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Indexed as: Riddle v. Town of Gibsons, 2017 BCHRT 148

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:

Dorothy Riddle

COMPLAINANT

AND:

Town of Gibsons

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT: Section 27(1)(c)
APPLICATION TO FILE FURTHER SUBMISSIONS: Rule 28(5)

Tribunal Member:

Emily Ohler

Counsel for the Complainant:

Praveen Sandhu

Counsel for the Respondent:

Carolyn MacEachern

I INTRODUCTION

[1] Dorothy Riddle filed a complaint against the Town of Gibsons [Gibsons] alleging discrimination in accommodation, service or facility on the basis of physical disability contrary to s. 8 of the BC *Human Rights Code* [Code]. She alleges that Gibsons discriminated against her based on her disability by approving a development project that will negatively affect her access to a portion of the town's waterfront that she currently accesses by car to enjoy proximity to the ocean and the view.

[2] Gibsons denies discriminating, and applies to dismiss Ms. Riddle's complaint under s. 27(1)(c) of the *Code*, which provides:

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

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

[3] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

[4] Before I set out the background to the complaint and address the merits of the application, I must resolve two procedural matters related to submissions on the application.

II PROCEDURAL MATTERS

[5] Following Gibsons' reply in this application to dismiss, Ms. Riddle filed an application to make further submissions. In her application, Ms. Riddle objects to "the entirety" of reply materials submitted by Gibsons, and in the alternative seeks to file further submissions. As per Rule 28(5), the further submissions are attached to the application. Gibsons opposes Ms. Riddle's objection and application.

A. The objection

[6] Ms. Riddle refers to the Supreme Court's Civil Rules as a guide in arguing that Gibsons has inappropriately used its reply to repeat, amend or clarify its position. She says that the process has been rendered unfair given that Gibsons' "reply submissions are being used to repeat statements made, amend the position taken and clarify previous submissions and to provide additional evidence to bolster the submissions and evidence submitted in the original dismissal application materials."

[7] Ms. Riddle contends that in order to ensure that the process isn't unfair, she has two options: to "object successfully to the reply materials" or to "be successful in an application to make further submissions including the submission of the second affidavit."

[8] Gibsons argues that there is no basis for Ms. Riddle's objection to its reply submissions. It notes that Rule 28(5) provides that parties can make an application to consider further submissions to address a new issue raised in reply submissions. It notes further the inapplicability of the Supreme Court's civil rules on which Ms. Riddle relies in advancing her objection. Gibsons submits that, in any event, its reply submissions "were proper in the context of the application to dismiss process and the information (or lack thereof) provided by the complainant and her complaint and initial document disclosure." In that regard, Gibsons notes that Ms. Riddle disclosed details regarding her mobility limitations for the first time in mid-January 2017, notwithstanding the two doctor's letters were dated October 25 and November 30, 2016, and Gibsons' deadline for an application to dismiss was December 6, 2016. Ms. Riddle says the timeline was appropriate given both the dates she received the letters and the holiday period.

[9] The Supreme Court Rules do not apply to the Tribunal, and the Tribunal has wide discretion in respect of its Rules. There is precedent for the Tribunal declining to consider materials submitted in reply that should have been provided in an initial application: *Mason v. University of British Columbia and others*, 2008 BCHRT 159, para. 3; *Prasad v. Sunwood Drugs and others*, 2011 BCHRT 165, para. 32.

[10] Here, however, I see nothing improper in the reply materials submitted by Gibsons. In particular, I reject Ms. Riddle's assertion that the evidence provided by Gibsons by way of reply on the issue of distance to the waterfront constitutes case splitting. Gibsons provided evidence of its distance estimate in its original materials by virtue of an e-mail to Ms. Riddle attached to one of the affidavits submitted. Ms. Riddle provided her own, differing estimate of that distance in her response submissions, and it was appropriate for Gibsons to address that issue in its reply.

[11] I also reject Ms. Riddle's argument that

Had [Gibsons] made all of its submissions and set out all of its evidence in its original dismissal application materials, [she] would have had a fair opportunity to respond as of right and made even stronger submissions showing that, having received communication from [Gibsons] on the duty to accommodate and knowing her disability, [Gibsons] had an obligation to respond to [her] and engage in a discussion.

[12] That the question of whether Gibsons had accommodated Ms. Riddle is an issue in this case should not have been a surprise arising in the context of Gibsons' reply materials. Ms. Riddle had an opportunity to bring forward her best arguments in respect of the issues at hand in this case in her response, and any decision made in respect of not making "stronger submissions" on a particular point do not in my view impugn the appropriateness of Gibsons' reply.

[13] Gibsons' reply materials appropriately speak specifically to points raised by Ms. Riddle in her response, and raise nothing outside the scope of the issues, arguments and evidence raised in the materials filed before it.

[14] In any event, Rule 28(5) speaks specifically to a new issue raised in reply by providing an avenue to make further submissions on it. Ms. Riddle has availed herself of that avenue. I deny Ms. Riddle's objection and have considered Gibsons' reply materials in the context of this application to dismiss.

B. Application for further submissions

[15] Ms. Riddle applies to make further submissions and submit further evidence in order to address what she says are new issues raised by Gibsons' reply. In that regard, attached to the proposed further submissions is a second affidavit of Ms. Riddle.

[16] The Tribunal will not consider submissions other than those permitted in a schedule for submissions, unless it allows an application to file further submissions: Rule 28(4). Rules 28(5) and (6) address applications for further submissions. It is within my discretion to permit or consider additional submissions, but an application to file further submissions is an unusual procedure and should be limited solely to replying to new information or submissions contained in the reply: *Kruger v. Xerox Canada Ltd. (No. 2)*, 2005 BCHRT 24, at para. 22.

[17] An overriding consideration is whether fairness requires an opportunity for further submissions: *Gichuru v. The Law Society of British Columbia (No. 2)*, 2006 BCHRT 201, at para. 201; *Simpkin v. Stl'at'imx Tribal Police Board*, 2014 BCHRT 255, at para. 21. Additional submissions are not the norm, and caution must be exercised in granting applications for further submissions so as not to result in endless submission processes: *Murphy v. VIHA and others (No. 2)*, 2014 BCHRT 102, at para. 9.

[18] In this case, the further submissions proposed by Ms. Riddle provide clarification on various points raised in Gibsons' reply materials that I find helpful to the just and timely dispensation of this application, and I see no prejudice in allowing them.

[19] In allowing Ms. Riddle's further submissions, however, I must note the following. Ms. Riddle filed her objection to Gibsons' reply materials and application to make further submissions on February 7, 2017. As noted, the further submissions included a second affidavit of Ms. Riddle. The affidavit was unsworn as Ms. Riddle was out of the country at the time and unable to provide a sworn version. On February 16, Ms. Riddle submitted a sworn copy of her second affidavit. I pause here to note that the sworn version of this affidavit was sent to the Tribunal with a cover letter indicating, simply, that the sworn version was being provided "for the sake of completeness". What the cover letter in no way indicates is that in fact the sworn

version differs substantively from the unsworn version. This is concerning. If it were the case that Ms. Riddle's counsel could not obtain the information necessary from Ms. Riddle to ensure her affidavit was complete and accurate on February 7, 2017, I would have expected her to alert the Tribunal to this fact and seek an extension of time but she did not do so. Alternatively, if it were the case that Ms. Riddle's counsel realized there were key omissions made to the unsworn version, I would similarly have expected her to at least alert the Tribunal to the fact that the sworn version reflected changes in that regard, or more properly apply to file what was by that time a late additional submission. Instead, neither of these occurred, and the different version was simply submitted to the Tribunal as though it were one and the same as the unsworn version originally filed.

[20] I sought submissions on Ms. Riddle's application. In its response, Gibsons flagged this discrepancy, noted the new version of the second affidavit was out of time, and asked that I consider only the unsworn version of Ms. Riddle's second affidavit. In reply, Ms. Riddle's counsel resubmitted the sworn version of Ms. Riddle's second affidavit purportedly as affidavit number three in an effort to remedy the fact that the sworn version, which differed from the unsworn version, was late filed insofar as it constituted new evidence. In submissions, counsel says:

The Complainant quite appropriately chose to make necessary revisions before affirming and did so on a rush basis on the advice of counsel.

In any event, based on the Tribunal's current timeframe for providing submissions and affidavit material, attached is affidavit #3 of the complainant... in essentially the same form as the previous affidavit #2.

The Tribunal may choose to accept affidavit #2 as part of the submissions and overlook some of the grammatical errors which were not corrected due to time limitations in the rush to provide affirmed affidavit immediately upon the complainant's return to the country. Alternatively, affidavit #3 is being submitted under the current May 19, 2017 time deadline.

This is not a proper way to rectify the manner in which the different version of the affidavit was initially submitted. Not only that but, surprisingly, affidavit #3 is yet again different. Again, the submissions do not refer to the changes made to the substance of the affidavit.

[21] I would like to stress to counsel for Ms. Riddle the importance of taking care in such matters to ensure transparency and accuracy in the materials put before the Tribunal and provided to the other party. While I have not interpreted these events as attempts to mislead the Tribunal, the response to Gibsons' raising the first round of discrepancies does not appear to appreciate the seriousness of this matter. To then make further changes with a similar lack of forthrightness is concerning. Further, what I have before me is essentially three versions of the affidavit which has added to the time required to consider Ms. Riddle's application and the application to dismiss as a whole.

[22] In any event, Gibsons had a copy of the sworn affidavit and was clearly aware of its contents such that it had opportunity to address it in its materials. I see no prejudice to Gibsons in my considering the sworn version of the affidavit, and I have proceeded on that basis. I have disregarded the unsworn version of Ms. Riddle's second affidavit as originally submitted as well as affidavit #3, and have considered the first version of the sworn affidavit #2 only.

[23] In summary, I reject Ms. Riddle's objection, and have considered Gibsons' reply materials. I accept Ms. Riddle's application to file further submissions, and have considered them together with the first sworn version of her second affidavit.

III BACKGROUND

[24] Ms. Riddle is a resident of Gibsons. She has a physical disability that limits her mobility. Ms. Riddle says she can walk only about 12 metres before being affected by severe pain. She says that she is able to walk a maximum distance of 20 metres before having to sit and rest because of the progression of the pain, though with the assistance of a cane she can increase that distance to 30 metres. Ms. Riddle characterizes this trigger point as being when she is "totally immobilized by the pain".

[25] Gibsons is an oceanside town, managed by an elected Town Council. Gibsons has an Official Community Plan Bylaw [OCP] that sets out long-term objectives and policies to guide the Town Council's planning and management decisions. Gibsons also has a Harbour Area Plan [Plan] under the OCP umbrella. The Plan has five goals, one of which is to make the waterfront "fully accessible, physically and visually, retaining the sense of proximity to nature."

[26] Ms. Riddle says she regularly drives to the waterfront via a road that crosses another road and extends to the shore [Road]. She drives to the end of the Road, parks her car, and enjoys "peaceful contemplation of the natural beauty of Gibsons Harbour and the panoramic views...". She says that when she feels able to walk or stand, she exits her car and walks no more than 3 metres to stand immediately beside the water while remaining near her vehicle. She finds these moments "soul-renewing and a critical element" of her well-being. Ms. Riddle says that being able to get so near the waterfront by car in this way allows her to "feel on equal footing with other members of the community who can approach by walking."

[27] In 2013, a developer applied to the Gibsons Town Council for rezoning and development permits for a development that would include a hotel, conference centre and condominiums [Development]. The Development was proposed for parcels of land lying on both sides of the portion of the Road running from the crossroad to the ocean thus encompassing it, and was initially proposed as a large, single building. A component of the Development application accordingly sought to close the Road at the edge of the Development so it would no longer extend to the shore.

[28] The developer's application was large and required extensive review by Gibsons' staff, so it was separated into three major components:

- a. Issues of a statutory nature;
- b. Issues to be negotiated directly with the developer;
- c. Issues of a political nature requiring Town Council direction.

[29] Gibsons says it considered accessibility in respect of all of the above issues. For example, for the statutory issues it ensured compliance with the Building Code, Transportation Association of Canada standards and the Fire Code.

[30] Gibsons says that, initially, the application was not fully compliant with the OCP or zoning bylaws, and it suggested some modifications. Among other things, a July 2013 report from Gibsons' Director of Planning raised concerns over the potential negative effect on waterfront accessibility.

[31] The developer subsequently revised the plans such that the Development now consists of two buildings in place of one, with a pedestrian access area to the harbour running down the middle [Revision]. Essentially, the Road would still be closed to vehicle traffic, but would be replaced by an accessible pedestrian plaza leading to a smooth, accessibly graded, pedestrian seawall. Gibsons believed the Revision would improve existing public access to the waterfront, particularly access for people with mobility challenges. It specifically considered that the construction of "a level and accessible public pedestrian walkway and plaza", and the construction of an accessible waterfront walkway along the Harbour in front of the Development, would improve public access. It notes that, as part of this, the developer will close a gap in the otherwise walkable seawall, thereby allowing people to remain along the waterfront.

[32] On November 15, 2013, Gibsons' Advisory Planning Commission reviewed the Revision, and made recommendations, including that agreements be put in place with the developer to ensure that all proposed public spaces be "fully open and accessible".

[33] Gibsons also determined that the Development fit well with the Plan both in terms of accessibility and in terms of its encouraging tourism, higher density housing, improved marine facilities, and an extension to the seawalk.

[34] On October 1, 2015, Ms. Riddle emailed the Town raising her concerns about the closure of the Road and its impact on the accessibility of the waterfront to people with mobility challenges. She noted that the plans as then available to the public showed that one would

have to walk some distance from the parkade to the elevator, and from the elevator to the water, where even then it was unclear whether there would be seating. She also made a verbal presentation to Gibsons' Council at a public hearing held that same day.

[35] Gibsons received over 500 written submissions in respect of the October public hearing, and 90 people made verbal submissions.

[36] On October 6, 2015, Gibsons' Council approved amendments to the OCP and zoning bylaws, and authorized the Town to enter into a development agreement with the developer. The approved amendments included allowing tourist accommodation, apartment use, restaurant, conference facilities, retail, Marina, and marine fuel storage at the development site; it altered the allowable building height for the site; and it allowed for acquisition of land for the purpose of securing public access along the waterfront via means other than public ownership. It also zoned the proposed waterfront walkway as parks, recreation and open space for park use.

[37] Gibsons and the developer finalized a Development Agreement in October 2015. In it, Gibsons "exchanged" the Road for a public plaza leading to the waterfront, acquired a perpetual statutory right of way for a public pedestrian path along the waterfront at no cost, as well as additional public parking in the Development, including four accessible spots and pedestrian and wheelchair access to the waterfront walkway.

[38] On May 15, 2016, Ms. Riddle again emailed Gibsons reiterating her concerns about the Development and in particular closure of the Road. In this email, Ms. Riddle specifically references the Town's duty to accommodate residents with invisible mobility issues like her to ensure access to the waterfront. Ms. Riddle alleges that at no time did the Town follow up with her on her request for accommodation.

[39] On May 17, 2016, Gibsons approved the issuance of a development permit for the Development.

[40] Importantly to Ms. Riddle, the Revision still renders it impossible to approach the waterfront at this location by car, as it still closes the Road. Ms. Riddle says that given the limited distance she can walk, the Road's replacement with a pedestrian walkway has the same outcome as before the Revision – that she will no longer be able to view the water from the same proximity at that access point via vehicle access.

[41] This is the crux of her complaint before the Tribunal. Ms. Riddle says that the Revision does not mitigate the adverse impact to her and others with similar mobility issues that results from closing the Road. She asserts that closing the Road and leaving only access via the parkade elevator or pedestrian plaza would require her to walk 59.1 metres to physically access the waterfront, which is beyond her capability due to her mobility constraints. I note that this distance differs from that which Gibsons appears to have communicated to her in their email correspondence, and differs from the distance set out in Gibsons' submissions, addressed below.

[42] In her complaint, Ms. Riddle says that the closure of the Road would not result in providing "public access to the same body of water that is of at least equal benefit to the public" as required by the Community Charter. It would, she says, make it impossible for her to enjoy the current access that she has to the waterfront, whereby she is currently able to drive down to the end of the Road.

[43] Gibsons says that the current conditions at the Road pose hazards for people with mobility limitations "and do not provide good or safe access to the Harbour, pedestrian or seating areas, or water views." It argues that if the Development proceeds as currently proposed, Ms. Riddle "and others with physical disabilities will have *better* access to the Harbour and views of the Waterfront". Gibsons says in fact that Ms. Riddle will benefit from substantial improvements including:

- Sheltered parking;
- Firm stable surfaces;

- connections to pedestrian walkways without obstacles or tripping hazards;
- elevators to assist with the elevation drop from [the current Road access] to the waterfront;
- a safe and accessible waterfront pathway;
- seating that is a reasonable distance from parking areas;
- accessible washrooms; and
- improved ability to view the water.

[44] In addition, beyond what Gibsons says will be the improved accessibility at the Development site, Gibsons points out that Ms. Riddle will continue to have access to the waterfront and harbour at five other locations that provide equal or better access for people with mobility constraints than what is currently available via the Road. Ms. Riddle contests that this is the case. She says that none of the alternate access points currently being suggested by the Town of Gibsons allow for driving right up to the waterfront. In addition, they each involve one or more of the following barriers: excessive distance to be walked, walking across uneven ground, walking up or down a slope, and they offer only a partial rather than the panoramic view from the waterfront at Gibsons Harbour.

[45] It seems that, as of the time of this application, the Road is not yet closed.

[46] Ms. Riddle says that while she raised the issue of accommodation for persons with “hidden” mobility disabilities (meaning people with mobility disabilities who do not use a visible aid), Gibsons never engaged with her to discuss how best to accommodate her. She asserts that she has been requesting “for over three years that vehicular access to the Gibsons Harbour waterfront be maintained so that I and others like myself can enjoy the panoramic views at Gibsons Harbour in close proximity to nature.”

[47] Ms. Riddle seeks to require a change in the Development design to retain car access to the waterfront via the Road. She says that to her knowledge, Gibsons “has never in that three

year period asked the developer to present plans that would retain [the] Road as a road that provides vehicle access to the waterfront.”

[48] Ms. Riddle asked a former city planner to prepare two options for retaining vehicle access at the Road within the Development. She says that requiring the developer to maintain vehicle access via the Road would be of no monetary cost to the Town, but would simply require it to issue a stop work or suspension of work order while the plans are revised. She asserts that the developer would incur the costs associated with finalizing the alternate design, noting it is uncertain what additional expense would result to the developer in that respect.

[49] Gibsons argues that the Development – including closure of the Road – will improve accessibility to the waterfront in the area for Ms. Riddle and all members of the public including those with mobility challenges. Further, Gibsons notes that there are access points other than that found via the Road or eventually via the Development that Ms. Riddle could use to visit the waterfront. In essence, Gibsons argues that there is no adverse impact on Ms. Riddle as a result of the Development and closure of the Road.

[50] Alternatively, Gibsons argues that it has met its duty to accommodate Ms. Riddle by way of the improved waterfront access.

IV ANALYSIS AND DECISION

[51] Under s. 27(1)(c) the Tribunal determines whether, based on the material provided by the parties, and applying its expertise, it is persuaded that there is no reasonable prospect the complaint will succeed: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] SCCA No. 171; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49; and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, leave to appeal ref'd [2010] SCCA, No. 217. The propositions that can be taken from these cases in respect of preliminary applications to dismiss under s. 27(1) of the *Code* are:

- 1) The Tribunal's role in evaluating complaints under s. 27(1) of the *Code* is as a gatekeeper so that only complaints with sufficient merit will

justify the time and expense of proceeding to a full hearing: *Berezoutskaia* at paras. 23-26; *Hill* at para. 27.

2) The Tribunal's role in determining s. 27(1) applications is discretionary. The Tribunal does not make findings of fact but assesses the evidence with a view to 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* at para. 22.

3) The threshold for such a review is low. Ms. Riddle must only show her complaint is based on more than mere speculation or conjecture: *Hill* at para. 27; *Gichuru* at paras. 26-27.

[52] In *University of British Columbia v. Chan*, 2013 BCSC 942, the Court held that an application under s. 27(1)(c) requires the Tribunal to review and undertake a preliminary assessment of the evidence before it. The Tribunal can only make a decision based on the information that it has. It is the responsibility of the parties to advance the information which they believe is necessary to enable the Tribunal to make decisions under s. 27(1)(c). See also: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

[53] In a review under s. 27(1)(c) of the *Code*, the Tribunal does not determine whether the complainant has established a *prima facie* case of discrimination or the *bona fides* of the response: *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134 at para. 11. Rather, the Tribunal's task is focused on the likelihood that facts supporting the complaint could be made after a full hearing of the evidence.

[54] In order to succeed in her complaint at a hearing, Ms. Riddle would have to establish that the Respondent's actions caused her to experience an adverse impact in an area of life protected by the *Code*, in part, because of her physical disability: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33. If she established these elements, the onus would shift to Gibsons to establish that it has reasonably accommodated Ms. Riddle's disability. On an application to dismiss filed under s. 27(1)(c), the burden is not on Ms. Riddle to establish her case, but rather it is on the Respondent to show that she has no reasonable prospect of success in doing so: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.

[55] I have found it helpful to first consider the nature of the service customarily available to the public.

A. What is the service customarily available to the public?

[56] Ms. Riddle's complaint is brought under s. 8 of the *Code*, which prohibits discrimination in accommodations, services or facilities customarily available to the public. At a hearing of this matter, the Tribunal would have to determine what the service is, and in this case I find it especially important to define the service at issue because aspects of Ms. Riddle's argument, in my view, risk confusing this point.

[57] Gibsons acknowledges that its approval and permitting of developments falls within an area of services protected under the *Code*. Ms. Riddle submits that the service is "the (i) approval of plans for a development which eliminates [her] access via [the] Road or otherwise to Gibsons Harbour waterfront and (ii) the closure of [the] Road to vehicle traffic".

[58] Gibsons operates under the authority of the *Local Government Act*, RSBC 2015, c. 1, and the *Community Charter*, SBC 2003, c. 26. It is a democratic institution: *Catalyst Paper Cor. v. North Cowichan (District)*, 2012 SCC 2 at para. 19; *Community Charter*, s. 1. Its purposes are set out in s. 7 of the *Community Charter*:

Municipal purposes

7 The purposes of a municipality include

- (a) providing for good government of its community,
- (b) providing for services, laws and other matters for community benefit,
- (c) providing for stewardship of the public assets of its community, and
- (d) fostering the economic, social and environmental well-being of its community.

[59] The Town's functions are performed for the benefit of its public, which includes its residents. It is accountable to the public it serves, both through elections and through the

procedural protections in place that ensure the rights of citizens to have notice and be heard on matters that affect them: see e.g. *Community Charter*, Parts 3, 4 and 5.

[60] There is no dispute that Gibsons' approval and permitting of developments is a service protected under the *Code*. However, Ms. Riddle characterizes that service here specifically in relation to her use of the Road as a point of access to the waterfront. Based on the material before me, it is clear that in addition to its development approval and permitting services, Gibsons also provides the service of public access to the waterfront at various sites. In this case, Gibsons has decided to include the service of public access to the waterfront in the course of exercising its development approval and permitting services through negotiating the Development's inclusion of the public plaza, the seawalk, improvements to Winegarden Park, and public parking.

[61] In other words, Gibsons is not eliminating access to the waterfront from the site at the end of the Road, but rather is changing the manner in which it provides that service at the site, and it is using its development approval and permitting service as a vehicle for doing that.

[62] Municipalities are entitled to perform their functions within their legislative authority, and subject to judicial oversight. This may include approving developments or other public works that alter the landscape in ways that portions of the community may find undesirable. However, once it has elected to undertake a public activity, a municipality must do so in a way that is inclusive of people with disabilities and furthers the purposes of the *Code*. For example, in *Moser v. District of Sechelt*, 2004 BCHRT 72, a case Ms. Riddle relies on, the District of Sechelt built a seawall along the shoreline. The first section of the seawall was dangerous to the complainant because of her disabilities. The Tribunal found that the District had violated the *Code* by designing a seawall that did not take the realities of the complainant's disabilities into account: para. 77.

[63] In this case, Ms. Riddle frames her argument exclusively in respect of the manner in which Gibsons is providing the service of access to the waterfront. Currently, Gibsons does so through a small boardwalk at the end of the road. It has chosen, however, to instead provide

access through the proposed amenities at the Development. While Gibsons is achieving this by way of its development approval and permitting process, in my view, the service at issue in this case for the purpose of triggering s. 8 is Gibsons' provision of public access to the waterfront. Accordingly, I have assessed this case through that lens.

B. Is there no reasonable prospect that the complaint will succeed?

[64] I turn then to the question of whether there is no reasonable prospect that the Tribunal would find Gibsons has discriminated against Ms. Riddle regarding public access to the waterfront. It is not disputed in the materials that Ms. Riddle has a physical disability. As noted above, Gibsons argues that there is no reasonable prospect of the complaint succeeding on two bases. First, it says that there is no reasonable prospect that Ms. Riddle will be able to establish an adverse impact in relation to an accommodation, service or facility customarily available to the public. Second, it says that it has met its duty to accommodate Ms. Riddle by way of the improved waterfront access.

[65] It is apparent that Ms. Riddle focuses on a benefit she currently obtains at the Road while Gibsons focuses on the improvements to waterfront access, including for persons with mobility disabilities. The evidence and arguments about adverse impact and the accommodation provided at the Development are intertwined. I approach my assessment of the case with the following principles in mind. First, discrimination must be assessed contextually and purposively. Second, it is not appropriate to collapse the issue of accommodation into the analysis of *prima facie* discrimination. Third, the burden on Ms. Riddle under s. 27(1)(c) is low. Fourth, to the extent that it relies on its accommodation efforts, Gibsons must persuade me that at a hearing it is reasonably certain to establish it has reasonably accommodated Ms. Riddle.

[66] For the following reasons, I am persuaded that there is no reasonable prospect the complaint will succeed.

1. Adverse Impact

[67] Gibsons says that the Development will not have an adverse impact on Ms. Riddle as it will result in better access to the harbour for people with physical disabilities including her. Further, Gibsons points out that there are other points of access to the waterfront and harbour available to Ms. Riddle from which she can enjoy the view.

[68] Ms. Riddle's arguments focus largely on what she is losing in relation to the Road. Specifically, Ms. Riddle is losing the ability to drive a car to a spot immediately beside the ocean where she can access a perfect panoramic view.

[69] While Ms. Riddle derives value from the Road, it is unclear whether that value extends to other members of the community. The evidence before me is that the Road is currently of little if any value to other people with mobility disabilities, at least with respect to the specific service of access to the waterfront. In that regard, Gibsons submitted an affidavit from an expert, the Vice President, Access and Inclusion, for the Rick Hansen Foundation. This expert was retained by the Development to provide an expert opinion regarding accessibility to Gibsons harbour for people with various levels of ability and mobility impairments, including a comparison of the access in the area of the Road with and without the Development. With his affidavit, he provides his report in that regard. The expert is of the view that current access via the Road is unsafe and hazardous to the general public, especially for those with disabilities. Specifically, he notes it is steeply graded, only partially paved, mostly of gravel surface in significant disrepair, and creates an unsafe and hazardous situation for wheelchair users in particular. He notes there is no place to sit and rest along the waterfront for seniors or other people with disabilities. While there is a current wood structure at the viewing area, it is in significant disrepair and blocks the view of the waterfront for people of certain height. Conversely, he notes numerous improvements to universal access to the harbour as a result of the Development, including sheltered parking, firm stable surfaces, connections to pedestrian walkways without obstacles or tripping hazards, elevators to assist with the elevation drop to the waterfront from the road, a safe and accessible waterfront pathway, seating that is a reasonable distance from parking areas, improved waterfront views, and accessible

washrooms. The expert concludes that the Development, including closure of the Road, will provide a substantially safer public access to the waterfront for all users, including families, older adults, and people with mobility, vision, and hearing impairments, than the current Road access.

[70] Accordingly, while it is apparent that Ms. Riddle will be personally affected by the removal of the Road, the evidence does not reveal that waterfront access at the Road is of particular importance to others with mobility disabilities. Further, the impact is to some extent in relation to Ms. Riddle's personal preferences, for a particular view, proximity, and for experiencing the location from the comfort of her own car. This is revealed in part in the criteria Ms. Riddle elaborates in rejecting the alternative locations of access put forward by Gibsons. Ms. Riddle says that none of the alternate access points suggested by Gibsons suffice. She says that the key elements of access that would need to be provided at these other sites are:

- a. Parking either at the water line or within a walking distance of not more than 6 metres from the water line...
- b. A smooth stable horizontal surface for walking.
- c. Seating at the waterfront in order to be able to contemplate the view, or at least have railing against which to lean.
- d. Having an unobstructed view of the full panorama, from the Bluff including Keats Island to the Coast Mountains in close proximity to nature.
- e. Peaceful, non-commercial surroundings for that contemplation.
- f. The ability to enjoy the view from one's car if in significant pain or the weather is inclement.

[71] I note first that points b (walking surface) and c (seating) are elements of waterfront access at the Development but not at the Road. Point d (unobstructed panoramic view) and e (surroundings) are personal preferences. Point f (view from a car) is of particular value to Ms. Riddle whose disability limits the distance she can walk, because at the site of the Road she uses her car to park close to the ocean. Point a (distance) is the element that most affects Ms.

Riddle in relation to her disability. It is also distance that Ms. Riddle identifies as the barrier to her access to the waterfront at the Development.

[72] Of particular relevance to this point, Ms. Riddle argues that there is a distinction to be made between people with “visible” mobility disabilities, and people with “invisible” mobility disabilities. Ms. Riddle argues that for those with a “visible” mobility disability, the key issue is maneuverability, while for those like her with an “invisible” mobility disability, the key issue is distance. Accordingly, while Ms. Riddle concedes that the Development will improve access to the waterfront for people with “visible” mobility challenges, she disputes Gibsons’ assertion that it will do so for her.

[73] Ms. Riddle argues that the Development renders the waterfront “wholly inaccessible” to her because of her disability as she will not be able to traverse the distance between the parkade to the water. This distance, I note, is in dispute.

[74] In a December 5, 2016 e-mail from Gibsons’ director of planning to Ms. Riddle, he advises of the following options to access the waterfront via the Development and Winegarden Park:

1. The shortest option to access the waterfront views from the development is to park your car at level P1 at one of the handicap stalls across from the elevator. Taking the elevator up to the Plaza level the elevator brings you on to a Plaza from which one would have a view of the water and mountains.
2. Another option is to park your car at level P1 at one of the handicap stalls across from the elevator. Taking the elevator down to level P2 you travel about 12 m through the hotel lobby and then exit the lobby on the waterfront.
3. You can also park across from Winegarden Park ... And take the crosswalk to Winegarden Park and view the waterfront and access seating options close to the crosswalk.

[reproduced as written].

[75] Ms. Riddle argues that while there will be designated parking spaces in the Development at close proximity to the elevators to the seawall, there is no guarantee such a parking space will be available when she wishes to visit. This argument suggests that what Ms. Riddle seeks is guaranteed access, something that no person has at any public place where parking is involved. This problem is not specific to people with disabilities.

[76] Ms. Riddle says she is only able to walk 12 metres at a time comfortably before being affected by severe pain. She says she can walk 20 metres before she must sit and rest due to the progression of the pain, and with the assistance of a cane she can increase that distance to 30 metres before becoming totally immobilized by pain. In her first affidavit, Ms. Riddle says that she calculated that if she were to park on P1 and take the elevator down to P2, the total walking distance from the parking space “out to the waterfront” would be 59.1 metres, which is beyond her capability.

[77] It is difficult to reconcile the evidence about distances to the waterfront at the Development. Gibsons says, for example, that the hotel lobby exits at the waterfront. Ms. Riddle says it is a “significant distance” from the exit to being “physically at the waterfront”. Gibsons says that in light of Ms. Riddle's assertion that she can only stand for a few minutes without severe pain, objectively, the seating options that will be available via the Development will provide her and others with similar mobility limitations to benefit and allow them better access to views as there is currently no seating on the Road unless somebody enters with their vehicle. Ms. Riddle does not address the availability of seating as a means to assist her in covering the distance to the waterline, which appears to be important to Ms. Riddle.

[78] Ms. Riddle also argues that while Gibsons has only calculated access to the waterfront, it has not considered how she would return to her vehicle, noting that the distance there and back exceeds the total distance she can walk. Ms. Riddle does not explain how she returns to her vehicle from any location, including in the case of the example she gives – visits to her doctor's office. She references the ability to sit and rest as being of importance, and the evidence is that there will be public seating available at each level of the Development.

[79] Whether the waterfront access at the Development creates barriers for Ms. Riddle cannot be gauged in relation to the ease with which Ms. Riddle currently accesses the service as provided at the end of the Road. Rather, it must be gauged having regard to the access that will customarily be available to the public via the Development. The question is not whether Gibsons' actions render the waterfront itself inaccessible to Ms. Riddle, as she argues, but rather whether Gibsons' provision of the service of access to the waterfront via the Development is accessible to Ms. Riddle.

[80] At the Development, the service of access to the waterfront provided by Gibsons through its approval and permitting will include: a smooth, properly graded public plaza for viewing the ocean; a smooth pedestrian seawalk; seating at both locations; public parking that includes spaces designated for use by persons with disabilities; elevators; accessible public washrooms; and lighting.

[81] As a result of Gibsons' decision to provide waterfront access via the Development rather than via the Road, Ms. Riddle loses her preferred proximity, view, and mode of access. She will still, however, have ocean views (though perhaps not fully panoramic); she will still be able to have some proximity – by all estimates a matter of metres; and she will still be able to drive her car to around 12 metres from the elevator that will take her to a point from where (a) there is seating and/or (b) there is some view of the ocean.

[82] Ms. Riddle says the distance she will have to walk to access the waterfront is too far given her disability, but she has not said what, beyond perfection – ie. the ability to drive her car to the waterline – would be acceptable.

[83] As noted, the question of discrimination must be assessed contextually and purposively. I have considered the extent to which Ms. Riddle's concerns are personal in nature rather than related to her disability; the evidence about waterfront access at the Development, including parking facilities, seating, viewing options, and distances in relation to the options; and finally, the greater accessibility to the service for people with disabilities generally. In light of all of the material before me, I am persuaded there is no reasonable prospect that Ms. Riddle could

establish that the approval of the Development and the loss of the Road adversely affects her in relation to Gibsons' provision of waterfront access to the public, in such a significant way as to trigger the protections of the *Code*.

2. Accommodation

[84] In the alternative, if Ms. Riddle were to prove an adverse impact to her resulting from the approval of the Development, I am persuaded that Gibsons will almost certainly be able to prove that it reasonably accommodated her, both through its process of ensuring accessibility to people with disabilities, whether or not they use a mobility aid such as a wheelchair, and because I accept that, in the circumstances of this case, Gibsons is entitled to prioritize greater accessibility to the service for a greater number of people.

[85] Gibsons submits that the Development has been approved and designed with the needs of people with disabilities in mind, a submission well-supported by the evidence before me. In his affidavit, Gibsons' director of planning asserts that:

Accessibility to the waterfront is one of the five overarching goals of the harbor area plan and was a key consideration in the town's consideration of the development. As a planner, I am very much aware of Gibsons' aging population and of the significant number of community members that have some type of mobility limitation. Through the development application review process I have worked with the applicant's consultants to ensure accessibility was explicitly considered.

One of the key components of the development with respect to accessibility is the agreement of the developer to construct the waterfront walkway and provide access to the waterfront walkway through the public Plaza and the arcade of the development. There is currently a waterfront walkway along the Harbour but it is interrupted at the site of the development so the current waterfront walkway is not continuous and consists of two separate parts. This means that in the current situation one can only access both sections of the waterfront walkway by navigating the uneven surface and steep hill on [the Road] and walk around the site of the development. With the construction of the waterfront walkway, the missing link will be built and there will be a

continuous level and fully accessible walkway along the waterfront of the harbor.

... The town also obtained an agreement from the developer that the transition to surrounding areas would have a maximum grade of 5%, which is the recommended slope for gradual surface transitions. While the other parts of the current walkway along the Harbour are gravel, the waterfront walkway will be paved and will provide seating options, improving accessibility for people with mobility limitations.

[86] The director of planning also points out that there will be public parking across the street from the Plaza, an accessible ramp from the crosswalk to the public Plaza, public seating, parking spots for people with disabilities across from the elevator that leads from the arcade to the public Plaza and the waterfront walkway, and the elevators which will “address the significant elevation drop” from the road to the waterfront.

[87] Additionally, Gibsons’ chief administrative officer notes that staff considered accessibility in respect of issues of a statutory nature, issues to be negotiated directly with the developer, and issues of a political nature that require direction from counsel. With respect to statutory issues, for example, staff considered the building code, Transportation Association of Canada standards and the fire code, which all have accessibility considerations and requirements. He points out that the design of the Development currently meets these requirements and is required to meet these requirements throughout construction. The chief administrative officer also notes that staff considered accessibility when it obligated the developer to construct the missing link of the waterfront walkway along Gibsons Harbour as part of the Development, negotiated rates of 5% or less for any slopes that may be required, and ensured that the design of sidewalks, road, and parking lots also include accessibility considerations as required by the town development guidelines. He notes that the Development includes a redesign and improvements to the adjacent Winegarden Park, and that those also considered accessibility.

[88] As noted above, Gibsons has also submitted an affidavit from an expert with the Rick Hansen Foundation who was retained by the Development. I outlined above the expert’s concerns regarding access to Gibsons Harbour for people with various levels of ability and

mobility impairments and the numerous improvements to universal access to the harbour as a result of the Development.

[89] Also as noted above, Ms. Riddle concedes that the Development will improve access for people with “visible” mobility challenges, but disputes Gibsons’ assertion that it will do so for her. Ms. Riddle argues that for those with a “visible” mobility disability, the key issue is maneuverability, while for those like her with an “invisible” mobility disability, the key issue is distance.

[90] Gibsons argues that the distinction Ms. Riddle draws between hidden and visible mobility disabilities is irrelevant to this case, as Gibsons has considered accessibility for those with mobility issues whether readily apparent or not, including for those who cannot walk long distances. It notes that its expert evidence employed a broad framework of disability, providing findings and recommendations for people with mobility issues without distinguishing between people with hidden and visible mobility impairments.

[91] The evidence before me supports that Gibsons took into account the needs of persons with disabilities generally, including those who must use or choose to use a mobility aid and those who do not. It is clear from the expert evidence submitted by Gibsons that the Development improves access for both groups. I repeat those improvements here for convenience: sheltered parking, firm stable surfaces, connections to pedestrian walkways without obstacles or tripping hazards, elevators to assist with the elevation drop to the waterfront from the Road, a safe and accessible waterfront pathway, seating that is a reasonable distance from parking areas, improved waterfront views, and accessible washrooms.

[92] Gibsons submits that it:

felt that the accessibility concerns raised by the complainant were addressed in the development, and in particular the new pedestrian friendly and accessible public Plaza, the waterfront walkway, gradual slopes, seating and parking options, viewpoints, and the presence of an elevator in the parkade of the development.

[93] Gibsons submits that both parties are to participate in the accommodation process, and the terms cannot be dictated by either side. It relies on *Central Okanagan School District No. 23 v. Renaud*, [1992] 1 SCR 970, and *C v. University of Victoria*, 2013 BCHRT 252 [C], at para. 68. Gibsons says that, like in *C*, it is clear that Ms. Riddle will only be satisfied if she is able to access the harbour via the Road or a road through the Development; however, Gibsons is only required to provide reasonable accommodation, not perfect accommodation. Gibsons says that Ms. Riddle did not engage in the accommodation process in a way that allowed it to canvas accommodation options, and that the town thought that it had addressed her accessibility concerns through the design of the Development. It notes that before receiving Ms. Riddle's response submissions and her affidavit, Ms. Riddle had not provided any details regarding her mobility limitations or what accommodation she requires in relation to the Development except for retaining her ability to access the harbour via the Road. Gibsons says that the town is not required to consider a major redesign of the Development given the ability of Ms. Riddle to access the harbour by way of the Development and alternative access points. It notes that the construction of a road between the two buildings in place of the pedestrian Plaza would impact accessibility for others with mobility limitations including, for example, creating narrow sidewalks down a steep slope alongside vehicle traffic lanes.

[94] Ms. Riddle objects to the alternative viewing points put forward by Gibsons as follows:

Labonte Park: there is no vehicle access to the waterfront... The public parking... Result in needing to walk approximately 15 m across a small wooden bridge across uneven grassy ground to bench that provides a view of only the southern portion of the panorama.

Headlines road: the end of this road at the waterfront has signage clearly prohibiting cars and parking. I would need to park at least 45 m away and then walk down an uneven gravel slope road to approach the beach where there is no railing or seating. In addition, the view from this beach is not the same as at Gibsons Harbour...

Molly's Lane: this Lane is a commercial "scruffy" lane with public parallel parking and no clear view of Gibsons Harbour. Part of the parking is along the wooden fence with no view at all. The other part of the parking is along the chain fence where there is a private parking lot (and

thus parked cars) between the public parking in the view. The walking surface is uneven and there is no public seating within a short distance. The view, if it can be seen, is of only the southern part of the panorama.

Armours Beach: the public parking for Armours Beach is along the main road out of or into town, and three parking spaces are frequently filled. The parking is at the top of a relatively steep slope that would involve at least 30 m of walking to reach a bench (not the waterfront) in order to seek a view. The view is of only the northern half of the panoramic view.

[95] At the portions of the Development that Gibsons has ensured are for public use in respect of its service of access to the waterfront, Ms. Riddle will be able to access both seating and views of the ocean. While not necessarily at the same proximity or same full panorama as she would like, I am satisfied that Gibsons would establish it has taken reasonable steps to ensure that the public access it is providing to the waterfront at the Development site through negotiation of the public plaza, seawalk, seating in respect of both, and public parking, constitute a reasonable accommodation of people with mobility disabilities, including Ms. Riddle.

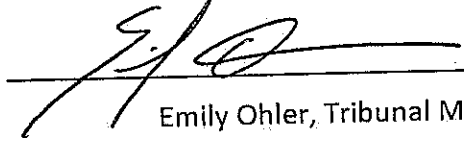
[96] Ms. Riddle has focused on a perfect accommodation of her needs at the Development given the loss of the benefits she obtains at the Road. However, I agree with Gibsons that it must ensure that it reasonably accommodates the needs of persons with disabilities to ensure its services are accessible. In this case, the evidence supports Gibsons' efforts to significantly improve access to the waterfront for people with disabilities. To the extent that Ms. Riddle is personally affected by the changes flowing from the approval of the Development, the need for accessibility for all persons with disabilities must also be weighed in the balance of providing reasonable accommodation. I am satisfied that Gibsons will establish that its steps in the approval of the Development to date have reasonably accommodated Ms. Riddle.

V CONCLUSION

[97] Gibsons is providing access to the waterfront as a service by requiring the Development to incorporate, among other things, the public pedestrian plaza, a waterfront walkway that closes the existing gap in the seawalk, and amenities to ensure the accessibility of both

including elevators, designated parking stalls for persons with disabilities, and seating. Ms. Riddle would prefer a perfect panoramic view, taken in immediately beside the ocean, from the comfort of her vehicle, absent commercial activity in order to give her a sense of repose. While this is clearly desirable, I am persuaded that there is no reasonable prospect that the Tribunal would conclude that an abridgment of her wants in this regard – particularly in the context of the purposes of the *Code* – constitutes a breach of the *Code*.

[98] Gibsons' application to dismiss Ms. Riddle's complaint under s. 27(1)(c) is granted. The complaint is dismissed.



Emily Ohler, Tribunal Member