. the inability to offer regulation play and competition meant the softball program was not ultimately the program the Association wanted for its female payers, as it did not offer the same opportunities for player development and opportunities and for attracting, for example, higher-level coaches, in a sport that is dominated by women at the collegiate and international level;
>
> e. the Association's baseball teams play at Hollywood Diamond, which has provincial or national class field and amenities and suffered from

none of the softball program's issues with developing players, preparing players for competition or attracting coaches and competition from teams in other municipalities; and

f. the disparity between the suitability of Hollywood Diamond for boys' baseball and for girls' softball – and the consequential disparity for competition and development – was unfair to the Association's female softball players and needed to be addressed.

[11] The Association decided to focus its softball program at the Pemberton Diamond. It determined that some changes were required to make the field work properly. In July 2016, it presented a plan to a City staff person which included: improvements to existing facilities, including extending the scorekeeping building, expanding fences and gates, installing a concession stand, building new bleachers, and possibly a batting cage; and a skinned infield.

[12] The City must approve proposals for facility upgrades and the installation of permanent structures in City parks. It must also approve any capital expenditures in accordance with its budgeting process.

[13] With the City's support, the Association successfully applied for grant funding for work to make Pemberton a "stand-alone girls softball park". In its application, it set out the intended scope of work, which reflected the improvements set out above and a skinned infield, and enclosed letters of support from the Mayor and two City Councillors. In early 2017, the Association was awarded a $25,000 USD grant. The grant was time-sensitive and restricted to Pemberton Park. The Association proposed to use the grant money and volunteer labour to complete the improvements.

[14] At that time in 2017, the City was completing work at Hollywood Diamond that had been requested by the Association. The City says that the Association had asked it to prioritize this work because it was hosting the Little League Provincial Championship Tournament.

[15] At the same time, because of the time-sensitive nature of the grant, the Association asked to begin construction at Pemberton immediately. In March 2017, Mr. Sharpe wrote to the City's Director of the Parks, Recreation and Facilities Department [**Parks Director**],

expressing frustration with “roadblocks” they were facing in their attempts to use the grant and complete the work. He was hoping they could avoid further problems, including “gender discrimination”.

[16] Between May 2017 and November 2018, Mr. Sharpe says that the Association followed the City’s direction to use its grant for a first phase of Pemberton improvements, including dugouts, spectator seating, and fencing. Mr. Sharpe says that they understood that the City was supportive of a “phase two” of work, to install the skinned infield and the batting cage. The City denies that it had approved a “phase two” at this point.

[17] In November 2018, in advance of the 2019 season, Mr. Sharpe advised the City that the Association’s softball program was now part of Softball BC, which he said required changes to the softball field, including a skinned infield. (In fact, the City has submitted evidence that a skinned infield is not a league requirement, but simply “part of best practices”). Mr. Sharpe submitted some amended dimensions for left field and backstop, placement of the foul poles, and a request for a skinned infield.

[18] In July 2019, at the request of the City, the Association submitted formal Project Proposals for the skinned infield and batting cage at Pemberton Park. The City says these were the first official proposals it received regarding these requests, and they were received after the June 1 deadline for requests requiring capital expenditure.

[19] The Association’s proposals required a design review to assess the potential impact on City infrastructure and land, as well the community and park users. In August 2019, City staff completed their design review of the proposal to install a batting cage. They did not support a permanent batting cage and recommended a temporary one instead. In September 2019, the Parks Director determined that the “back-and-forth” about the Associations’ proposals was “having a negative impact on our teams’ delivery of the long list of projects that have been approved by Council”, and he no longer supported staff spending time on it. In October 2019, the City told the Association that it did not have the resources to complete the design review or accommodate the infield skinning project in 2020.

[20] At this point, the Association understood that it should make its requests about the park directly to City Council, which could direct the Parks Department regarding its priorities. It presented its requests to City Council on November 21. In that meeting, the Parks Director explained that "the challenge that we face with this particular project is the fact that we have … quite a heavy workload that's sort of planned out for the next several years" and that Pemberton Park was "one of the best maintained and highest quality parks in the entire inventory". He explained that it was "simply a matter of prioritization and ability for us to take on that project".

[21] In November and December 2019, the Association solicited letters of support for its Pemberton Park project. The Canadian Association for the Advancement of Women and Sport and Physical Activity encouraged the City to consider the project "an opportunity to invest in the athletic and personal development of girls in the Victoria community". Softball Canada explained that softball is played on a skinned infield, and that a grass infield is not preferred. Softball BC explained:

> Playing softball games on grass infields changes the dynamics of the game considerably and is less than ideal. Skinned infields also are used for a wider variety of softball disciplines, including slo pitch and orthodox, making these fields multi use.
>
> In order for Beacon Hill Association to continue to develop female athletes in the sport of softball, and particularly to develop competitive players and teams, having a fully skinned infield is critical. When considering bids for regional and provincial events, Softball BC places a high priority on the quality of the facility being used, and certainly a fully skinned infield is a key piece in that consideration.

[22] In January 2020, City Council unanimously approved a motion to have staff report back to Council for the 2021 budget with options for improving Pemberton Park field for girls' softball and other users. In 2021, the City approved a budget that included the Association's request for a skinned infield at Pemberton. The Association asked that the work be done before the 2021 season, and offered to delay the start of the season. However, the City determined that the conditions were best in the summer, and the work would be more likely to

complete on time and budget, and be of a higher quality, in the summer. At the time the materials in this application were filed, the City planned to complete the work in the summer/early fall of 2021 to be ready for use in the 2022 softball season.

III DECISION

[23] The City asks the Tribunal to dismiss this complaint without a hearing on the basis that it does not allege facts that could establish a contravention of the *Code,* has no reasonable prospect of success, and does not further the purposes of the *Code.* I consider each of these arguments in turn.

A. No arguable contravention

[24] Section 27(1)(b) of the *Code* gives the Tribunal the discretion to dismiss all or part of a complaint if it does not allege facts that could, if proven, contravene the *Code*. Under s. 27(1)(b), the Tribunal only considers the allegations in the complaint and information provided by the complainant. It does not consider alternative scenarios or explanations provided by the respondent: *Bailey v. BC (Attorney General) (No. 2),* 2006 BCHRT 168 at para. 12; *Goddard v. Dixon*, 2012 BCSC 161 at para. 100; *Francescutti v. Vancouver (City),* 2017 BCCA 242 at para. 49. The threshold for a complainant to allege a possible contravention of the *Code* is low: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56.

[25] There is no dispute that all the Players are girls and protected from discrimination based on their sex. In their complaint, the Players must set out facts that could prove they experienced an adverse impact respecting a service customarily provided by the City, and that their sex was a factor in that adverse impact: *Moore v. BC (Education),* 2012 SCC 61 at para. 33.

[26] The City argues that there are no facts in the complaint that could establish that the City was responsible for the decision that the Players would exclusively play at Pemberton Park, or that their sex – rather than their sport – was a factor in any adverse impact they experienced. The City's other arguments relate to its response and defence to the complaint, which is not a

proper consideration under s. 27(1)(b). I consider those arguments below, in my assessment of whether the complaint has no reasonable prospect of success.

[27] Applying the low threshold of s. 27(1)(b), and without considering the City's response to the complaint, I am not persuaded to dismiss the complaint on this basis. The complaint alleges the following facts which, if proven, could establish discrimination:

a. Softball is a sport dominated by women. All of the Association's softball players are girls, while 96% of its baseball players are boys.

b. The Association has contracted with the City to use three fields for its sporting programs. The City is responsible for approving and funding certain upgrades and work on those fields.

c. Softball fields and baseball fields are different.

d. The City has approved and supported requests to upgrade and maintain baseball facilities at Hollywood Diamond.

e. The City has not approved requests necessary to change Pemberton Park from a baseball field to a softball field.

f. As a result, the all-female Players are not afforded the same opportunity as their predominantly male counterparts to play their sport at a high-quality facility that meets their needs. This impacts their development as players, the quality of coaching, and their ability to host tournaments. This disproportionate impact on girls may support a connection to their sex.

[28] This is enough to surpass the low threshold of s. 27(1)(b), and I deny the application to dismiss the complaint under that section.

B. No reasonable prospect of success

[29] Under s. 27(1)(c) of the *Code*, the Tribunal looks at all the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[30] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [***Hill***] at para. 27.

[31] I begin with the City's arguments that the Players have no reasonable prospect of connecting any adverse impacts to decisions or actions of the City, rather than the Association.

[32] First, the City says that it has other softball fields available that the Association could have applied to use. It says it was the Association who elected not to apply to use a softball facility, and the City cannot be responsible for the consequences of that decision.

[33] There is relatively little evidence about these other fields, and why the Association did not apply for a license to use them. There is some evidence, however, to suggest that the other options were either not available or not equivalent to the three parks that the Association did apply to use. Specifically, the City says that it offered the Association the facilities at Royal Athletic Park – the City's "premier park", which has a skinned infield. The only evidence about this option is an email from the Association's President in January 2020, in which he asked about how to reduce the cost of using this field: "This is an awesome facility and we would like

to make use of it but are really limiting our usage due to cost". This evidence suggests, and the City does not dispute, that the Royal Athletic Park is a more expensive option than the ones the Association chose. Next, the City says that the Association could have used Central Park, with two skinned fastball diamonds. The only evidence about this option is in a letter written by Mr. Sharpe to the Mayor and City Council on January 6, 2020, in which he says:

> The viability of our softball program depends on having a proper playing surface … In Victoria, at least three official softball fields have disappeared within the last decade – Topaz Park, McDonald Park and Fisherman's Wharf Park. That leaves only Vic West Park, Central Park and Heywood Park able to provide regulation softball opportunities for the community **and they are all booked by other user groups**. [emphasis added]

This evidence suggests that other options may not have been available. On the whole, the evidence before me is not sufficient to conclude that the Association elected to use Pemberton Park over other suitable options and so the Players have no reasonable prospect of proving that the City is responsible for any adverse impacts arising out of the choice to use Pemberton.

[34] Second, the City acknowledges that there are differences between the facilities at Hollywood Park and Pemberton Park. It appears undisputed that the Hollywood facilities are generally nicer. However, the City says that the Players have no reasonable prospect of proving that it is responsible for the adverse impacts of playing at Pemberton Park instead of Hollywood. The Players had equal access to the facilities at Hollywood and used that field for practice. The City says that a skinned infield is not required by Softball BC, and the Association could have allowed all its players to play softball and baseball at both Hollywood and Pemberton. The City had no role in any Association decision to restrict the Players to Pemberton Park and use Hollywood Diamond for baseball. Any adverse impacts from the differences between the facilities are a consequence of the Association's decisions.

[35] To begin, there is ample evidence to support the Players' contention that softball is best played on a skinned infield, even if that is not a league requirement. This could support a finding that the Players were adversely impacted by not having access to a field designed for their sport, in contrast to the baseball players. Next, it is undisputed that, despite having access

to the funds and the labour, the Association could not convert the Pemberton Diamond into a softball diamond with a skinned infield without the approval and cooperation of the City. In this situation, I cannot conclude that the Association has no reasonable prospect of proving that the City may be responsible for impacts on the Players arising from its decisions regarding the request for a skinned infield and other improvements.

[36] Third, the City says that it was the Association – and not the City – that made Hollywood Diamond a baseball-only diamond through its requests for facilities and maintenance alterations. It says the Association asked the City to prioritize those requests, which it did. There is relatively little evidence before me about these requests, but it does not seem that the Players dispute this assertion. Rather, they argue that the City's conduct in approving and supporting its upgrades and work at Hollywood Diamond is contrasted with its conduct regarding Pemberton Park and thus supports their complaint of disparate treatment. This is not a basis to dismiss the complaint.

[37] Fourth, the City says that, under the terms of its licensing agreement, it is not responsible for providing or maintaining all baseball facilities. Rather, it is the Association's responsibility to "maintain in a safe and reasonable condition… all existing structures and buildings". It is unclear what this means for the Players' human rights complaint, in circumstances where there is no dispute that the City had a role in making the changes to Pemberton that the Association was seeking.

[38] Fifth, the City says that female baseball players have access to Hollywood Diamond and it is only softball players that say they do not. I understand the City to argue that any impacts from the different facilities arise because of the sport that the player plays, and not their sex. "Softball player" is not a characteristic protected under the *Code.*

[39] The alleged connection between the Players' sex and any adverse impact is a significant issue, and I am not persuaded they have no reasonable prospect of proving that connection. The Players rely on statistics of the gendered makeup of the Association's softball teams compared to its baseball teams, alleged disparate treatment by the City in response to its

baseball and softball-related requests, and a perception by some Players that they are not being treated fairly because they are girls. The use of statistics to prove a discriminatory connection in human rights law is complex: see eg. *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association,* 2018 BCCA 132at paras. 89-98; *Fraser v. Canada (Attorney General),* 2020 SCC 28 at paras. 56-67. Neither party addressed this issue directly in their submissions. Statistical disparities are a type of circumstantial evidence that can support a finding of discriminatory impact on a group of people. At this stage, the statistical evidence of the gendered divide between baseball and softball players is not necessarily conclusive, but – along with the other evidence presented by the Players – is enough to take the allegation of discrimination out of the realm of conjecture. Ultimately, whether there is a discriminatory connection between the Players' sex and any adverse impacts of playing on Pemberton Park is a question of fact that merits a hearing.

[40] Finally, the City argues that it is not obligated to equally equip all its facilities. It says that it "provides upgrades in accordance with its policies which are applied equally and have no relation to an alleged discriminatory decision on the basis of gender". It says parks are upgraded according to City resources and priority planning, which accounts for a broad range of interests as well as budget and staffing constraints.

[41] I accept there is no evidence capable of supporting a finding that the City was making decisions based on the Players' gender. However, that kind of intention is not required by the *Code:* s. 2. The *Code* is focused on eradicating discriminatory **impacts,** regardless of intention. The Players' burden in this complaint is to prove that they were adversely impacted in a service customarily provided by the City (here, the City's decision-making regarding the Association's requests for changes to make Pemberton a softball facility), and that their sex was a factor in that adverse impact. As I have explained, the evidence takes these allegations out of the realm of conjecture. At a hearing, the City can then justify those impacts based on factors like its obligations to the broader community and other users of the park, as well as municipal priorities and plans, and staffing and budget constraints: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 SCR 868 at para. 20.

While it has referenced those countervailing considerations, the City has not directly argued that the complaint is bound to fail because it is reasonably certain to justify any impacts, and nor would I reach that conclusion based on the limited evidence before me: *Purdy v. Douglas College and others,* 2016 BCHRT 117 at para. 50.

[42] In sum, the evidence before me takes the Players' complaint out of the realm of conjecture. This is not a decision that the complaint will be successful, only that it warrants a hearing and decision on its merits. I deny the application to dismiss the complaint under s. 27(1)(c) of the *Code.*

C. Would not further the purposes of the Code

[43] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[44] The City's arguments that it would not further the purposes of the *Code* to proceed are primarily founded on its position that it is not responsible for any discrimination. I have addressed those arguments above, and am not persuaded they are a basis to conclude the complaint does not further the purposes of the *Code.* To the contrary, if the Players establish discrimination, then the *Code's* purpose of identifying and eradicating discrimination will be fulfilled, as will its purpose of providing a means of redress for people who have experienced discrimination: s. 3.

[45] To the extent the City may be arguing that any potential discrimination has been remedied by its approval of a temporary batting cage in 2019 and the skinned infield in 2021, I am not persuaded this is a basis to dismiss the complaint. The question of whether the City is

responsible for sex-related impacts on the Players for the period of the complaint is outstanding and has not been resolved. It furthers the purposes of the *Code* for the Tribunal to resolve that issue on its merits. I deny the application to dismiss the complaint under s. 27(1)(d(i) of the *Code.*

IV CONCLUSION

[46] Before concluding, I note that the City's submissions included comments questioning whether Mr. Sharpe continues to be an appropriate representative for the Players, and is fulfilling his obligations to communicate with the Players. Based on the material before me, I see no particular cause for concern. Because the City has not asked the Tribunal to make a determination or order regarding Mr. Sharpe's representation, I have not found it necessary to consider this issue in my decision.

[47] The application to dismiss the complaint is denied. The complaint will be scheduled for a hearing. Given the nature of issues in the complaint, the parties may want to consider streamlining the hearing process by an agreed statement of facts and/or evidence adduced by affidavit.

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Devyn Cousineau, Vice Chair