S-2 50064

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

MICHAEL SHARPE, REPRESENTATIVE COMPLAINANT on behalf of FEMALE SOFTBALL PLAYERS

PETITIONER

AND:

THE CORPORATION OF THE CITY OF VICTORIA and THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

City of Victoria
City Hall
1 Centennial Square
Victoria, B.C., V8W 1P6

BC Human Rights Tribunal
1270 – 605 Robson Street
Vancouver, B.C., V6B 5J3

Attorney General of British Columbia
Ministry of Attorney General
3rd Floor – 1001 Douglas Street
Victoria, B.C., V8W 2C5
Pursuant to the *Judicial Review Procedure Act*, s 16

The address of the registry is: Victoria Law Courts
Supreme Court Registry
PO Box 9248, Stn Prov Govt
850 Burdett Avenue, 2nd Floor
Victoria, BC, V8W 9J2

The petitioner(s) estimate(s) that the hearing of the petition will take two days.

[X] This matter is an application for judicial review

[ ] This matter is not an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below by

[X] the person(s) named as petitioner(s) in the stye of proceedings above

[ ] ** (the petitioner(s))

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The ADDRESS FOR SERVICE of the petitioner(s) is: Gall Legge Grant Zwack LLP 1000 – 1199 West Hasting Street Vancouver, BC V6E 3T5 Attention: Peter A. Gall, K.C. Fax number address for service (if any) of the petitioner(s): N/A E-mail address for service (if any) of the petitioner(s): pgall@glgzlaw.com
(2)	The name and office address of the petitioner(s) lawyer is: Peter A. Gall, K.C. Gall Legge Grant Zwack LLP 1000 – 1199 West Hastings Street Vancouver, BC V6E 3T5

CLAIM OF THE PETITIONER

OVERVIEW

A. Overview of the Petition

1. The proceeding underlying this petition is a human rights complaint, which was filed in 2020 (the "**Complaint**") by a concerned father and coach, Mr. Michael Sharpe (the "**Representative Complainant**") on behalf of female softball players in the Beacon Hill Baseball Softball Association (the "**Association**").

2. The Complaint alleges that the respondent City of Victoria ("**City**" or "**Respondent**") systemically underfunds, and fails to provide necessary approvals for, the Association's softball program, which is exclusively played by female Association registrants, as compared with the Association's baseball program, overwhelmingly played by male registrants.

3. In particular, the Complaint alleges that, since 2016, the field, facilities, and amenities made available to the Association's softball program by the City have been, and remain, inadequate and inferior compared to those provided to the baseball program, and that the City has refused to support or approve the Association's proposals to narrow the gendered gap.

4. Taken together, these actions have resulted in female softball players being deprived of the opportunities available to the overwhelmingly male baseball players, and have deprived female softball players of the opportunity to play softball at a competitive level and develop in a sport where Canadian women excel internationally.

5. This unequal treatment of female registrants of the Association as compared with male registrants is alleged in the Complaint to constitute discrimination on the basis of sex under the *Human Rights Code*, RBSC 1996, c. 210 (the "***Code***").

6. The Complaint explicitly alleges, and has always alleged, that this discriminatory treatment began in 2016, when the softball program was moved to another park leased from City – Pemberton Park – which has a field unsuited to competitive softball, and facilities that are of a lower grade than those provided to the overwhelmingly male baseball program.

7. The represented class of players covered by the original Complaint, which was filed in 2020, included all female softball players of the Association between the years of 2019 and the present (the "**Complainants**").

8. The Representative Complainant was, at that time, not represented by legal counsel, and was unaware that the Complaint could extend back beyond the ordinarily one-year time limit under the *Code*, on the basis that the City's conduct amounted to a continuing contravention.

9. The Complainants subsequently applied to add additional complainants to the Complaint, being female softball players with the Association in any of the 2016, 2017 or 2018 years, who were not already Complainants, but who were subjected to the same disparate treatment as the Complainants.

10. The proposed amendments further alleged that the City's systemic underfunding of the softball program amounted to a continuing contravention of the *Code*, which rendered the claims brought on behalf of the players between 2016 and 2018 timely.

11. On an application to amend, the Tribunal must consider whether the amendments allege a breach of the *Code*, including whether the allegations are timely, and if so, whether it would further the purposes of the *Code* to permit the amendment in light of the need to provide fairness to the parties.

12. In a decision dated October 29, 2024, the respondent BC Human Rights Tribunal (the "**Tribunal**") denied the application to amend the Complaint to include the female players between 2016 and 2018, on the following two grounds:

    a. That the Players had not filed a form necessary to seek an amendment, being Form 3; and

    b. That it would not be fair to the City to permit the proposed amendment at that stage of the proceedings.

13. The Tribunal subsequently discovered that its first ground for denying the amendment was mistaken, as the Complainants had in fact properly filed the necessary form to seek an amendment to the Complaint.

14. As a result, the Tribunal issued a reconsideration decision, on its own motion, approximately one week later.

15. In its reconsideration decision, the Tribunal acknowledge its error in rejecting the proposed amendments based on the failure to file the appropriate form, but confirmed its refusal to grant the proposed amendments on the alternative ground of the alleged unfairness to the City of permitting it.

16. The Tribunal's decision to refuse the proposed amendment is patently unreasonable, as it deprives nearly 100 female players of the opportunity to have their discrimination claims heard and resolved. Further, permitting the amendment will occasion no unfairness or prejudice whatsoever to the City.

17. While permitting the proposed amendment will expand the number of complainants who may be found to have suffered discriminatory treatment or who may be entitled to a remedy, it will not otherwise change or alter the scope of the Complaint, or change the legal analysis that is required to resolve it.

18. The Complaint has always alleged that female softball players of the Association have been forced to use the inadequate and unequal facilities since 2016, when the softball program was first moved to Pemberton Park.

19. That is the foundation of the discrimination Complaint, and the facts underlying that allegation, going back to 2016, were always included as part of the Complaint.

20. This fundamental allegation – that female softball players have been required to use the inadequate and unequal facilities at Pemberton Park since 2016 – is the very same for female softball players between 2016 and 2018, as it is for the existing Complainants.

21. In addition, the proposed amendment does not seek to add any additional grounds of discrimination, or to add additional discriminatory conduct that the Tribunal must consider. The legal analysis is the same for all female softball players of the Association, regardless of which year they played.

22. Thus, there is no need for the Respondent to undertake extensive additional pre-hearing investigations, disclosure, or preparations, given that the allegations in relation to the two classes of players are fundamentally the same, and they are based on the same essential factual and legal assertions that were already covered by the Complaint.

23. Moreover, even if there was a need for any additional preparations as a result of the proposed amendment, and even if this would have rendered the scheduled hearing date unviable – which is not the case – those concern could be addressed by a brief adjournment of the hearing.

24. And in fact, following the Tribunal's decision to deny the proposed amendment, it subsequently granted an adjournment of the scheduled hearing dates on other grounds. This has eliminated any possible justification for refusing to permit the proposed amendments, and yet the Tribunal has not reconsidered that decision.

25. If the decision to deny the amendment is upheld, the human rights claims of the female softball players who played for the Association between the years of 2016 and 2018 will not be adjudicated at all, and they will be denied any chance for a remedy arising from the allegedly discriminatory treatment.

26. In short, granting the amendment will not occasion any unfairness to the Respondent, particularly any unfairness that could not be resolved by an adjournment, which has since been granted in any event. Rather, it will merely ensure that others who have been subjected to the same allegedly discriminatory treatment will have their complaints heard and determined under the *Code*.

27. Therefore, denying this proposed amendment was patently unreasonable, and that decision should be quashed.

PART I: ORDER SOUGHT

28. The Petitioners seek the following orders:

    a. An order in the nature of *certiorari* quashing the decisions of the Tribunal, dated October 29th and November 6th, 2024, refusing to permit the Petitioner to amend the Complaint;

    b. An order in the nature of *mandamus* requiring the Tribunal to permit the Petitioner to amend the Complaint in the manner set out in the application to amend, dated September 11, 2024, or in the alternative, remitting the matter back to the Tribunal to be decided in accordance with the Court's reasons;

    c. An interlocutory stay of the Tribunal proceeding, including the hearing and adjudication of the Complaint, pending the resolution of this Petition;

    d. Such other relief as may be warranted; and

    e. Costs.

PART II: FACTUAL BASIS

29. The petitioner Mr. Michael Sharpe has been a member of the Beacon Hill Baseball Softball Association (the "**Association**") for more than 10 years, participating as Board member, parent, and coach.

30. Mr. Sharpe has been approved by the Tribunal as the Representative Complainant of a class of complainants consisting of female softball players with the Association between 2019 and the present (i.e. the Complainants), and brings this petition on behalf of the Complainants in that capacity.

31. Mr. Sharpe is the father of a female softball player who began playing Tee-ball with the Association in 2013, and continued playing softball with the Association, including during the relevant period.

32. In 2016, the decision was made to move the Association's softball program from the existing baseball stadium at Hollywood Park to the softball field at Pemberton Park, due to the fact that the Hollywood Park baseball infield was not suited to a competitive softball program, which required a different diamond.

33. The respondent City is the owner of both Hollywood Park and Pemberton Park, and licenses the use of the parks to the Association. The City is responsible for both regulating the use of the parks, and for funding or approving all improvements and changes to the parks.

34. From 2016 until February 11, 2020, Mr. Sharpe was a Board member of the Association who, in conjunction with the Presidents of the Association, were responsible for liaising with the City regarding the facilities for the softball program.

35. During this period, Mr. Sharpe consistently participated in discussions with the City and engaged in public advocacy, in an attempt to ensure that the exclusively female softball program was provided with a field, facilities, and amenities equivalent to the overwhelmingly male baseball program.

36. On February 10, 2020, Mr. Sharpe filed the underlying human rights Complaint with the Tribunal, on behalf of the female softball players of the Association, alleging that their treatment by the City was discriminatory on the basis of sex.

37. At the time of filing the Complaint, Mr. Sharpe was not represented by counsel. The Complaint is set out on the Tribunal's default forms, where there is limited space to detail the nature of the discrimination, and as such sets out the discrimination claims at a relatively high level.

38. At that time, Mr. Sharpe was only aware of the one-year time limit to file a complaint as set out in the Tribunal form. He was not aware of the concept of a "continuing contravention" or the ability to bring a claim on behalf of those who had been impacted by the allegedly discriminatory treatment prior to one year before the filing of the complaint.

39. However, it is clear from the original Complaint that the discrimination alleged involved the treatment of all female softball players in the Association going back to 2016, when the decision was made to move to Pemberton Park.

40. The Complaint specifically alleges that the adverse impact suffered by female softball players of the Association has been "ongoing since 2016".

41. This was acknowledged in a letter dated March 9, 2020, from the Tribunal member who was tasked with screening the representative complaint:

> Your complaint is in the area of services and based on sex. You say the girls' softball program is not being provided the same level of service as the boys' baseball program. The girls want equal park facilities where they can practice and play as the boys.
>
> You say that the girls do not have access to a safe and properly skinned infield for their softball program at Pemberton Park. You say that the existing field configuration with rectangular cut outs is unsafe and has resulted in injury to some girls. The City is aware and not doing anything about it. The boys, on the other hand, have access to high quality regulation baseball field and facilities at Hollywood Park which the City maintains throughout the year.
>
> The adverse impact is that the girls who play softball at Pemberton Park are losing (or have lost) the opportunity to develop skills. This means that they may not be able to compete at higher levels to attain scholarship opportunities.

> **You say these issues have been ongoing since 2016 and efforts to have this inequality addressed and corrected has not been successful**. [emphasis added]

42. Although aware that the Complaint alleged discriminatory treatment impacting female softball players of the Association going back to 2016, the Tribunal member did not advise Mr. Sharpe that he could bring the Complaint on behalf of players prior to 2019 in the event that it was a continuing contravention.

43. The City's response to the Complaint, dated June 25, 2020, details its position regarding the allegations in the Complaint, including the allegations going back to 2016. The City does not allege that there were any significant differences between the state of Pemberton Park or Hollywood Park, and their associated fields and facilities, between 2016 and 2019.

44. The Complainants' document disclosure included documents going back to 2009, including over 100 documents created during the 2016-2018 period. The City's document disclosure contained documents going back to 2012, and included nearly 100 documents that were created during the 2016-2018 period.

45. In November 2020, the City applied to dismiss the Complaint, alleging that the Complaint did not allege a breach of the *Code*, that it had no reasonable prospect of success, and that proceeding with it would not further the purposes of the *Code*.

46. The submissions and evidence filed on the application to dismiss, by both the Complainants and the City, went into detail regarding the situation of players of the Association both prior to and after 2016, including the move to Pemberton Park in 2016, and the situation of the exclusively female softball players compared with that of the overwhelmingly male baseball players since that time.

47. On August 23, 2023, the Tribunal denied the City's application to dismiss in its entirety, in a decision indexed at *Female Softball Players (by Michael Sharpe) v. City of Victoria*, 2023 BCHRT 112 ("**Dismissal Decision**").

48. In its summary of the facts underlying the Complaint, the Tribunal detailed the situation impacting the players of the Association before 2016, the move of the softball program to Pemberton Park in 2016, and the allegations relating to unequal treatment since 2016 as it relates to the different fields, facilities, and amenities.

> Dismissal Decision, paras 10-22.

49. The resolution of the City's unmeritorious application to dismiss took nearly three years.

50. On April 2, 2024, after the denial of the City's application to dismiss, the Complainants filed Tribunal Form 9.4 pertaining to the remedy sought, indicating that they were seeking remedies for all players in the Association, beginning with those who played in the 2016 year.

51. Other forms relating to the Complainants' disclosure and witness list were filed at the same time, and accounted for the Complainants' intention to seek remedies on behalf of all female softball players of the Association going back to 2016.

52. Counsel for the Complainants wrote to counsel for the City on April 2, 2024, serving the above forms, and expressly informing the City of the Complainants' intention to apply to amend the Complaint to formally confirm:

> … that, while the Respondent's conduct complained of in 2020 included *Code* violations in 2019, the Respondent has been in violation of the *Code* since 2016 — as described by the Complainant in its 2021 Response to the Respondent's application to dismiss — each of which instance in 2016 to 2018 constituted violations on their own.

53. On April 23, 2024, counsel for the Complainants emailed counsel for the Respondent, attaching a document titled "Player Roster List 2016 to Present", which included the original Complainants as well as the complainants that would be included in the affected class through the proposed amendments.

54. On May 7, 2024, counsel to the Complainants emailed counsel for the Respondent, confirming the Complainants' intention to apply to amend the Complaint to cover all female softball players of the Association following the move to Pemberton Park in 2016.

55. On September 11, 2024, the Complainants applied to amend the Complaint, by filing both a Form 7.1 – General Application form, and a Form 3 – Amendment form, the latter of which specified the proposed amendments as follows:

> a. amend the Complaint style of cause so that the Complainants are described as "All female softball players registered with the Beacon Hill Baseball Softball Association who have played at Pemberton Park since the start of the 2016 season and/or currently play at Pemberton Park"; and
>
> b. bring into scope of the Complaint allegations of continuing contravention by the Respondent, the City of Victoria, from the start of the 2016 softball season to the start of the 2019 season.

56. By way of a decision dated October 29, 2024, and indexed at *Female Softball Players (by Michael Sharpe) v. City of Victoria (No. 2)*, 2024 BCHRT 307 ("**Original Decision**"), the Tribunal denied the Complainants' application to amend the Complaint to include the female softball players between 2016 and 2018 on the basis of a continuing contravention.

57. In the Original Decision, the Tribunal rejected the proposed amendments on two grounds:

a. That the Players had not filed a necessary form, being Form 3, and therefore had not adequately particularized the nature of the proposed amendments; and

b. That it would not be fair to the City permit the proposed amendment at that stage of the proceedings.

58. The first ground was wrong. As the Tribunal later acknowledged, the Complainants had filed the proper Form 3, as required, and the fact that Form 3 was enclosed in the application was clearly indicated on the General Application Form 7.1.

59. As it relates to the second ground, the Tribunal relied upon the principle that "a party affected by a decision must know the case against them and be provided a meaningful opportunity to respond to it", and raised the concern that certain amendments may deprive the responding party – in this case the City – of procedural fairness where that party does not have the "time or resources" to adequately respond to the complaint as amended.

Original Decision, paras 14-15, citing *Christensen v. Caretenders Financial Services Inc. and others (No. 2)*, 2023 BCHRT 205, para 12.

60. There was no evidence before the Tribunal that the City did not know, from the very outset of the Complaint, that the Complainants alleged that the discriminatory treatment went back to 2016, or that the City would not have the time or resources to respond to the proposed amendments, particularly with a brief adjournment, if one became necessary.

61. The Tribunal subsequently reconsidered the Original Decision, on its own motion, in a decision dated November 6, 2024, and indexed at *Female Softball Players (by Michael Sharpe) v. City of Victoria (No. 3)*, 2024 BCHRT 317 ("**Reconsideration Decision**"), and confirmed that its first ground for denying the amendment was mistaken:

> [2] In *Female Softball Players (by Michael Sharpe) v. City of Victoria*, 2024 BCHRT 307 [**Original Decision**], I denied the Players' application to amend their complaint in part because I thought they had not filed a Form 3 specifying the amendments sought. After making that decision, it came to my attention that the Players had indeed filed a Form 3. It was not fair to make the Original Decision without considering all the information filed by the parties. To remedy this unfairness, I am reconsidering the Original Decision in light of the Form 3: *Tribunal Rules of Practice and Procedure*, Rule 36; *Zutter v. British Columbia (Council of Human Rights)* (1995), 1995 CanLII 1234 (BC CA), 122 DLR (4th) 665 (BCCA). [emphasis in original]

62. However, in the Reconsideration Decision, the Tribunal confirmed its second and alternative ground for denying the proposed amendment, being that the application should not be permitted due to the alleged unfairness to the respondent City, as explained in the following passages:

> [16] Here, upon a global review of the submissions filed with the Tribunal, including the Form 3, I am satisfied that the Players allege facts from 2016 to 2018 that could, if proven, contravene the *Code*.
>
> [17] However, even if the submissions are clear on what allegations the Players seek to add to the complaint, I deny the application to amend because of the effects that the amendment would likely have on the Tribunal's complaint process. It is too late to add 95 class members and new allegations stretching back 8 years. As set out at para. 17 of the Original Decision:

> … This is already a complex matter involving two weeks of hearing time. At this point, parties should be preparing for the hearing. The amendments would likely take away from this preparation. If the amendments are allowed, it would likely require an application for particulars as well as an amended response to the complaint. Further disclosure might be necessary. The amendment would likely result in the addition of witnesses to the witness list and would in all likelihood result in an application for an adjournment of the hearing. At the very least, it would likely require more hearing days, which could slow down the hearing process – and complaint resolution – significantly. While we do not know exactly what would occur as a result of the amendments, I am satisfied that some additional steps would have to be taken, putting the hearing dates in jeopardy.
>
> [18] Finally, a note on remedy. The Players say that if the amendments are not allowed, it will deny justice to some 95 players from the 2016-2018 season and remove from proper scrutiny the conduct of the elected and non-elected officials of the City over three years. However, if the Players complaint is found to be justified, they will be entitled to remedies under the *Code*. The Players seek a declaration that the conduct complained of is discriminatory, a cease and desist order, and an order that key softball amenities at Pemberton Park be improved or installed. These remedies, if awarded, would benefit all softball players at Pemberton Park, not just the class members. While the Players do seek an individual remedy in the form of an injury to dignity award, the amount sought per player is modest. I am not persuaded that this is a reason to allow the amendments.

63. The Tribunal did not indicate why such extensive additional preparation was assumed to be necessary, given that both the factual basis of the Complaint and document disclosure of the parties had already extended back to 2016, and did not indicate why any such preparation could not have been accommodated by a brief adjournment, if necessary.

64. If the Original Decision and the Reconsideration Decision ("**Decisions**") are upheld, approximately 100 registered female softball players of the Association, who allegedly suffered discrimination under the *Code* during the 2016 to 2018 seasons, will be deprived of an opportunity to have their claims placed before the Tribunal, and deprived of any potential remedy.

65. On November 20, 2024, the Representative Complainant gave notice to the Tribunal and the City that the Complainants had just secured legal counsel to petition the Supreme Court for judicial review of the Decisions, and that Complainants would be seeking an adjournment of the upcoming hearing in order to allow time for the judicial review to unfold.

66. In accordance with the timeline set by the Tribunal, the Complainants filed their formal application to cancel the hearing dates (i.e. seek an adjournment) on December 2, 2024.

67. In a decision dated December 20, 2024, and conveyed to the parties on December 23, 2024, the Tribunal granted the application to adjourn the hearing dates, and indicated that the

case manager would be in touch to schedule a pre-hearing conference before the end of March 2025.

68. The Tribunal said that the decision to adjourn the hearing was based on the parties' state of preparedness, and that the pending judicial review was a "neutral" factor in its decision to adjourn the hearing.

69. Although the Tribunal's refusal to permit the amendments was based on the presumption that the City would not have adequate time to prepare to address the amended complaint prior to the scheduled hearing dates – which the Petitioner does not concede but specifically denies was the case – the hearing dates have now been cancelled. The adjournment will provide the City with a number of additional months for preparation, and indeed, as much as it could reasonably require in the circumstances to respond to the proposed amendments.

70. Nevertheless, the Tribunal did not reconsider the impugned Decisions to refuse to permit the proposed amendments following its decision to adjourn the hearing.

PART III: LEGAL BASIS

A. Applicable Legal Principles

71. The *Code* is quasi-constitutional legislation that must be interpreted generously, in light of its remedial purpose. As the Supreme Court of Canada has explained:

> [17] The *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes [citations omitted].
>
> [18] Those purposes include the prevention of arbitrary disadvantage or exclusion based on enumerated grounds, so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination.
>
> *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, paras 17-18.

72. In light of the nature and purposes of the *Code*, the Tribunal should seek to ensure that allegations of discrimination are meaningfully adjudicated, wherever possible, and should be cautious before depriving individuals of their opportunity to have their claims adjudicated under the *Code*, particularly on technical grounds.

73. It is trite law that in a human rights proceeding, the original complaint and any response to complaint "are not the equivalent of pleadings in a civil matter", and should not be treated with the same strictness as pleadings in court, particularly where the complaint is originally drafted and filed while a party was unrepresented (as in this case).

See e.g. *Andrews and others v. B.C. (Four Ministries)*, 2005 BCHRT 321, paras 15-17; *McLardy v. Burt (No. 3)*, 2007 BCHRT 362, para 8; *Nelson v. Pinnacle Renewable Energy and another*, 2024 BCHRT 165, paras 20-24.

74. The fact that complaints should be read broadly and generously has been recognized by the Tribunal in the context of applications to dismiss, where the Tribunal has stated:

> [63] … Human rights complaints should not be interpreted in a restrictive manner. To do so undermines the generous, aspirational purposes of the *Code* set out in s. 3. Further, in applications under s. 27(1)(c), such as this one, where a complainant is not represented by legal counsel, the Tribunal must be cautious in winnowing complaints. This is reflected in the following statement about the Tribunal's gatekeeping function under s. 27(1)(c) made by the Honourable Madam Justice Walkem in *Lord v Fraser Health Authority*, 2021 BCSC 2176 at para. 36:
>
> > The BCHRT is tasked with hearing and adjudicating the complaints of vulnerable individuals who allege that they have been discriminated against based on a protected ground. Guarding the Tribunal's efficiency is an important task, reflected in their powers to assess and winnow out complaints with no reasonable chance of success. However, equally, efficiency requires ensuring that complaints that merit a hearing are heard, despite appearing at the gate in ragged form, and in ways that require more work to comprehend. A process that winnows out complaints that are imperfectly brought, but that likely contain valid complaints of human rights violations, cannot be said to be an efficient process.
>
> *The Parent obo the Child v. Fraser Health Authority operating as the Hospital and another*, 2024 BCHRT 45, para 63.

75. Where the impact of denying an amendment is to preclude the adjudication of a substantive claim, as in this case, it will substantively dispose of that issue, rendering it subject to judicial review or appeal. Such rulings stand on the same footing as a decision striking an existing complaint or pleading.

See e.g. *McDowell v. Automatic Princess Holdings, LLC*, 2017 FCA 126 (CanLII), [2018] 3 FCR 445, paras 26-27; *Aecon Mining Construction Services, a division of Aecon Construction Group Inc. v K+S Potash Canada GP*, 2023 SKCA 102, paras 43-48.

76. On an application to amend, the Tribunal must consider whether the amendments allege a breach of the *Code*, including whether the allegations are timely, and if so, whether it would further the purposes of the *Code* to permit the amendment in light of the need to provide fairness to the parties.

See e.g. *Pausch v. School District No. 34 and others*, 2008 BCHRT 154, para 29.

B. Application of the Legal Principles to this Case

77. In this case, the Complainants applied to amend the style of cause and allege a continuing contravention to bring female softball players between the start of the 2016 season and the end of the 2018 season into scope of the Complaint. Regarding this proposed amendment, the Tribunal was "satisfied that the Players allege facts from 2016 to 2018 that could, if proven, contravene the *Code*."

Reconsideration Decision, para 16.

78. As such, the only remaining question was whether it would further the purposes of the *Code* to permit the amendment, including ensuring that all parties are treated fairly.

79. Rule 24 of the *Tribunal Rules of Practice and Procedure* ("**Tribunal Rules**") contemplates that, up until four months before a scheduled hearing, most amendments to a complaint can be made without needing to apply to the Tribunal for leave. Leave is only required for amendments that are proposed within four months of a scheduled hearing, that raise complaints outside of the applicable time limits, or that are filed while an application to dismiss is outstanding.

80. The proposed amendments in this case were filed three months and three weeks before the scheduled hearing date, and therefore only one week after the period during which the Tribunal Rules ordinarily presume that amendments can be accommodated within the scheduled hearing period.

81. In determining whether it is consistent with the purposes of the *Code* to permit an amendment, the Tribunal has emphasized that a very important consideration is whether the facts underlying the proposed amendment were already part of, or referred to, in the original complaint.

82. For instance, in *Read v Century Holdings Ltd. dba Best Western Tsawwassen Inn*, the Tribunal held:

> [72] In the present case, I find that it is in the public interest to amend the Complaint, notwithstanding the fact that the ground which is sought to be added relates to events which occurred more than six months prior to the amendment being sought. In so finding, I rely upon the following factors. First, and very importantly, the incidents in question were clearly referred to in the original Particulars. While this is also relevant to the question of prejudice, which I deal with below, the references to the events in the original Particulars means that there is no unfairness to the Respondent in having to deal with an allegation of sexual harassment.
>
> [73] Further, the fact that the incidents were referred to in the original Particulars indicates to me that the Complainant, who was unrepresented at the time, had in mind the instances of alleged sexual harassment when she made her original Complaint to the Commission. It is significant that the Complaint Information

> Form, which frames the Complaint, was drafted not by the Complainant, but by the Commission. The allegations of sexual harassment are not a matter which the Complainant has held in her back pocket, only to foist them upon an unknowing Respondent at a later date. [emphasis added.]

Read v. Century Holdings Ltd. dba Best Western Tsawwassen Inn, 2003 BCHRT 52 ("***Read***"), paras 72-73.

83. The same analysis applies in the present case, given that the central facts underlying the proposed amendments were all clearly alleged as part of the original Complaint and subsequent process of particularization and document disclosure.

84. These central facts include, but are not limited to, the softball program moving to Pemberton Park in 2016, the inferior field and facilities available in Pemberton Park since 2016, the superior field and facilities provided to the baseball program since 2016, and the failed attempts to secure equivalent facilities for the softball program since 2016.

85. All of these facts, as set out in the original Complaint, apply equally to the claims of those complainants who would be added by the proposed amendments – the only difference being that they would have suffered the unequal treatment while playing in 2016 through 2018, instead of while playing in 2019 or after.

86. In addition, an amendment to a complaint is more likely to be permitted if "a complaint before the Tribunal is likely to be the only means of redress available". That is clearly the case here, as there will be no means of recourse for the excluded complainants if they are barred from participating in the Complaint as a result of the Decisions.

Read, para 75.

87. The Tribunal did not consider any of these factors in its Decisions denying the proposed amendment.

88. Rather, in issuing the Decisions, the Tribunal considered only one factor – the alleged unfairness or prejudice to the City arising from the proposed amendments.

89. The Tribunal presumed, without evidence, that permitting the proposed amendments would occasion some unfairness or prejudice to the City. In particular, the Tribunal presumed that it would require additional preparation prior to the scheduled hearing date, and that this preparation could not be accommodated within the time period remaining.

90. However, that conclusion was patently unreasonable, given the fact that the fundamental factual and legal allegations would not change as a result of the proposed amendments, and therefore would require little if any additional preparation.

91. The Complainants allege, and have always alleged, that since 2016, when the softball program moved to Pemberton Park, the field, facilities, and amenities available to the Association's female softball players were inferior to the field, facilities, and amenities available to overwhelmingly male baseball players of the Association at Hollywood Park.

92. This is reflected in the fact that both the original Complaint and the City's response detailed facts going back to 2016; that their document disclosure each included hundreds of documents created between 2016 and 2018; and that the evidence and arguments filed on the application to dismiss cover the period from 2016 and 2018.

93. As just noted, the same fundamental allegation applies equally to all female softball players of the Association since 2016. All were subject to the same field, facilities, and amenities, and hence the same adverse treatment, that is alleged to be discriminatory; the only difference is the year in which they suffered the allegedly unequal treatment.

94. There was no evidence before the Tribunal that, in light of these facts, permitting the amendment would require extensive additional preparation on the part of the parties, or that this preparation could not be accommodated within the remaining time period prior to the scheduled hearing.

95. Indeed, there was no concrete evidence before the Tribunal that any actual prejudice or unfairness to the City would in fact be occasioned by permitting the proposed amendments, nor any reason to believe that would be the case.

96. For instance, the City did not indicate that the field, facilities, or amenities available to Association's players between 2016 and 2018 were substantively different that those available to those after 2018, or that there were any additional facts not already addressed by the parties in their filed forms, submissions, disclosure, and evidence that would in any way alter the scope of the hearing.

97. In addition, the proposed amendments in this case did not in any way change the nature of the legal issues raised in the Complaint, which is identical for both the excluded complainants and included Complainants. This is another factor that operates in favour of permitting the proposed amendment.

Pattinson v. University of Northern British Columbia and another, 2021 BCHRT 33, para 29.

98. And there is no basis to assert that the outcome of the City's application to dismiss would have been any different if the amendments had been permitted, particularly given the Tribunal's conclusion that the proposed amendments alleged facts between 2016 to 2018 that could, if proven, contravene the *Code*.

Reconsideration Decision, para 16.

99. In short, there was no basis for concluding that the City would suffer any unfairness or prejudice as a result of the proposed amendment, particularly not to the extent that could reasonably justify depriving the excluded complainants of their ability to seek and pursue remedies under the *Code* for allegedly discriminatory treatment.

100. Finally, even if permitting the proposed amendments would have required some additional preparation on the part of the City, and even if that could not have been accommodated prior to the scheduled hearing date, both of which are disputed, this would not deprive the

City of procedural fairness, and in particular its right to know the case against them and be provided a meaningful opportunity to respond to it.

101. Rather, given the significance and gravity of summarily dismissing otherwise meritorious allegations of discrimination without a hearing, the reasonable response would have been to permit a brief adjournment to allow for that preparation to occur.

102. And that is what has since occurred, as the Tribunal has now – following its Decisions to refuse to permit the proposed amendments – granted a general adjournment of the scheduled hearing dates.

103. This has in turn eliminated any prospect of unfairness to the City arising from permitting the proposed amendments, as they will have any additional time they reasonably require to prepare to respond to the proposed amendments (which the Complainants submit will require very little if any additional preparation, for the reasons stated above).

104. It is patently unreasonable in these circumstances for the Tribunal to have denied the proposed amendment to the Complaint, and hence deprive a group of vulnerable claimants that may have been subject to discrimination of a potential remedy, where any alleged unfairness or prejudice could be addressed by an adjournment.

105. This was explained by the Alberta Court of Kings Bench in *Gallagher v. Hotel Employees and Restaurant Employees International Union (Local 47),* where the Court found a decision of the Alberta Labour Relations Board's patently unreasonable, for the following reasons:

> [37] The applicants argue that their motion to amend the particulars of their complaints was unreasonably refused. They repeat the arguments made under the previous heading; there was general notice to the union that a s. 151 hearing might well target hostile behaviour by the union in relation to named members. They add that the legislative purpose underlying the creation of administrative tribunals is to empower the tribunals with the flexibility and efficiency that are not always possible in the courts. They offer, by analogy, case law interpreting the *Rules of Court* on adjournments. That case law is summarized as follows: "it is a wrong exercise of discretion to refuse an amendment which would do no harm or harm compensable in costs": *Civil Procedure Guide*, p. 358. The case law also emphasizes that the main way in which to avoid harm is to grant an adjournment along with the amendment.
>
> (…)
>
> [41] I accept the applicant's position that an adjournment should have been granted; moreover, here the Board's refusal was patently unreasonable.
>
> [42] Adjournments are discretionary. However, that discretion must be exercised reasonably. The analogy made by the applicants is useful. Judges also have a discretion in the matter of adjournments; however, their discretion must be exercised judicially, that is reasonably. The test of the reasonable exercise of

> discretion is the one proposed by the applicants: adjournments should be allowed unless there is unfairness or unless there is prejudice that is not compensable in costs. The exercise of judicial discretion is reviewable by the Court of Appeal; if that court concludes that the discretion was not exercised reasonably, it will order a new trial. This remedy demonstrates that procedure is not "only" process; sometimes process goes to the heart of fairness and may even reach constitutional proportions.
>
> [43] The union does not suggest that it would have suffered any prejudice if an adjournment had been granted or that any prejudice it suffered would not have been compensable in costs.
>
> [44] In summary on this point, the decision to refuse an adjournment was wrong. The union, the other respondents, and the Board, if the Board's preparation is relevant, would have been able to prepare to meet the amended position if an adjournment had been granted. The union faced no prejudice. If the tribunal had been a court, an appeal court would have ordered a new trial. But the Board is not a Court. The Board does not have to be right but it cannot be patently unreasonable. The Board's decision here was patently unreasonable; there are four reasons for that conclusion. [emphasis added]
>
> *Gallagher v. Hotel Employees and Restaurant Employees International Union (Local 47)* (1993), 11 Alta LR (3d) 406, 1993 CanLII 7125 (KB), paras 37, 41-44.

106. The same rationale applies in the present case.

107. Finally, the Tribunal's belief that the remedies available to the excluded complainants are "modest" on a per player basis is irrelevant, and fails to account for the valuable purpose of damages for injuries to dignity and self-respect under the *Code*.

> Reconsideration Decision, para 18.

108. Put differently, the mere fact that the Tribunal may not consider such a remedy meaningful is not a sufficient basis for refusing to permit the proposed amendments in circumstances where the result of such a decision is to deprive approximately 100 individuals of their right to have their claims heard, and where the amendments can clearly be accommodated without occasioning any unfairness or prejudice to the respondent, as in the present case.

C. Conclusion

109. In conclusion, the Tribunal's refusal to permit the proposed amendment was patently unreasonable, as it was not based on any evidence of actual prejudice or unfairness that the City would suffer, but rather assumed or presumed prejudice, which was inconsistent with the reality of the proceedings.

110. In particular, the Tribunal failed to take into account the facts material to the matter before the Tribunal, including that:

a. the factual basis (and hence necessary evidentiary preparation) for the Complaint had always extended back to 2016;

b. the adverse treatment suffered by the excluded complainants was the same as that suffered by the initial class of Complainants as set out in the original Complaint; and

c. the legal analysis would be substantively the same or identical for the excluded complaints as for the original Complainants.

111. The Tribunal's conclusion was particularly unreasonable as any concerns arising from the scheduled hearing date could have been easily resolved by a brief adjournment, which could have addressed any alleged prejudice or unfairness while avoiding driving nearly 100 complainants from the seat of judgment.

112. That there was no reasonable basis to refuse to permit the amendment was demonstrated clearly when, weeks after that decision was made, the Tribunal held that an adjournment was merited in light of the parties' current stage of preparations.

113. Finally, even if permitting the proposed amendment would have occasioned any prejudice or unfairness that could not have been resolved through a brief adjournment, which is denied, the Tribunal did not weigh any such prejudice or unfairness against the severity of dismissing otherwise viable allegations of discrimination.

114. That is, the Tribunal did not take into account the harmful impact of wholly depriving the excluded complainants of any opportunity to have the discrimination they claim to have suffered addressed. Such a severe result is clearly contrary to the purpose of the *Code,* and should only be countenanced where it is necessary to prevent some irremediable prejudice to the other side, which simply did not exist in this case.

115. The fact that the award on a per player basis may be "modest" in dollar terms does not mean that such an award is insignificant or meaningless in compensating those who have suffered discrimination, nor does it provide independent grounds for refusing to permit an amendment tin these circumstances.

116. Thus, the Tribunal's decision is patently unreasonable, inconsistent with the purposes and objects of the *Code*, and must be quashed.

PART IV: MATERIAL TO BE RELIED UPON

1. *Judicial Review Procedure Act,* RSBC 1996, c 241;

2. *Human Rights Code*, RSBC 1996, c 210;

3. *Supreme Court Civil Rules*, BC Reg 168/2009;

4. Affidavit #1 of Anne Wong, made January 3, 2025;

5. The pleadings and materials filed herein; and

6. Such further and other material as counsel may advise.

Date: 01/03/2025

Signature of lawyer for the petitioner
Peter A. Gall, K.C.

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this petition

[ ] with the following variations and additional terms:

Date: _____
[month, date, year]

Signature of
[ ] Judge [ ] Associate Judge