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Indexed as: v. Greater Vancouver Housing and others, 2008 BCHRT 41

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

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

B E T W E E N:

COMPLAINANT

A N D:

Greater Vancouver Housing Corp., B.C. Housing Management Commission,
Greater Vancouver Regional District, and Her Majesty the Queen in Right of
the Province of British Columbia as represented by the Ministry of Forests and
the Ministry Responsible for Housing

RESPONDENTS

**REASONS FOR PRELIMINARY DECISION
APPLICATIONS TO DISMISS**

Tribunal Member:	Marlene Tyshynski
Counsel for the Complainant:	Jessie Hadley
Counsel for the Respondents Greater Vancouver Housing Corp. and Greater Vancouver Regional District:	Bruce Jordan
Counsel for B.C. Housing Management Commission:	Kevin Boonstra
Counsel for Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Forests and the Ministry Responsible for Housing:	Stephanie Jackson

Introduction

[1] [redacted] filed a complaint in which she alleged that the Respondents, Greater Vancouver Housing Corp. (“GVHC”), B.C. Housing Management Commission (“BC Housing”), Greater Vancouver Regional District (“GVRD”), and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Forests and the Ministry Responsible for Housing (the “Ministry”), and together (the “Respondents”), discriminated against her regarding a service customarily available to the public or with respect to tenancy, or both, contrary to ss. 8 and 10 of the *Human Rights Code*.

[2] The Respondents have provided corrected names which have been used in the style of proceeding and in this decision.

[3] [redacted] is a tenant in a public housing complex. She states that she has multiple disabilities, including hyper-reactive airway disease caused by second-hand smoke.

[4] In her complaint, [redacted] raises a systemic and an individual allegation of discrimination against the Respondents. She alleges that given the known harm to health of second-hand smoke, the failure of the Respondents to provide any smoke-free subsidized housing to disabled persons is discriminatory. As a disabled individual residing in subsidized housing, and, in particular, as a person diagnosed with a respiratory disease, [redacted] alleges that she suffered discrimination due to the Respondents’ failure to provide her with smoke-free housing.

[5] The complaint is filed pursuant to ss. 8 and 10 of the *Code*. Section 8 of the *Code* provides:

- (1) A person must not, without a bona fide and reasonable justification,
 - (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

- (2) A person does not contravene this section by discriminating
 - (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or
 - (b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

[6] Section 10 of the *Code* provides:

- (1) A person must not
 - (a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or
 - (b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,
because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.
- (2) Subsection (1) does not apply in the following circumstances:
 - (a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;
 - (b) as it relates to family status or age,
 - (i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or
 - (ii) a rental unit in a prescribed class of residential premises;
 - (c) as it relates to physical or mental disability, if
 - (i) the space is a rental unit in residential premises,
 - (ii) the rental unit and the residential premises of which the rental unit forms part,
 - (A) are designed to accommodate persons with disabilities, and
 - (B) conform to the prescribed standards, and
 - (iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.

[7] The Respondents deny that they have discriminated against _____ and each Respondent applies to have the complaint against it dismissed.

[8] Along with her response to the applications to dismiss, _____ filed an amendment to section E of her complaint, setting out further particulars respecting the alleged discrimination of each Respondent. The particulars will be set out in the body of this decision. The Respondents addressed the amended complaint in their replies.

[9] The bases for the applications to dismiss are as follows:

- The Ministry applies pursuant to ss. 27(1)(b) and (c) of the *Code*.
- BC Housing applies pursuant to ss. 27(1)(b)(c) and (d).
- GVRD applies pursuant to s. 27(1)(c).
- GVHC applies pursuant to ss. 27(1)(c) and (d).

[10] The relevant portions of s. 27 read 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;

[11] The parties filed extensive submissions and supporting documentation. While I do not refer to every submission made, I have read and considered them in reaching my decision.

Background

[12] GVHC is a non-profit organization which owns and operates approximately 3,500 rental units in 54 housing complexes in the Lower Mainland. It provides affordable

housing for about 10,000 people who have varying income levels and whose rent is based on family income.

[13] GVHC receives funding from BC Housing which provides funding for a variety of subsidized housing and other programs. BC Housing is a crown agency falling under the auspices of the Ministry. It operates under its own name pursuant to the *British Columbia Housing Management Commission Regulation*, B.C. Reg 368/2000 (“BC Housing Reg”).

[14] _____ resides at _____, one of the housing complexes owned and operated by the GVHC and funded by BC Housing. _____ is comprised of 86 units within a number of two-storey buildings arranged in clusters of generally six units.

[15] _____ entered into a month to month tenancy agreement with GVHC in June 1995. Her suite is on the second floor in the middle of a six-plex.

[16] _____ has multiple disabilities including chronic pain syndrome, chronic fatigue syndrome, fibromyalgia, osteoporosis, osteoarthritis, migraine, and mould allergies. As a result of her disabilities, she is unable to work and receives Persons with Disabilities Benefits.

[17] Another tenant of _____ entered into a month to month tenancy agreement with GVHC in October 15, 1996, for the suite directly below that of _____. This tenant suffers from multiple sclerosis and resides in a suite modified for a disabled person. She is a smoker.

[18] There are two other smokers in the six-plex where _____ resides.

[19] The tenancy agreements do not prohibit smoking.

[20] _____ states that she has been exposed to an increasing amount of tobacco and/or marijuana smoke from her neighbours since the spring of 2006.

[21] In the summer of 2006, _____ was diagnosed with hyper-reactive airway disease which is caused and exacerbated by second-hand smoke. Doctors have advised her that she is at high risk to develop full asthma, chronic obstructive lung disease, and lung cancer.

[22] informed GVHC of her condition in the summer of 2006 and requested assistance. She made a variety of suggestions respecting how her exposure to second-hand smoke could be addressed. There is a dispute in the material filed respecting whether s suggestions were viable solutions.

[23] GVHC made efforts to reduce and/or eliminate the smoke that was experiencing. There are disputes in the material filed respecting what the efforts constituted of, whether the efforts were effective, and if there was a break down in communication.

[24] GVHC is a wholly owned subsidiary of GVRD. contacted the GVRD to ask if GVHC had any smoke-free buildings. She was advised that there were no smoke-free buildings and no plans to create any. states that on at least two occasions a GVHC employee made dismissive comments in response to her requests.

[25] filed a complaint pursuant to the *Residential Tenancy Act*, S.B.C. 2002, c. 78. The arbitral decision required GVHC to take measures to reduce exposure to second-hand smoke. The parties disagree on whether the measures were fulfilled. has not found the arbitrated results of assistance.

[26] In September 2006, enquired whether BC Housing had any smoke-free buildings and was informed that they do not. She met with a BC Housing representative in January 2007, to seek assistance with finding a smoke-free residence. She was advised that she could have her name put on a wait list for a portable housing subsidy and that she could review BC Housing's list of properties to see if any might meet her needs. states that she was told that the subsidies are limited and that "she would not get one any faster just because she had the skills to write a letter to her MLA". This comment is denied by BC Housing. is on the wait list for a portable housing subsidy.

[27] On February 16, 2007, the GVHC board approved a motion to declare the building in which resides smoke-free and to provide incentives for the current smokers to move. Two of the smokers moved. The tenant, who lives below her and whose smoking finds the most problematic, did not move.

[28] GVHC provided [redacted] and another tenant with respiratory disease the option of moving to another smoke-free residence. There is a dispute in the material filed respecting why this option was not effective.

[29] [redacted] states that she sought assistance to find a smoke-free residence from the Minister Responsible for Housing but has not received a response.

Analysis

Applications to dismiss pursuant to s. 27(1)(b)

[30] The Ministry and BC Housing have applied to have the complaint dismissed pursuant to s. 27(1)(b) of the *Code*.

[31] The Ministry's submissions address both ss. 27(1)(b) and (c) together. The tests under each subsection are different and will be set out in this decision. I have considered the tests relevant to each subsection and have considered the Ministry's submissions and affidavit evidence from the perspective of the separate tests.

[32] Complaints may be dismissed under s. 27(1)(b) only if the acts or omissions alleged in the complaint would not contravene the *Code*. Determinations under this section are made on the basis of the allegations outlined on the face of the complaint, without reference to any alternative explanation or evidence which the respondents may put forward: *Bailey v. B.C. (Min. of Attorney General) (No. 2)*, 2006 BCHRT 168, at para. 12.

[33] On the face of her original complaint, [redacted] alleges that:

- The Ministry of Health confirmed her understanding that exposure to second-hand smoke was dangerous to her health and referred her letter seeking assistance to find smoke-free subsidized housing to the "Minister Responsible for Housing". To the date the complaint was filed [redacted] had not been provided with any information or assistance respecting obtaining smoke-free subsidized accommodation.

[34] In response to the complaint form question respecting why a complainant believes the alleged facts constitute discrimination, [redacted] stated that, given the known harm to health of second-hand smoke, the failure of the Respondents to provide any smoke-free subsidized housing to disabled persons is discriminatory, and that as a result

of this “position” or “policy” she, as a disabled person diagnosed with a respiratory disease, has suffered discrimination.

[35] describes her amended complaint as a “further articulation of her claims against the Respondents”. She alleges that the Ministry breached ss. 8 or 10 of the *Code* when it:

- failed to exercise its power and discharge its duty to ensure that public housing is provided in a way that complies with the *Code* and that this contributed to the discrimination she suffered;
- failed to ensure that at least some public housing is provided that can reasonably accommodate those with disabilities who require a smoke-free environment;
- failed to provide sufficient funding to public housing providers such as BC Housing and the GVHC to permit them to provide smoke-free housing to the public; and
- when the Ministry was notified that required smoke-free housing, it failed to take steps to ensure her disability was accommodated to the point of undue hardship.

[36] On the face of her original complaint allegations against BC Housing are that:

- It does not provide any smoke-free housing; and
- Its employee advised her that her housing subsidy was attached to the building in which she currently resided and could not be transferred elsewhere, and while could be put on a portable subsidy, these subsidies were very limited and writing to her MLA would not assist in obtaining one faster.

[37] In her amended complaint, alleges that BC Housing breached ss. 8 or 10 of the *Code* when it:

- failed to exercise its powers under the BC Housing Reg. to ensure compliance with the *Code*;
- failed to ensure that at least some form of public housing or public housing subsidy is provided that can reasonably accommodate the complainant and those with disabilities who require a smoke-free environment; and
- when BC Housing was notified that required smoke-free housing, it failed to take reasonable steps to accommodate her disability to the point of undue hardship.

Does the Code apply to the Ministry and BC Housing in the circumstances of this complaint?

[38] Relying on *Tenant A v. Landlord and Manager (No. 2)*, 2007 BCHRT 321, the Ministry and BC Housing submit that s. 8 of the *Code* prohibits discrimination with respect to accommodations, services and facilities customarily available to the public. They submit that s. 8 does not apply to a tenancy relationship, the context of the complaint. Therefore, the allegations of discrimination against them pursuant to s. 8 must be dismissed.

[39] Further, they submit [redacted] is not in a tenancy relationship with either the Ministry or BC Housing; therefore s. 10 of the *Code* is also not applicable and any allegations of discrimination against them pursuant to s. 10 must also be dismissed.

[40] In *Tenant A*, the respondents were the landlord and the manager of the building in which the complainant resided. The landlord was a government agency that owned the building and provided subsidized housing “to persons facing barriers to full participation in society”. The complainant alleged that the respondents had failed to address her complaints of being subjected to harassment by a fellow tenant on grounds of race, colour, ancestry, place of origin, and mental disability.

[41] At the outset, the Tribunal addressed whether the facts alleged by the complainant were sufficient to ground a potential complaint under s. 8 of the *Code*. The Tribunal said:

A review of the two provisions [ss. 8 and 10] indicates that the Legislature has turned its mind to each of the two areas of discrimination, and has drawn distinctions between them. The prohibited grounds of discrimination are not identical. In particular, discrimination on the basis of age and lawful source of income is prohibited in respect of tenancy, but not services. I note in this connection that, effective January 1, 2008, age will be added as a ground of prohibited discrimination under s. 8: *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*, SBC 2007, Chapter 21 – Bill 31, s. 3. Further, the two sections have different statutory defences and exemptions, each tailored to the area of proscribed discrimination.

In my view, it would be contrary to the intention of the Legislature, as expressed in ss. 8 and 10, to superimpose s. 8 as an additional prohibition on discrimination in relation to tenancy: see *Dow v. Summit Logistics and RWU Local 580*, 2006 BCHRT 158, where analogous reasoning was employed in respect of a union’s obligations under ss. 8 and 14 of the *Code*. Where a landlord or other person is alleged to discriminate against a person in relation to tenancy, that complaint is properly brought pursuant to s. 10, and not s. 8.

Discrimination proscribed under s. 10 will include discrimination in respect of services rendered by a landlord as an incident of the landlord – tenant relationship. For example, it is common for landlords to provide services to tenants such as maintenance, security or garbage removal. The provision of such services is a term or condition of the tenancy, and any discrimination in respect of them would be caught by s. 10(1)(b).

That is not to say that a landlord could not also discriminate in respect of a service contrary to s. 8, in circumstances where the landlord provides services other than as a term or condition of tenancy. For example, a landlord might provide services to persons other than its tenants. In those cases, s. 8 would apply.

In the present case, Tenant A is a tenant of the Landlord, and any services provided to her by the Landlord or the Manager were provided to her as an incident of the landlord – tenant relationship. Therefore, Tenant A’s complaint falls within s. 10 of the *Code*, not s. 8. I therefore dismiss the part of her complaint under s. 8, as it fails to allege acts or omissions which could contravene that section of the *Code*. (paras. 10 – 15)

[42] The reasoning the Ministry and BC Housing urge me to adopt would result in the creation of a *Code* exemption, for the Ministry and its agents, respecting the provision of subsidized housing, in circumstances where a landlord-tenant relationship did not exist.

[43] However, exceptions from the application of the *Code* need be express. In *British Columbia v. Bolster*, 2007 BCCA, Madame Justice Levine comments on the interpretive principles applicable to the *Code*. She states:

Human rights legislation is recognized as having a special character. It is to be interpreted so as to give it full force and effect, and is not to be limited except by express legislative language. The Supreme Court of Canada expressed those principles in *Re Winnipeg School Division No. 1 and Craton et al.*, [1985] 2 S.C.R. 150 at 156:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. (para. 78)

[44] I note that s. 10 applies to the conduct of a “person” toward a “person”. The correct interpretative approach to human rights legislation is one that is large and liberal

and advances the broad policy considerations underlying it: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 526 at para. 12; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 89.

[45] Section 10 does not restrict its application to that of landlord and tenant. However, the Tribunal has employed a contextual assessment of the word “person” under s. 10 and has required evidence of a landlord-tenant-like relationship; see *Tenant A*, *supra*, at para. 27; *Ettya v. Au and Lim*, 2006 BCHRT 453; *Davis v. Hrycan*, 2003 BCHRT 40. The Tribunal has been reluctant to adopt an overbroad interpretation of the word “person” under s. 10: *Davis*, at para. 12.

[46] The plain meaning of ss. 10(1) and (2), that a person must not deny a person the right to occupy a tenancy or discriminate regarding a term or condition of the tenancy on a protected ground, in my view, implies sufficient control or authority to ensure that there is no discrimination within the context of a tenancy-like relationship.

[47] [redacted] has not described her relationship with the Ministry or BC Housing as one that is a landlord-tenant-like relationship falling within the scope of s. 10.

[48] Therefore, I dismiss [redacted] s. 10 complaint against the Ministry and BC Housing pursuant to s. 27(1)(b), as the facts alleged, even if proven, could not be discrimination against these respondents under this provision.

[49] With respect to whether s. 8 applies to the circumstances of this case, I do not agree that the decision in *Tenant A* is applicable. I understand that, in *Tenant A* the Tribunal was considering circumstances where the respondents were in a landlord-tenant relationship with the complainant and concluded that s. 10 was applicable. In *Tenant A* the Tribunal held that it would be contrary to the intention of the Legislature, as expressed in ss. 8 and 10, to superimpose s. 8 as an additional prohibition on discrimination in relation to tenancy. *Tenant A* did not address the issue raised in this complaint of whether the conduct of non-landlord respondents could be discrimination with respect to services in the provision of subsidized housing to disabled persons.

[50] [redacted] submits that her allegations against the Ministry and BC Housing are of discrimination against persons with disabilities, in the course of their performance

of their roles as funder, overseer and administrator of public housing in BC. Her complaints against these respondents are not about the day-to-day operation and issues related to tenancy but about the provision of housing pursuant to the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307, by the Ministry and its agents and are appropriately characterised as the provision of a service.

[51] The Ministry and BC Housing dispute that they have the duties or the control alleged.

[52] In my view, a final determination of whether they do requires a factual foundation best achieved at a hearing.

[53] In light of the applicable interpretive principles for human rights legislation, and based on the facts alleged by , I find that her allegations against the Ministry and BC Housing could amount to discrimination under s. 8 of the *Code*.

[54] The applications of the Ministry and BC Housing to dismiss the complaint pursuant to s. 27(1)(b) are dismissed.

Application to dismiss pursuant to s. 27(1)(c)

[55] All four Respondents have applied to have the complaint dismissed against them pursuant to s. 27(1)(c).

[56] Under s. 27(1)(c) of the *Code*, the Tribunal is provided with discretion to dismiss a complaint if it considers that the complaint has no reasonable prospect of success. The principles which the Tribunal employs in considering applications to dismiss under s. 27(1)(c) are well-established and were articulated in *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134:

The role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the bona fides of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would

have to meet. Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the information available to it. (paras. 11 – 12)

[57] First, in response to a number of the submissions made I wish to clarify that a complainant is not required to make out a *prima facie* case of discrimination at this stage in the Tribunal process. The ability to establish a *prima facie* case of discrimination is not a prerequisite to proceeding to a hearing. Section 27 allows the Tribunal to dismiss complaints over which it does not have jurisdiction, and provides the Tribunal with discretion to dismiss complaints on the grounds set out in the various subsections. Generally, the onus is borne by the party making the application, the respondent. In determining a s. 27(1)(c) application, the Tribunal conducts a global assessment of all the material before it. The applicable test is that set out in the *Code*, whether there is no reasonable prospect that the complaint will succeed.

The Ministry

[58] The Ministry explains that the Minister of Forests also acts as the Minister of Housing, doing so through the Ministry of Forests and Range. BC Housing is a crown agency, under the auspices of the Ministry. BC Housing is empowered to conduct business under its own name. The Ministry provides funding to BC Housing on a global basis for all of its operations.

[59] The Ministry states that it does not set policies regarding the management of individual housing projects. Its role is limited to the provision of funding to BC Housing which, in turn, develops, manages, and/or administers subsidized housing options in the Province.

[60] The Ministry argues that there are no acts or omissions alleged against the Ministry that could establish liability under the *Code* given its limited role of fund provider, and due to its limited role, it is not in a position to provide an accommodation to

It relies on *Maycock v. Canadian Tire Corporation Limited and another*, 2004 BCHRT 33, where the Tribunal held, that since Canadian Tire did not exercise direction or control over the franchisee and its employees, it could not be held liable for their conduct.

[61] The Ministry also relies on *Volkow v. Summit Logistics Inc.*, 2004 BCHRT 43, where the complainant alleged that his employer and union breached the *Code* by making payments into a pension fund that was allegedly administered in a discriminatory way by its Trustee. The Tribunal found neither the employer or the union liable on the basis that the Trustee was not accountable to them and they did not direct the conduct of the Trustee.

[62] [redacted] distinguishes *Maycock* and *Volkow*. She submits that the Ministry has power to exercise control over BC Housing and has a duty to ensure that the services provided under its mandate are provided in a non-discriminatory manner. [redacted] submits that her circumstances are similar to those in *Moore v. Ministry of Education*, 2005 BCHRT 580 (under judicial review before BCSC) where the Tribunal held that a government Ministry is liable for discrimination that occurs in the provision of services that are within its mandate and that it has the ability to control.

[63] In reply to [redacted] amended complaint and response, the Ministry argues that [redacted] seeks to establish that the Ministry has a pro-active duty to prevent discrimination which does not exist. The Ministry also addresses how [redacted] complaint may very well pit one disabled group, those with respiratory disease against others, those addicted to smoking.

[64] On the material filed, I am not able to determine the scope of the Ministry's role respecting the provision of subsidized housing, nor am I am able to determine whether the Ministry is in a position of oversight respecting compliance with the *Code* in relation to subsidized housing.

[65] I am not able to conclude there is no reasonable prospect that [redacted]'s individual or systemic complaint would not succeed against the Ministry.

The GVRD

[66] The GVRD applied to have the complaint against it dismissed on the one ground that there is no reasonable prospect that the complaint will succeed against it pursuant to s. 27(1)(c). It submits that the GVHC and it are separate corporate entities and the GVHC has sole responsibility for [redacted]'s tenancy.

[67] The Ministry's affidavit stated that the GVHC is a wholly owned subsidiary of the GVRD.

[68] [redacted]'s amended complaint and response made the following allegations:

- The GVRD has power to provide public housing, create policy and enter into agreements relating to the provision of affordable housing in the GVRD area pursuant to the *Local Government Act*, R.S.B.C. 1996, c. 323.
- The GVRD provides significant amounts of public housing through its wholly owned subsidiary, the GVHC and does so pursuant to agreements or other arrangements that give it control over GVHC's operations.
- The board of the GVRD comprise most of the GVHC board. The GVRD is aware of GVHC's operation and has power to oversee and direct its actions.
- The GVRD failed to exercise its powers to ensure that GVHC's actions in relation to [redacted]'s tenancy complied with the *Code*.
- The GVRD had notice of [redacted]'s requirement for smoke-free housing and failed to take steps to accommodate it to the point of undue hardship.

[69] Documentary corroboration of [redacted]'s allegation that board members of the GVHC also sit on the board of the GVRD was provided.

[70] [redacted] alleges that the GVRD discriminated against her pursuant to s. 10 of the *Code* by failing to ensure GVHC accommodated her at [redacted] and pursuant to s. 8 by failing to exercise its powers to ensure that public housing and housing assistance programs under its administration would accommodate the complainant and others with disabilities who require a smoke-free environment.

[71] The GVRD submits that [redacted]'s suggestion that the *Local Government Act*, R.S.B.C. 1996, c. 323, creates a duty for the GVRD to act pro-actively is incorrect. The GVRD adopts the s. 27(1)(c) submissions of BC Housing and the Ministry. It submits that [redacted] has adduced no evidence that the board of GVRD directs decisions taken by the GVHC.

[72] I am faced with inconsistent and insufficient material on which to conclude in accordance with the Tribunal's test in *Wickham* that the application to dismiss should succeed. In my view, a determination of the issues raised requires the benefit of evidence

adduced at a hearing. I am not persuaded that the complaint has no reasonable prospect of success against GVRD pursuant to either s. 8 or s. 10 of the *Code*.

BC Housing

[73] I have reviewed the extensive submissions filed by BC Housing. Ultimately, I am faced with conflicting affidavits concerning exchanges between [redacted] and a BC Housing employee. Despite submissions respecting the very high demand for subsidized housing, and the vulnerable nature of the people who are served, I do not have adequate material before me regarding BC Housing's efforts to accommodate [redacted] to conclude that, based on these efforts, there is no reasonable prospect of success. I also do not have adequate information in response to the complaint of systemic discrimination to determine that there is no reasonable prospect of success in establishing this allegation. In my view, the nature of the issues raised requires a full airing at a hearing, with the opportunity for cross-examination. I am not persuaded there is no reasonable prospect of success of the complaint against BC Housing.

GVHC

[74] In her amended complaint [redacted] states that her allegations against GVHC are that it discriminated against her in relation to the terms and conditions of her tenancy contrary to s. 10 of the *Code*. She alleges that GVHC does not have a system in place that ensures that tenants like [redacted] who require a smoke-free accommodation can get it. She alleges that she is the victim of adverse discrimination. [redacted] acknowledges efforts made by GVHC to accommodate her disability but alleges that these efforts have fallen short of accommodation to the point of undue hardship.

[75] In this case too, the submissions made and the affidavits filed are conflicting. There is no doubt that the GVHC made efforts to accommodate [redacted] requirement for a smoke-free residence. It may be that, at a hearing, GVHC will be able to establish that it accommodated [redacted] to the point of undue hardship, and/or that she failed to co-operate sufficiently and, as a result, a satisfactory accommodation was not achieved. On the affidavit material filed I am not persuaded that [redacted] complaint has no reasonable prospect of success against GVHC.

Application to dismiss pursuant to s. 27(1)(d)(ii)

[76] GVHC and BC Housing have applied to dismiss the complaint on the basis that proceeding with it would not further the purposes of the *Code*.

[77] With an eye to fulfilling the goals the *Code* seeks to achieve the Tribunal has identified a range of circumstances where, on a case by case basis, it has determined that it is appropriate to dismiss a complaint. In *Williamson v. Mount Seymour Housing Co-operative*, 2005 BCHRT 334, the Tribunal said:

Generally, the Tribunal's ability to ensure that any of purposes of the Code will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings. More specifically, where a complaint of discrimination has already been appropriately resolved, through whatever means, there is no need to proceed with the complaint in order to prevent discrimination or provide a means of redress – the discrimination has already been remedied. Further, the promotion of a climate of understanding and mutual respect where all are equal in dignity and rights may be enhanced by parties resolving claims of discrimination through consensual as opposed to adjudicated processes. (para. 13)

[78] BC Housing submits that the complaint should be dismissed as not furthering the purposes of the *Code*, given that it has no responsibility or control over and could do nothing to rectify the discrimination, if proven. In the alternative, it argues that a Tribunal order that BC Housing provide a non-smoking building would jeopardize the health and welfare of other disabled persons and so be contrary to the goals the *Code* seeks to achieve.

[79] The GVHC relies on *Williamson*, and submits that the complaint should be dismissed as it has responded appropriately, searching and providing an appropriate accommodation to

[80] Whether was accommodated by BC Housing or the GVHC, and whether the non-existence of smoke-free subsidized housing amounts to systemic discrimination of persons with disabilities are in dispute. In my view, the complaint raises issues that are important, and are worthy of full and careful consideration by the Tribunal. The answers are not obvious. In my view, a hearing with the opportunity to

consider expert evidence on the issues that are science-based, tested evidence from witnesses with first-hand knowledge about the provision of subsidized housing, and relevant legal argument related to the established facts will assist in providing a well-reasoned decision respecting the individual and the systemic allegations of discrimination raised.

Conclusion

[81] The applications of the Ministry and BC Housing that the complaints against them under s. 10 of the *Code* be dismissed pursuant to s. 27(1)(b) are granted.

[82] The application of the Ministry to dismiss the complaint against it under s. 8 of the *Code* pursuant to ss. 27(1)(b) and (c) is denied.

[83] The application of BC Housing to dismiss the complaint against it under s. 8 of the *Code* pursuant to ss. 27(1)(b), (c) and (d)(ii) is denied.

[84] The application of GVRD to dismiss the complaint against it pursuant to s. 27(1)(c) of the *Code*, is denied.

[85] The application of GVHC to dismiss the complaint against it under s. 10 of the *Code* pursuant to ss. 27(1)(c) and (d)(ii) is denied.

Marlene Tyshynski, Tribunal Member