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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:

Shelly Stefanishion

COMPLAINANT

AND:

Princess Resort and Westbank First Nation and Bill Brewer and Darcy Osberg

RESPONDENTS

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

Tribunal Member: Sonya Pighin

On their own behalf: Shelly Stefanishion

Counsel for Westbank First Nation and Bill Brewer: Julia Buck

Counsel for Princess Resort and Darcy Osberg: Jeff Nicholls

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I INTRODUCTION

[1] On June 2, 2020, Shelly Stefanishion filed a complaint with the Tribunal alleging that:

a. Westbank First Nation and its bylaw enforcement officer, Bill Brewer, discriminated against her regarding a service that Westbank First Nation makes customarily available to the public, contrary to s. 8 of the *Human Rights Code*, RSBC 1996 c. 210 [***Code***], because of her mental disability.

b. Princess Resort and its park manager, Darcy Osberg, discriminated against her in a term or condition of her tenancy, contrary to s. 10 of the *Code*, because of her mental disability.

[2] On October 27, 2020, Westbank First Nation and Mr. Brewer applied under ss. 27(1)(a), (b), (c) and (d)(ii) of the *Code*, for an order dismissing the complaint against either both of them, or Mr. Brewer, without a hearing because either the complaint is not within the Tribunal's jurisdiction, the complaint does not allege a contravention of the *Code*, the complaint has no reasonable prospect of success at a hearing, or proceeding with the complaint against Mr. Brewer would not further the purpose of the *Code*.

[3] On the same day, Princess Resort and Mr. Osberg applied under ss. 27(1)(a), (c) and (f) of the *Code*, for an order dismissing the complaint against them without a hearing because either the complaint is not within the Tribunal's jurisdiction, the complaint has no reasonable prospect of success at a hearing, or another proceeding has appropriately dealt with the substance of the complaint.

[4] Ms. Stefanishion filed responses to the respondents' applications, and the respondents' subsequently filed replies to her responses. However, due to a backlog of cases the Tribunal was unable to assign the applications to a Tribunal member until October 2023.

[5] After the applications were assigned to a Tribunal member, the Tribunal identified that part of each application requires it to consider the constitutional applicability of the *Code*, and the Respondents had not served notice of their application on the Attorney Generals of Canada

and British Columbia as required: *Code*, at s.32(j), *Administrative Tribunals Act,* SBC 2004, c. 45, s. 46, and *Constitutional Question Act*, RSBC 1996, c. 68, s. 8. The Tribunal wrote the parties advising them that the Respondents must serve notice of their respective applications on the Attorney Generals of Canada and British Columbia before it would treat them as complete.

[6] On November 28, 2023 and December 4, 2023, Westbank First Nation and Princess Resort, respectively, provided the Tribunal confirmation that they served the complaint on the Attorney Generals of Canada and British Columbia. Neither Attorney Generals have participated in the applications.

II PRELIMINARY MATTER

[7] As a preliminary matter, I note that Westbank First Nation has advised the Tribunal that the Canadian Human Rights Commission accepted jurisdiction over a complaint that Ms. Stefanishion made to it under the *Canadian Human Rights Act* (RSC, 1985, c. H-6) regarding the same matters as those set out in Ms. Stefanishion's complaint to the Tribunal. If a respondent wishes for the Tribunal to defer a complaint on the basis that another proceeding is capable of appropriately dealing with it, they may apply for an order from the Tribunal deferring the complaint until the outcome of the other proceeding: *Code* at s. 25; *Interpretation Act* [RSBC 1996] Chapter 238 at s. 39; *Supreme Court Act* [RSBC 1996] Chapter 443 at s. 1 "proceeding." If parties all agree that the Tribunal should defer the complaint on the basis that the *Canadian Human Rights Act* proceeding is capable of appropriately dealing with it, they may ask the Tribunal to do so by advising the case manager, in writing, that they "request a deferral of the complaint on the basis that the *Canadian Human Rights Act* proceeding is capable of appropriately dealing with it." When the Tribunal orders a deferral, it is not dismissing the complaint. Instead, it is putting the complaint on hold until the other proceeding has concluded, and then the Tribunal will only dismiss the complaint if Ms. Stefanishion withdraws it, or the respondents show that the other proceeding has appropriately dealt with it.

III DECISION

[8] I deny each of the respondents' applications to dismiss the complaint without a hearing. I will now explain this decision. I will start with an overview of the parties, their relationships to one another, the complaint background, and the laws that arise in the context of these applications. Then, I will explain my reasons for denying each of the respondents' individual applications.

IV BACKGROUND

A. The Parties and their relationships to one another

[9] Westbank First Nation is an Indigenous community that identifies as part of the Okanagan Nation. Both Canada and British Columbia recognise it as having its own governmental structure, and the authority to make some of its own laws. Among other things, the *Constitution Act, 1867* sets out that Parliament has exclusive law-making authority over "Indians and Lands reserved for Indians": *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 at ss. 91 to 95 [***Constitution***] at s. 91(24). In accordance with that authority, Parliament enacted the *Westbank First Nation Self-Government Act*, S.C. 2004, c.17 [***Westbank Act***], which gives the *Westbank First Nation Self-Government Agreement* [***Westbank Agreement***] the force of law: at s.3(1). The Westbank Agreement sets out that its Council, which its members elect in accordance with rules and procedures set out in its Constitution, has the authority to make and enforce various Westbank Laws that affect Westbank Lands. Westbank Lands are set apart by Her Majesty the Queen for the use and benefit of Westbank First Nation, and they include the Tsinstikeptum Indian Reserve Number 9: *Westbank Agreement* at Part 1.

[10] Mr. Brewer is the Law Enforcement Officer for Westbank First Nation. In that capacity, he is responsible for enforcing Westbank Laws on Westbank Lands. This includes enforcing the *Westbank First Nation Residential Premises Law No. 2008-03* [***Westbank Tenancy Law***] and

Westbank First Nation Dog and Cat Control Law, No. 2005-04 [***Westbank Animal Law***], which Westbank First Nation and Princess Resort make arguments about in their applications.

[11] Ms. Stefanishion refers to Princess Resort as her landlord. Princess Resort refers to itself as the Princess Resort and RV Park Partnership, which it describes as a partnership of four Indigenous persons who are members of Westbank First Nation, each of whom it says hold lawful possession interests in Tsinstikeptum Indian Reserve Number 9. Prior to the *Westbank Act*, the *Indian Act*, (R.S.C., 1985, c. I-5) set out requirements for how a member of Westbank First Nation may obtain an individually owned interest in Westbank Lands, known as lawful possession, which is the closest type of individual ownership to that of fee simple ownership that a person can have in reserve lands. When the *Westbank Agreement* came into effect, interests held by individual members of Westbank First Nation continued and they became subject to the provisions of any *Westbank Law* governing interests in Westbank Lands: *Westbank Agreement* at s. 91. Princess Resort says that it operates the Shady Rest Park on those parcels of lands that its partners' have a lawful possession interest in. They are part of the Tsinstikeptum Indian Reserve Number 9. Ms. Stefanishion rents a pad from Princess Resort in the Shady Rest Park.

[12] Mr. Osberg describes himself as the General Manager of Princess Resort and RV Park Partnership, and says he is being responsible for managing Shady Rest Park operations, which include enforcing its park rules, responding to complaints from park tenants, and ensuring that the partnership fulfills its obligations to park tenants. Ms. Stefanishion refers to Mr. Osberg as her landlord. As I understand it, Princess Resort and Mr. Osberg have no authority from Westbank First Nation to monitor or enforce Westbank Laws. Both Princess Resort and Ms. Stefanishion describe their relationship to one another as a private relationship between landlord and tenant.

[13] Before moving on, I note that Princess Resort has not provided the Tribunal the names of each of the Princess Resort and RV Partnership's individual partners. I also note that in support of its application, Princess Resort provided a copy of a tenancy agreement between Princess Enterprises and a person I will refer to as A.R. It shows Ms. Stefanishion as the person

signing that agreement on behalf of A.R. and Mr. Osberg signing it on behalf of Princess Enterprises. Ms. Stefanishion has not named the Princess Resort and RV Park Partnership, its individual partners, or Princess Enterprises as respondents. I encourage Ms. Stefanishion to ensure she has properly named both herself and the respondents in the complaint. She can learn more about how to do so on the Tribunal's website.

B. The complaint background

[14] I now turn to the complaint background. Ms. Stefanishion alleges that she has post traumatic stress disorder and panic attacks. She says she has a registered service dog, named Bailey, who helps her manage symptoms of those alleged mental disabilities.

[15] Regarding the complaint against Westbank First Nation and Mr. Brewer, Ms. Stefanishion alleges that, on May 19, 2020, Bailey got off leash on a public pathway exiting a beach area and scratched a child. She says, the same day Mr. Brewer attended her home and asked her what happened. According to Ms. Stefanishion, Mr. Brewer advised her that Bailey is a dangerous dog, that she must remove Bailey from the property, and that she can never have Bailey back again. According to Ms. Stefanishion, she complied with Mr. Brewer's direction, and she has not had Bailey in her care since May 19, 2020, which has had a severely negative impact on her mental health.

[16] Along with the complaint, Ms. Stefanishion provided the Tribunal a copy of an order, dated May 27, 2020, which is signed by Mr. Brewer and states that the Westbank First Nation deems Bailey a dangerous dog under its *Westbank Animal Law*. It states that Westbank First Nation orders Ms. Stefanishion to keep Bailey confined securely indoors or in an enclosure, and to ensure that Bailey is leashed, controlled, and effectively muzzled while in public locations. Last, it sets out that a failure to abide by the order can lead to the possession and possible destruction of Bailey.

[17] The Westbank First Nation and Mr. Brewer filed a joint complaint response. They say Bailey was at large and injured a child, which resulted in Westbank First Nation deeming Bailey a dangerous dog and issuing the order to Ms. Stefanishion. They say Mr. Brewer was not aware

of Ms. Stefanishion having any disability and that the order issued by Westbank First Nation was not in any way related to it. They do not say whether Mr. Brewer directed Ms. Stefanishion to remove Bailey from the property.

[18] Regarding the complaint against Princess Resort and Mr. Osberg, Ms. Stefanishion alleges that on May 20, 2020, she emailed Mr. Osberg to advise that she had removed Bailey from her rental pad, and Mr. Osberg asked her what happened. She says Mr. Osberg committed to following up with Mr. Brewer, but "did not mention an accommodation" and "there was no opportunity to seek other solutions." It is not clear what Ms. Stefanishion means regarding "an accommodation" or "other solutions" that Mr. Osberg should have offered or made available to her regarding her interactions with Westbank First Nation and Mr. Brewer, which I understand had to do with their enforcement of the *Westbank Animal Law*.

[19] Ms. Stefanishion further alleges that on June 17, 2020, Mr. Osberg attended her residence, aggressively came at her, and told her to remove a fence that she was building because she had no approval to put it in. As I understand it, Ms. Stefanishion was building a fence to comply with Westbank First Nation's order that she keep Bailey confined securely indoors or in an enclosure. She says she tried to explain to Mr. Osberg that she was only following the Westbank First Nation's laws, which I understand to mean the *Westbank Animal Law*. She says Mr. Osberg didn't let her respond, was rude and overbearing toward her, and told her to seek medical help when she told him she was unwell. According to Ms. Stefanishion, Mr. Osberg told her that since she did not get approval from Princess Resort for a fence, Bailey can never come back.

[20] Last, Ms. Stefanishion alleges that Mr. Osberg complained to the Deputy Registrar under the *Guide Dog and Service Dog Act*, SBC 2015, c. 17, seeking to have Bailey decertified as a service dog.

[21] Princess Resort filed a complaint response on behalf of itself and Mr. Osberg. In it, they say that in July 2019 Princess Resort approved Ms. Stefanishion to have Bailey on its property because she satisfied it that Bailey is a certified service dog, which is an exception to its general

rules and regulations that do not allow dogs on its premises. They further say that, in August and September 2019, Princess Resort received complaints about Bailey being off leash, trespassing on other residents' properties and being aggressive to other residents. They say that in response to those complaints, Princess Resort told Ms. Stefanishion that she must keep Bailey on leash when not within her pad, including while at the beach and at the lake. In that complaint response, they do not deny or provide their own versions of those events that allegedly occurred between Mr. Osberg and Ms. Stefanishion on May 20 or June 17, 2020. They also do not deny or provide a response to Ms. Stefanishion's allegation about Mr. Osberg seeking to have Bailey decertified as a service dog.

C. The validity of laws that arise in the applications

[22] I now comment briefly on how I treat the validity of those laws that arise in these applications. First, the validity of the *Code* is not at issue. The respondents' do not argue that the *Code* or any portion of it is invalid. As I assess the respondents' arguments, I presume that the *Code* is constitutionally valid, meaning that the Legislature enacted it in accordance with its authority to make laws under s. 92 of the *Constitution*: *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662. Second, the validity of the *Westbank Act* and *Westbank Agreement* are not at issue. Last, the validity of those Westbank Laws that are relevant to the complaint are not at issue. The combined effect of the *Westbank Act* and the *Westbank Agreement* are that Westbank First Nation has authority to make and apply its own laws about:

a. local services on Tsinstikeptum Indian Reserve Number 9, including services in relation to animal control;

b. landlord and tenant matters with respect to Westbank Lands, including residential premises and manufactured home parks;

c. the imposition of penalties on persons convicted of violations under Westbank Laws;

d. the establishment of enforcement procedures for Westbank Laws; and

e. the appointment and assignment of duties to its own officials for the enforcement of Westbank Laws on Westbank Lands: *Westbank Agreement* at ss. 133, 195(a), 197(a), 198(a) and 212(k).

[23] In accordance with these authorities, Westbank First Nation enacted the *Westbank Animal Law* and the *Westbank Tenancy Law.* I treat both as valid subordinate federal laws because they were created by Westbank First Nation in accordance with powers delegated to it through the combined effects of the *Westbank Act* and *Westbank Agreement*. My treatment of these Westbank Laws as subordinate federal laws is consistent with the BC Supreme Court's treatment of Westbank First Nation's former *Law to Regulate Residential Premises on Westbank Lands*, No. 2005-21, which it also enacted in accordance with authorities under the *Westbank Act* and *Westbank Agreement*: *Waterslide Campground v. Goulet*, 2008 BCSC 532 [***Goulet***] at paras. 28 to 34.

[24] Before moving on, I note that Westbank First Nation has not argued that its enactment and enforcement of Westbank Laws are an exercise of its inherent aboriginal right to self-governance under s. 35 of the *Constitution Act, 1982*. I note that, if they had both argued and proven this, then Aboriginal rights under s. 35 of the *Constitution Act, 1982* are a limit on both federal and provincial jurisdictions. Provincial laws of general application, including the *Code*, apply to Aboriginal peoples in their exercise of Aboriginal rights, unless that law – or in this case, the *Code* – is unreasonable, imposes a hardship or denies the Aboriginal peoples who are exercising the right their preferred means of exercising it, and the restrictions set out in the *Code* cannot be justified by the Province based on the justification framework for an infringement of aboriginal rights in *R. v. Sparrow*, [1990] 1 S.C.R. 1075: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 103, 104, 141, 142, 151 and 152. I find it necessary to explain this because as the legal landscape of Aboriginal peoples' inherent rights to self-government evolves, so too will the role of the Tribunal in assessing its jurisdiction over matters involving Aboriginal peoples.

[25] Now that have provided some background regarding the parties, the complaint and complaint response, and the laws that arise in the context of this application, I move on to explain why I deny the respondents' applications to dismiss the complaint based on a lack of jurisdiction.

V SHOULD THE COMPLAINT BE DISMISSED UNDER S. 27(1)(a) OF THE *CODE*?

[26] Section 27(1)(a) of the *Code* authorises the Tribunal to dismiss all or part of a complaint if it is satisfied that the complaint is not within the jurisdiction of the Tribunal. The Tribunal must determine its own jurisdiction at a preliminary stage where there are "sufficient foundational facts" and a "clear legal question": *HTMQ v. McGrath,* 2009 BCSC 180 at para. 64. However, it may defer a decision about its jurisdiction when additional evidence or factual inquiry is necessary for it to make that decision: *McGrath* at para. 64; *Barker v. Hayes*, 2008 BCCA 148 at paras. 33-35.

[27] The respondents' arguments about the Tribunal's jurisdiction are set out in Princess Resort's application and adopted by Westbank First Nation and Mr. Brewer in their application. Ms. Stefanishion makes no arguments about the Tribunal's jurisdiction. However, as I understand it, she opposes the respondents' applications.

[28] The respondents make two arguments. First, they argue that the Tribunal should dismiss the complaint against them because the functional test outlined by the Supreme Court of Canada confirms that the impugned conduct falls under federal jurisdiction, and they were acting under Westbank Law, which is federal law. I treat their reference to the functional test as a reference to the functional test set out by the Supreme Court of Canada in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 [***NIL/TU,O***]. I treat Westbank First Nation's reference to Westbank Law as a reference to the *Westbank Animal Law*, and Princess Resort's reference to Westbank Law as a reference to the *Westbank Tenancy Law*.

[29] Second, the respondents argue that the Tribunal should dismiss the complaints against them because they concern the use and possession of reserve lands, which lie at the core of Canada's exclusive jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution*. I treat this as their argument that the Tribunal has no jurisdiction over the complaint by virtue of the division of powers set out in ss. 91 and 92 of the *Constitution*.

A. Should the Tribunal dismiss the complaint against Westbank First Nation and Mr. Brewer, under s. 27(1)(a) of the *Code*, in accordance with the functional test from NIL/TU,O?

[30] I deny Westbank First Nations' application for an order dismissing the complaint under s. 27(1)(a) of the *Code* based on an application of the functional test from NIL/TU,O. Westbank First Nation has not proven that the Tribunal has no jurisdiction over the complaint based on the functional test from *NIL/TU,O*.

[31] *NIL/TU,O* is a case about whether the NIL/TU,O Child and Family Service Society, that provides child welfare services to Indigenous peoples, is a "federal work, undertaking or business," making its labour relations subject to the *Canada Labour Code*, R.S.C. 1985, c. L-2, or whether it is instead a provincial entity, making its labour relations subject to the provincial *Labour Relations Code*, RSBC 1996, c.244. In deciding the issue, a majority of the Court started with a recognition that labour relations are presumptively a provincial matter under s. 92(10) of the *Constitution*, which provides the provinces exclusive jurisdiction over "Local Works and Undertakings." However, by exception the federal government may assume jurisdiction over labour relations when it makes declarations under s. 92(10)(c) of the *Constitution* that "Local Works and Undertakings" are for the general advantage of Canada or for the advantage of two or more of the Provinces. In the *Canada Labour Code*, Parliament declares certain works, undertakings, and businesses to be a "federal work, undertaking or business," and in doing so it assumed legislative authority over those works, undertakings, and businesses: at s. 2. The majority points to the functional test in *Four B Manufacturing Ltd. v. United Garment Workers of America,* [1980] 1 S.C.R. 1031 [***Four B***] as the first step to take in determining whether an entity's labour relations are federally regulated, and it says that only if that inquiry is

inconclusive should a court proceed to an examination of whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue: at para. 18. The majority then applied the functional test to determine whether NIL/TU,O is a "federal work, undertaking or business": at paras. 11 and 12. It found that NIL/TU,O is a provincial undertaking making it subject to the province's *Labour Relations Code*: at para. 10. It then declined to consider whether the *Labour Relations Code* impairs the core of a federal power.

[32] In the circumstances of this application, it is not appropriate for the Tribunal to apply the functional test from *NIL/TU,O*. The Tribunal does not need to determine whether Westbank First Nation is a federal work, undertaking, or business for the purposes of labour relations. Nor does the Tribunal need to determine whether Westbank First Nation is, overall, an entity that Parliament has exclusive authority to regulate under s. 91(24) of the *Constitution*. Those issues are not in dispute. The issue is whether the *Code* authorizes the Tribunal to hear a dispute about Westbank First Nation allegedly discriminating against Ms. Stefanishion in its enforcement of the *Westbank Animal Law*, an otherwise valid subordinate federal law made by Westbank First Nation in accordance with those powers delegated to it by Parliament.

[33] If Ms. Stefanishion's complaint were about a part of the *Code* that regulates labour relations, then it is possible that the Tribunal could make a conclusive finding, based on the functional test in *NIL/TU,O*, that the *Code* is inapplicable to the complaint. However, for this to occur:

a. First, the complaint would need to allege discrimination under a part of the *Code* that affects labour relations.

b. Second, the respondent named in that complaint would need to be a person that Parliament has assumed jurisdiction over labour relations for, either in its enactment of the *Canada Labour Code*, or under some other legislation enacted by it in accordance with s. 92(10)(c) of the *Constitution*.

[34] In such circumstances, the *Canadian Human Rights Act* would apply by virtue of the fact that it extends the rules in it to all laws in Canada that are within the purview of matters

coming within the law-making authority of Parliament, to give effect to the principle of non-discrimination based on a list of protected characteristics including mental disability: at s.2. By enacting both the *Canada Labour Code* and the *Canadian Human Rights Act*, Parliament has assumed its jurisdiction over discrimination regarding the labour relations of entities that come under the *Canada Labour Code*.

[35] Next, I comment on decisions the Tribunal has made about its jurisdiction by applying the functional test from *NIL/TU,O*. There are cases where the Tribunal points to *NIL/TU,O* and states that it has "repeatedly noted that in labour relations and human rights matters, provincial jurisdiction is the rule and federal jurisdiction is the exception": *Pierre v. Bertrand and another*, 2011 BCHRT 284 at para. 7; *Scodane v. Albright and another*, 2011 BCHRT 366 [***Scodane***] at para. 11; *Rampanen-Fritzsche v. Okanagan Nation Alliance and another*, 2012 BCHRT 138 at para. 10; *Prichard v. Tla'Amin Community Health Board Society and others*, 2012 BCHRT 152 at para. 13. The Tribunal then applies the functional test and concludes whether the *Code* is applicable to the complaint based on it. There is also a case where the Tribunal states that the law requires it to apply the functional test and it points to the *NIL/TU,O* case: *Scharfe v. Clover Towing and others*, 2016 BCHRT 177 at para. 20. In that case, the Tribunal also applies the functional test and concludes whether the *Code* is applicable to the complaint based on it.

[36] Insofar as the above-mentioned Tribunal decisions are about complaints made under parts of the *Code* that relate to labour relations, the Tribunal's use of the functional test to assess jurisdiction is consistent with my above-mentioned approach to using it for that purpose. However, I do not adopt the Tribunal's position that in all human rights matters, provincial jurisdiction is the rule and federal jurisdiction is the exception. In those non-labour related cases, the Tribunal repeats its position without any explanation of where it comes from, and without pointing to former Tribunal cases that explain it. I also do not accept that in all cases the law requires the Tribunal to apply the functional test. There is no authority that says this.

[37] I also comment that in a pre-*NIL/TU,O* decision the Tribunal states that s. 92(13) of the *Constitution* grants the provinces jurisdiction over "Property and Civil Rights in the Province": *Azak v. Nisga'a Nation and others; Robinson and Lincoln v. Nisga'a Nation and*

others, 2003 BCHRT 79 [***Azak***] at para. 23. It then says that the jurisprudence is clear that, as it relates to labour relations and human rights law, the federal and provincial governments do not have concurrent jurisdiction. It points to *Four B* as its authority on this point: *Azak* at para. 34. I do not adopt the Tribunal's position that *Four B* stands for the proposition that as it relates to human rights law, the federal and provincial governments do not have concurrent jurisdiction. First, *Four B* is the same as *NIL/TU,O* in that it only addresses an issue of labour relations. It has nothing to do with human rights law. *Four B* was about whether a provincial *Labour Relations Act* applies to the activities of a provincially incorporated company that is owned by four members of a First Nation band and is located on a First Nation's reserve lands. Second, nothing in *Four B* says that in human rights matters provincial jurisdiction is the rule and federal jurisdiction is the exception.

[38] Next, assuming I were to accept that, as stated in *Azak*, the Legislature enacted the *Code* in accordance with its authority under s. 92(13) of the *Constitution*, then s. 92(13) must still be treated different than s. 92(10), which is what the Court dealt with in both *NIL/TU,O* and *Four B*. Section 92(10) of the *Constitution* sets out an exclusive power of the Legislature, and then it sets out circumstances where Parliament may assume that exclusive power. Section 92(13) does not set out circumstances under which Parliament may assume the Legislatures exclusive power over "Property and Civil Rights in the Province." The Supreme Court of Canada describes the Legislatures power under s. 92(13) of the *Constitution* as one that serves to accommodate regional and cultural diversity in law, and it has said that this power must be carefully protected: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [***Greenhouse Reference***] at para. 210. It has further said that s. 92(13) of the *Constitution* gives the provinces autonomy to develop their societies, and that Parliament cannot generally use its powers in a manner that eviscerates the provinces power to do so: *Greenhouse Reference* at para. 49.

[39] Last, I recognize that in *D.L. v. BC Ministry of Children and Family Development and others (No. 3)*, 2021 BCHRT 35 [**D.L.**], the Tribunal states that:

> This Tribunal presumptively has jurisdiction to adjudicate human rights complaints in BC. Constitutionally, this jurisdiction is grounded in s.

> 92(13) of the *Constitution Act, 1867*, which grants the provinces jurisdiction over "property and civil rights": *Azak v. Nisga'a Nation and others*, 2003 BCHRT 79 at para. 23. There is an exception to this jurisdiction where a complaint arises in respect of a matter "coming within the legislative authority of Parliament" for the purpose of triggering the jurisdiction of the *Canadian Human Rights Act*, s. 2; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 at para. 12.

[40] In *D.L.*, the Tribunal relies on its decision in *Azak* and the Supreme Court of Canada's decision in *NIL/TU,O* for its position. For the same reasons I've laid out above, I do not adopt the Tribunal's reasoning on this position.

[41] However, before I move, I comment that in *Azak* the Tribunal also states that in respect of human rights and labour relations, the Supreme Court of Canada has consistently applied the doctrine of interjurisdictional immunity, under which the province has no jurisdiction over a vital part of a federal undertaking, so any otherwise valid provincial laws which affect a vital part of a federal undertaking are inapplicable to that federal undertaking: at paras. 35 and 36. It concludes that because of the doctrine of interjurisdictional immunity, the *Code* cannot apply to the Nisga'a Nation, the Nisga'a Lisims Government or its employees or officers in their exercise of governmental powers under the terms of the Nisga'a Final Agreement: at para 37. I agree that it is appropriate to consider the doctrine of interjurisdictional immunity when assessing whether the *Code* applies to complaints about a First Nation's exercise of governmental powers that are given to it by Parliament. Later, I come back to the doctrine of interjurisdictional immunity.

[42] I have now explained why applying the functional test in *NIL/TU,O* does not result in the *Code* being inapplicable to Westbank First Nation regarding the complaint. Next, I turn to the Westbank First Nation's arguments that the Tribunal has no jurisdiction over the complaint by virtue of the division of powers set out in ss. 91 and 92 of the *Constitution*.

B. Should the Tribunal dismiss the complaint against Westbank First Nation and Mr. Brewer, under s. 27(1)(a) of the *Code*, because it has no jurisdiction by virtue of the division of powers set out in the *Constitution*?

[43] I defer my decision on Westbank First Nations' application for an order dismissing the complaint under s. 27(1)(a) of the *Code* based on the division of powers in the *Constitution*. To make that decision I require additional evidence and further factual inquiry into the matter. As such, I order as follows:

a. If Westbank First Nation wishes to continue with this part of its application, it must, no later than 30 days from the date of this decision, provide the Tribunal its additional submissions and any additional evidence that it wishes to rely on in support its application.

b. If Westbank First Nation does not comply with the order made under paragraph 43(a), the Tribunal will treat this part of its application as withdrawn.

c. If Westbank First Nation continues with this part of its application, then Ms. Stefanishion may, no later than 60 days from the date of this decision, provide the Tribunal any additional response submissions and evidence that she wishes to rely on in opposition to Westbank First Nation's application.

d. Westbank First Nation may, no later than 75 days from the date of this decision, provide the Tribunal any reply it may have to Ms. Stefanishion's response submissions.

[44] Now that I have made my decision, I explain why I require additional evidence and further factual inquiry into whether Westbank First Nation has proven that the Tribunal has no jurisdiction over the complaint based on the division of powers in the *Constitution*.

[45] There are three ways a respondent can prove that the Tribunal has no jurisdiction over the complaint due to the division of powers in the *Constitution*. First, a respondent can prove that the *Code* or a part of it is constitutionally invalid on the basis that the "matter" addressed

by it is within the jurisdiction of Parliament under s. 91 of the *Constitution*. To prove this, they must first point to the *Code*'s leading feature or true character, also described as its "pith and substance," which can be found either in its dominant purpose or in its practical effect. Next, they must show that the pith and substance of either all or part of the *Code* is a matter within the exclusive jurisdiction of Parliament. If they prove this, then either the *Code* or that part of it will be *ultra vires*, meaning that the Province enacted it without constitutional authority: *R. v. Morgentaler*, [1993] 3 SCR 463; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at paras 52 to 58; *Greenhouse Reference* at paras. 51 to 56.

[46] Westbank First Nation made no arguments about whether the *Code*, or part of it, is invalid. As I have already stated, above, the validity of the *Code* was not raised as an issue in its application. If Westbank First Nation intended to raise validity of the *Code* as an issue, then I do not have a sufficient evidentiary or factual basis from it upon which to decide whether the *Code* is invalid.

[47] Second, a respondent can prove that the Tribunal has no jurisdiction because, under the doctrine of federal paramountcy, the *Code* is inoperable respecting the complaint. The doctrine of federal paramountcy stipulates that where a valid federal law conflicts with a valid provincial law, the federal law will prevail. A conflict arises in two situations. First, an operational conflict arises when it is impossible to comply with both the *Code* and a federal law. Second, even if it is possible to comply with the laws of both jurisdictions, a conflict will arise if the operation of the *Code* frustrates the purpose of the federal law: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [***Maloney***] at paras. 18 to 30.

[48] Westbank First Nation has raised the *Westbank Law*, *Westbank Agreement*, *Westbank Animal Law*, and *Canadian Human Rights Act* as relevant to its application. However, it made no arguments about whether there is an operational conflict between the *Code* and those federal laws. It also made no arguments about whether applying the *Code* to the complaint frustrates the purposes of those federal laws. As such, I do not have a sufficient evidentiary or factual

basis upon which to decide whether the *Code* is inoperable respecting the complaint under the doctrine of federal paramountcy.

[49] Before moving on, I note that in the absence of a conflicting federal law, provincial laws of general application can apply on Indian reserves, and federal and provincial laws that merely duplicate one another, but do not conflict, can exist side by side, as is the case regarding provincial and federal laws that regulate traffic on reserve: *R. v. Francis*, [1988] 1 S.C.R. 1025 at para. 9; See also *Maloney* at para 26; *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 80; *Canadian Western Bank v. Alberta,* 2007 SCC 22 [***Western Bank***] at para. 72; and *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161. This is because while the respective powers of the Legislature and Parliament are exclusive, the same fact situations can be regulated from different perspectives, and when this situation arises, the double aspect doctrine applies, which allows both levels of government to enact laws on the matter as long as each level of government is pursuing objectives that fall within their jurisdiction: *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para. 84; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at paras. 14 and 15.

[50] Third, a respondent can prove that the Tribunal has no jurisdiction over a complaint because the doctrine of interjurisdictional immunity deems the *Code* to be inapplicable to that complaint. The Supreme Court of Canada most recently summarised the doctrine of interjurisdictional immunity as follows, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [***PHS***]:

> **58** The doctrine of interjurisdictional immunity is premised on the idea that there is a "basic, minimum and unassailable content" to the heads of powers in ss. 91 and 92 of the *Constitution Act, 1867* that must be protected from impairment by the other level of government: *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 839. In cases where interjurisdictional immunity is found to apply, the law enacted by the other level of government remains valid but has no application with regard to the identified "core".

> **59** It is not necessary to show that there is a conflict between the laws adopted by the two levels of government for interjurisdictional immunity to apply: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 52 ("*COPA*"). Indeed, it is not even necessary for the government benefiting from the immunity to be exercising its exclusive authority: *Western Bank* at para. 34.

[51] On the one hand, the *Code* will be inapplicable to Westbank First Nation under the doctrine of interjurisdictional immunity if it impairs the federal government's jurisdiction over Westbank First Nation. On the other hand, if the *Code* merely has an incidental effect on the federal government's jurisdiction over Westbank First Nation, and such incidental effects are without relevance for constitutional purposes, then the *Code* will continue to be valid and applicable to Westbank First Nation: See for example, *Paul v. British Columbia* (*Forest Appeals* Commission), 2003 SCC 55 at para 14; *R. v. Morris*, 2006 SCC 59 at para. 85. This is because legislation enacted by the Legislature may have incidental or secondary effects upon a head of power that is allocated to Parliament; Incidental intrusions are to be expected: *Western Bank* at paras 25 to 29; *Jim Pattison Enterprises v. British Columbia (Workers' Compensation Board)*, [2011] B.C.J. No. 134 at paras 77 and 78.

[52] Westbank First Nation has made no arguments about whether the *Code* impairs either Parliament's jurisdiction under s. 91(24) of the *Constitution* or the delegated authority that Parliament granted to it under the *Westbank Act* and *Westbank Agreement* to enact and enforce Westbank Laws. As such, I do not have a sufficient evidentiary or factual basis upon which to decide whether the *Code* is inapplicable to the complaint in accordance with the doctrine of interjurisdictional immunity.

[53] Before moving on, I comment that I understand the doctrine of interjurisdictional immunity has been applied to shield First Nations people from provincial laws of general application that deal with the right to ownership and possession of immovable property on reserve: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [***Derrickson***] at para 41. In *Derrickson*, the Supreme Court of Canada held that provisions in the *Family Relations Act*, R.S.B.C. 1979, c. 121 dealing with the division of family assets were not applicable to lands in a reserve that are held

by individual band members under certificates of possession: at para. 43. In doing so, it stated that:

> When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction: at para. 42.

[54] However, the Supreme Court of Canada's revised approaches to that doctrine since it decided *Derrickson* require there to be an element of impairment for the doctrine to apply.

[55] Now that I have explained why I defer my decision on Westbank First Nation's request for an order dismissing the complaint under s. 27(1)(a) of the *Code* based on division of power arguments, I move on to Princess Resort's application for an order dismissing the complaint under s. 27(1)(a) of the *Code*.

C. Should the Tribunal dismiss the complaint against Princess Resort and Mr. Osberg, under s. 27(1)(a) of the *Code*, in accordance with the functional test from NIL/TU,O?

[56] Princess Resort has argued that the functional test in *NIL/TU,O* determines whether an activity on First Nations lands falls under federal jurisdiction, and it has makes various arguments about why its activities fall within the regulation of Parliament. In doing so, it points the Tribunal to *Cahoose v. Ulkatcho Indian Band and another*, 2016 BCHRT 114 [***Cahoose***]. In *Cahoose*, the Tribunal applied the functional test to determine its jurisdiction over a complaint made against the Ulkatcho Indian Band alleging discrimination in employment: at para. 1.

[57] For the same reasons I've set out above regarding Westbank First Nation's application, it is not appropriate for the Tribunal to apply the functional test from *NIL/TU,O* in these circumstances. The Tribunal does not need to determine whether Princess Resort is a federal work, undertaking, or business for the purposes of labour relations. Nor does the Tribunal need

to determine whether Princess Resort is, overall, an entity that Parliament has exclusive authority to regulate under s. 91(24) of the *Constitution*. Those issues are not in dispute.

[58] The issue here is whether the *Code* authorizes the Tribunal to hear a dispute about Princess Resort allegedly discriminating against Ms. Stefanishion in their management of her tenancy agreement over Westbank Lands, which is a private law contract between Ms. Stefanishion and Princess Resort.

D. Should the Tribunal dismiss the complaint against Princess Resort and Mr. Osberg, under s. 27(1)(a) of the *Code*, because it has no jurisdiction by virtue of the division of powers set out in the *Constitution*?

[59] I defer my decision about whether Princess Resort has proven that the Tribunal has no jurisdiction over the complaint based on the division of powers in the *Constitution*. To make that decision I require additional evidence and further factual inquiry into the matter. As such, I order as follows:

a. If Princess Resort wishes to continue with this part of its application, it must, no later than 30 days from the date of this decision, provide the Tribunal its additional submissions and any additional evidence that it wishes to rely on in support its application.

b. If Princess Resort does not comply with the order made under paragraph 59(a), the Tribunal will treat this part of its application as withdrawn.

c. If Princess Resort continues with this part of its application, then Ms. Stefanishion may, no later than 60 days from the date of this decision provide the Tribunal any additional response submissions and evidence that she wishes to rely on in opposition to that application.

d. Princess Resort may, no later than 75 days from the date of this decision, provide the Tribunal any reply it may have to Ms. Stefanishion's response submissions.

[60] Now, I explain why it is that I require additional evidence and further factual inquiry into whether Princess Resort has proven that the Tribunal has no jurisdiction over the complaint based on the division of powers in the *Constitution*.

[61] Princess Resort made no arguments about whether the *Code* or a part of it is constitutionally invalid on the basis that the "matter" addressed by it is within the jurisdiction of Parliament under s. 91 of the *Constitution*. It made no arguments about what the "matter" addressed by the *Code* is. It made arguments about how the use and possession of reserve lands lie at the core of Parliament's jurisdiction over "Lands Reserved for Indians" under s. 91(24) of the *Constitution*. However, those arguments are not helpful to me in assessing the "matter" that lies at the heart of the *Code* and whether that "matter" includes "Lands Reserved for Indians." As such, Princess Resort has not provided me with a sufficient evidentiary or factual basis upon which to decide whether the *Code* is invalid.

[62] I now turn to whether Princess Resort has illustrated that the Tribunal has no jurisdiction because, under the doctrine of federal paramountcy, the *Code* is inoperable respecting the complaint. Princess Resort has raised the *Westbank Law*, *Westbank Agreement* and *Westbank Tenancy Law* as relevant to its application. However, it has made no arguments about whether there is an operational conflict between the *Code* and those federal laws. Nor did it make arguments about whether applying the *Code* to the complaint frustrates the purposes of those federal laws. As such, I do not have a sufficient evidentiary or factual basis upon which to decide whether the *Code* is inoperable respecting the complaint under the doctrine of federal paramountcy.

[63] Last, I turn to whether Princess Resort has illustrated that the Tribunal has no jurisdiction because, under the doctrine of interjurisdictional immunity, the *Code* is inapplicable to the complaint. To begin, I recognise that Princess Resort points to:

a. The Supreme Court of Canada's statement that "The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution*. It follows that provincial

legislation cannot apply to the right of possession of Indian Reserve lands": *Derrickson* at para. 41. The issue in *Derrickson* was whether provisions of the provincial *Family Relations Act* dealing with the right to ownership and possession of immovable property applied to lands on an Indian reserve.

b. The BC Court of Appeal's decision that the provincial *Manufactured Home Park Tenancy Act* is constitutionally inapplicable to a tenancy agreement regarding reserve lands because it purports to regulate possession of land and *Derrickson* is a clear authority that provincial legislation is not applicable to issues regarding possession of reserve lands: *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 at paras. 50 and 51; *McCaleb v. Rose*, 2017 BCCA 318 at paras. 6 and 14.

c. A decision that B.C.'s *Residential Tenancy Act* does not apply to Indian lands. The Supreme Court made that decision by interpreting a landlord and tenant lease using the common law: *Matsqui Indian Band v. Bird*, 1992 CanLII 1255 (BC SC).

d. A decision that Ontario's *Tenant Protection Act* does not apply to leases regarding reserve lands that are entered into under the *Indian Act*, despite s. 88 of the *Indian Act* stating that laws of general application in a province apply to Indians in certain circumstances: *Morin v. Canada* [2000] 4 CNLR 218. The Federal Court decided this case by interpreting and applying s. 88 of the *Indian Act*.

e. A decision that Nova Scotia's *Residential Tenancy Act* has no application to reserve lands in the province because it deals with the management, use and control of land by both landlords and tenants, which conflicts with Parliament's exclusive power to legislate regarding "Indians and Lands Reserved for Indians." The Court also decided that since s. 88 of the *Indian Act* says that laws of general application in the province apply to "Indians" and it does not say they apply to "Indian Lands," the *Residential Tenancy Act* cannot apply to reserve lands in the

province by virtue of s. 88 of the *Indian Act*: *Millbrook Indian Band v. Northern Counties Residential Tenancies Board et al.*, 84 DLR (3d) 174.

[64] Princess Resort further argues that each of the above cases shows that landlord and tenant relations on reserve lands are a federal matter to which provincial landlord and tenant laws are inapplicable. They also argue that the complaint engages a landlord-tenant relationship, so it is outside of provincial jurisdiction to apply the *Code* the complaint. However, Princess Resort has made no arguments about whether the *Code*, which admittedly governs tenant relations but specifically states that its purposes are the prevention, elimination, and remedying of discriminatory conduct, impairs either Parliament's jurisdiction under s. 91(24) of the *Constitution* or the delegated authority that Parliament granted to Westbank First Nation under the *Westbank Act* and *Westbank Agreement* to create and enforce its own laws regarding landlord and tenant matters.

[65] Now that I have explained why I defer Princess Resort's request for an order dismissing the complaint under s. 27(1)(a) of the *Code* based on the division of powers in the *Constitution*, I move on to explaining why Westbank First Nation has not proven that the complaint does not allege a contravention of the *Code* warranting its dismissal under s. 27(1)(b) of the *Code*.

VI SHOULD THE COMPLAINT AGAINST WESTBANK FIRST NATION BE DISMISSED UNDER S. 27(1)(b) OF THE *CODE*?

[66] The Tribunal may dismiss all or part of a complaint under s. 27(1)(b) of the *Code* if it is satisfied that acts or omissions alleged in the complaint do not contravene the *Code*. Under s. 27(1)(b) of the *Code*, the Tribunal only considers the allegations in the complaint and information provided by the complainant. It does not consider alternative scenarios or explanations provided by the respondent: *Bailey v. BC (Attorney General) (No. 2),* 2006 BCHRT 168 at para. 12; *Goddard v. Dixon*, 2012 BCSC 161 at para. 100; *Francescutti v. Vancouver (City),* 2017 BCCA 242 at para. 49.

[67] The threshold for a complainant to allege a possible contravention of the *Code* is low: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56. In this case, to allege that Westbank First Nation contravened s. 8 of the *Code*, Ms. Stefanishion must set out facts that, if proven, could establish that:

a. She has a mental disability, which is a characteristic protected by the *Code*;

b. She experienced an adverse impact regarding a service customarily available to the public; and

c. Her protected characteristic was a factor in the adverse impact she experienced: *Code* at s. 8; *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[68] Westbank First Nation argues that Ms. Stefanishion has not alleged facts that, if proven, could establish that her alleged mental disability was a factor in the adverse impact she says she experienced. More specifically, they argue that she has not alleged facts that if proven could establish a connection between her disability and Mr. Brewer's act of deeming her dog a "dangerous dog" under the *Westbank Animal Law*.

[69] Ms. Stefanishion made no arguments about the facts she has alleged that, if proven, could establish a connection between her alleged disability and Mr. Brewer's alleged conduct. However, she alleges in the complaint that she has PTSD, high acute anxiety, that Bailey is her service dog, and that Bailey is an aid to her mental wellbeing, emotional stability, and getting her out of bed every day. She further alleges that she has not had Bailey with her since May 19, 2020, which is the same date that she says Mr. Brewer told her she could not have Bailey on her rental pad, and that she has been unwell, fragile, and afraid since then. I am satisfied that these alleged facts, if proven, could establish a connection between Ms. Stefanishion's disability and Mr. Brewer's conduct.

[70] Before I move on, I recognise that Westbank First Nation also argues that Ms. Stefanishion acknowledges that Mr. Brewer did not know anything about her disability when he attended her house and told her she had to remove her dog. I accept that Ms. Stefanishion has not alleged facts that, if proven, could establish that Mr. Brewer was aware of her alleged disability at the time. However, discrimination under the *Code* does not require an intention to contravene the *Code*: *Code* at s .2. It is also well established that discrimination can take many forms, including indirect discrimination, where otherwise neutral policies may have an adverse effect on certain groups of people with protected characteristics: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 32.

VII SHOULD THE COMPLAINT BE DISMISSED UNDER S. 27(1)(c) OF THE *CODE*?

[71] Next, I move on to explaining why I deny the respondents' applications to have the complaint dismissed on the basis that it has no reasonable prospect of success at a hearing. I start with preliminary remarks regarding s. 27(1)(c) of the *Code*, then I move on to each of the respondents' applications.

[72] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing. The Tribunal does not make findings of fact under s. 27(1)(c). Instead, it looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[73] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. In a dismissal application, a complainant does not have to prove their complaint

or show the Tribunal all the evidence they may introduce at a hearing. They must only show that the evidence they provide the Tribunal takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [***Hill***] at para. 27.

A. The complaint against Westbank First Nation and Bill Brewer

[74] Now, I explain why I deny Westbank First Nation's application for an order dismissing the complaint against it and Mr. Brewer under s. 27(1)(c) of the *Code*.

[75] To succeed in its application, Westbank First Nation must convince the Tribunal that Ms. Stefanishion has no reasonable prospect of success in proving the complainant's case at a hearing, which requires her to prove each of those matters I have set out above.

[76] I start with Westbank First Nation's argument that Ms. Stefanishion has no evidence to show a connection between the alleged harm that occurred and the identified ground of discrimination. Ms. Stefanishion makes no specific arguments in response. However, she makes written statements in her letter to the Tribunal responding to the dismissal application, as well as in the complaint form, which I treat as her unsworn evidence about the matters in the complaint. She also provided the Tribunal with documentary evidence. In Westbank First Nation's reply to Ms. Stefanishion's response, it made no arguments and provided no additional evidence on this point.

[77] Westbank First Nation has not convinced me that Ms. Stefanishion has no reasonable prospect of success in proving her alleged disability was a factor in the adverse impacts she allegedly experienced regarding its conduct. First, Ms. Stefanishion provided the following evidence which could prove at a hearing that she experienced adverse impacts regarding Westbank First Nation's conduct.

a. In the complaint, Ms. Stefanishion says that having to remove Bailey from her property has resulted in an adverse impact on her psycho-emotional state, her feelings, her stability, and her ability to function.

b. In Ms. Stefanishion's letter to the Tribunal, she says that, on May 19, 2020, Mr. Brewer demanded she remove Bailey from her home by 3:00 p.m. the following day, which triggered her to have increased panic attacks, suicidal ideation and debilitating anxiety and depression.

c. In a May 20, 2020 email from Ms. Stefanishion to Mr. Brewer, she states that Bailey helps her with mood, anxiety, and overall wellbeing. She also states in that email that "I feel you just dismissed my disability and discriminated without offering some accommodation for my needs and impacted me so deeply, emotionally, psychologically that affected by dignity, feelings…"

[78] Second, Ms. Stefanishion provided the following evidence which could prove at a hearing that her alleged mental disability was a factor in the adverse impacts she experienced:

a. In the complaint, Ms. Stefanishion says she has PTSD and panic attacks.

b. A May 25, 2020 document from St. Paul's Hospital states that Ms. Stefanishion attended with chest pain, which she attributed to being separated from her PTSD service dog. The document also states that Ms. Stefanishion reported developing increased anxiety.

c. In a May 28, 2020 email from Ms. Stefanishion to the Kensington Medical Clinic, she asks to reschedule her appointment with the doctor urgently as she is "crashing" and needs a referral to a psychologist asap. She states in the email that her registered service dog, Bailey, had to be removed. A document from Kensington Medical Clinic, with the same date on it, states that Ms. Stefanishion requires regular psychotherapy to assist her in dealing with her chronic anxiety, depression, and severe PTSD.

d. In a May 30, 2020 email from Ms. Stefanishion to a person I refer to as R., she advises R. about Bailey being removed from her property, and says "I've crashed

with my nerves, attended St. Paul ER. And Monday called 911 in Kelowna. It's been very, very traumatic."

e. In a June 3, 2020 email from Ms. Stefanishion to Dr. K.S., she seeks a prescription for something to settle her down. In the email she says, "I'm pretty unstable, seems like I'm in crisis mode waiting, worry about my service dog." In a June 5, 2020 email from Dr. K.S. to Ms. Stefanishion, Dr. K.S. advises Ms. Stefanishion that he can give her a small prescription for periods of acute anxiety.

f. A June 5, 2020 document from the Westside Medical Associates states that Ms. Stefanishion requires counselling due to ongoing PTSD and panic attacks.

g. A July 17, 2020 medical note from Dr. K.S. states that Ms. Stefanishion is highly reliant on her support animal, Bailey, due to her underlying severe mental health issues.

h. A September 27, 2020 medical note from Dr. K.S., states that Ms. Stefanishion suffers from significant anxiety, depression, and symptoms compatible with PTSD, and that she has been prescribed medications with only a partial response. Dr. K.S. states that a vital component of Ms. Stefanishion's therapy and healing process is to have her support dog accessible at all times.

i. An undated written statement from Ms. Stefanishion describes Bailey's main function as a service dog being to help her regulate her emotions and to provide her support for her PTSD, anxiety, and depression, by grounding, distracting, and guiding her in the event of a panic attack. Ms. Stefanishion also states that she has found not having Bailey for the past four months unbearable at times.

[79] Before I move on, I comment on to Westbank First Nation's argument that Ms. Stefanishion cannot prove that Mr. Brewer had knowledge of her alleged disability and that his deeming of her dog as a "dangerous dog" had to do with her alleged disability. As I have already

stated above, Ms. Stefanishion does not need to prove that Mr. Brewer was aware of her alleged disability to succeed in proving her complaint.

B. The complaint against Princess Resort and Darcy Osberg

[80] Next, I explain why I deny Princess Resort and Mr. Osberg's application for an order dismissing the complaint against them under s. 27(1)(c) of the *Code*.

[81] Princess Resort argues that the actions of it and Mr. Osberg are justified. I understand their argument to be that the complaint has no reasonable prospect of success because at a hearing, they are reasonably certain to prove a bona fide and reasonable justification for their conduct. Ms. Stefanishion makes no arguments in response to this part of Princess Resort's application.

[82] To establish that the complaint has no reasonable prospect of success, because at a hearing, Princess Resort and Mr. Osberg are reasonably certain to prove bona fide reasonable justification for their conduct, Princess Resort and Mr. Osberg must establish that there is no reasonable prospect that findings of fact that would disprove the following matters could be made on a balance of probabilities after a full hearing of the evidence:

a. That Princess Resort adopted a standard for a purpose rationally connected to the function being performed;

b. That it adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and

c. That the standard is reasonably necessary to the accomplishment of that legitimate purpose. This third element encompasses its duty to accommodate Ms. Stefanishion to the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 SCR 868 [***Grismer***] at para. 20.

[83] I am satisfied that at a hearing Princess Resort and Mr. Osberg are reasonably certain to prove that Princess Resort adopted a standard that no dogs are allowed in the Park, and that this standard is rationally connected to a function that Princess Resort performs as a landlord. Princess Resort argues that it adopted a general standard of prohibiting dogs from the Park for the purpose of ensuring the safety of tenants and visitors to the Park, and to ensure residents of the Park enjoy peaceful occupancy of their pads. In support of this purpose, it points to s. 12.1 of the *Westbank Tenancy Law*, which says that a landlord must not disturb a tenant's occupancy or enjoyment of their residential premises. It says the no dogs in the Park standard assists it in upholding this duty to tenants.

[84] I assume without deciding, for the purposes of this application, that Princess Resort is reasonably certain to prove that it adopted this standard in an honest and good faith belief that doing so was necessary to safeguard tenants and visitors from harm. While it provides no evidence of this, Ms. Stefanishion has also not contested whether this is the case.

[85] However, Princess Resort has not convinced me that at a hearing it and Mr. Osberg are reasonably certain to prove that after they found out Westbank First Nation had deemed Bailey to be a "dangerous dog," they accommodated Ms. Stefanishion regarding the no dogs in the Park standard to the point of undue hardship.

[86] It is undisputed amongst the parties that after Ms. Stefanishion became a resident of the Park, Princess Resort became aware that she had a dog and that she claimed it was a service dog. In response to this, Princess Resort created an exception to its standard about no dogs in the Park, and it allowed Ms. Stefanishion to have a dog in the Park if she could prove that the dog is a certified guide dog or service dog under the *Guide Dog and Service Dog Act*.

[87] Princess Resort argues that it suspended that permission only after it received complaints about Bailey from other residents and after it found out that Westbank First Nation had deemed Bailey to be a "dangerous dog." It also argues that the suspension was only in place until the outcome of an investigation under the *Guide Dog and Service Dog Act* into

complaints about Bailey. In support of these arguments, Princess Resort provided the Tribunal with:

a. Documents dated August 6 and 15, 2019, in which Mr. Osberg advises Ms. Stefanishion that it's received complaints about Bailey being off-leash, on the beach, and chasing neighbourhood cats, about Bailey being off-leash swimming with other residents who do not feel comfortable with that.

b. Two June 2020 letters from Mr. Osberg to Ms. Stefanishion, in which he advises her that Princess Resort must ensure the safety of all tenants and visitors of the Park, that there is an active investigation under the *Guide Dog and Service Dog Act* into complaints about Bailey, and that it does not permit Bailey to be in the Park until the outcome of that investigation. Princess Resort also provided the Tribunal with

[88] Princess Resort has provided no evidence that could illustrate at a hearing that after it received complaints about Bailey in August 2019, it considered options regarding how to address those complaints without enduring undue hardship. For example, it did not consider alternatives to requiring Ms. Stefanishion to remove Bailey from the property. Princess Resort says it required Ms. Stefanishion to keep Bailey on a leash when on the common property of Shady Rest Park. However, it has not provided any evidence that it took any further steps, or considered any other options, about how to accommodate Ms. Stefanishion so she could keep Bailey while at the same time, ensuring other residents maintained peaceful occupancy of their pads. There is no evidence that Princess Resort did anything in response to these complaints, other than advise Ms. Stefanishion of the complaints.

[89] Likewise, Princess Resort has provided no evidence that could illustrate at a hearing that after Westbank First Nation deemed Bailey to be a "dangerous dog," it considered or took any steps to accommodate Ms. Stefanishion so she could keep Bailey while at the same time, ensuring the safety of residents and tenants, and that other residents maintained peaceful occupancy of their pads. According to the evidence of Ms. Stefanishion, she tried to take

additional steps to address concerns about Bailey, by building a fence that would enclose her pad area, and Ms. Osberg told her that she had to cease doing so because she had no approval from Princess Resort to do so. There is no evidence from Princess Resort about whether it considered approving Ms. Stefanishion's building of a fence, or about whether it would have experienced undue hardship if it had allowed her to do so.

[90] Now that I have explained why I am not convinced that, at a hearing, Princess Resort and Mr. Osberg are reasonably certain to prove a bona fide and reasonable justification for their conduct, I move on to explain why I find that Princess Resort has not proven the complaint should be dismissed because it was appropriately dealt with in another proceeding.

VIII SHOULD THE COMPLAINT AGAINST PRINCESS RESORT BE DISMISSED UNDER S. 27(1)(f) OF THE *CODE*?

[91] The Tribunal may dismiss a complaint under s. 27(1)(f) of the *Code* if the substance of that complaint has been appropriately dealt with in another proceeding. The principles underlying s. 27(1)(f) of the *Code* include finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity, and delay. In applying s. 27(1)(f) of the *Code*, the Tribunal is guided by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues that have already been decided: *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52 [***Figliola***] at para. 36.

[92] Princess Resort applied for an order dismissing the complaint under s. 27(1)(f) of the *Code* on the basis that the complaint has been appropriately dealt with in an arbitration proceeding under the *Westbank Tenancy Law*. However, it has not convinced me that the arbitration proceeding has appropriately dealt with the complaint.

[93] To decide whether the substance of the complaint has been appropriately dealt with in that other proceeding, I consider whether:

a. In the other proceeding, the decision-maker had jurisdiction to decide human rights issues under the *Code*;

b. legal issue decided in that other proceeding was essentially the same as what is in the complaint to the Tribunal; and

c. The complainant had an opportunity in the other proceeding to know the case to be met and have a chance to meet it, regardless of how closely the other proceeding's processes mirror the Tribunal's processes: *Figliola* at para. 37

[94] The arbitration proceeding addressed a complaint by Ms. Stefanishion against Princess Resort under s. 12 of the *Westbank Tenancy Law,* which provides that a landlord must not disturb a tenant's occupancy or enjoyment of their residential premises. In that proceeding Ms. Stefanishion argued that Princess Resort prohibited her from having Bailey at the Shady Rest Park, which was a breach of its obligations under s. 12 of the *Westbank Tenancy Law*. The *Westbank Tenancy Law* does not authorise an arbitrator acting under it to decide human rights issues under the *Code*.

[95] Furthermore, the arbitrator expressly declined to deal with the legal issue that is before the Tribunal in this complaint, which is whether Princess Resort discriminated against Ms. Stefanishion under s. 10 of the *Code* when, in May 2020, it required her to remove Bailey from her pad and the Shady Rest Park. Specifically, in paragraph 66 of the arbitrator's decision the arbitrator states that a claim for breach of human rights and or discrimination is to be heard in the appropriate forum. The sole legal issue before the arbitrator was whether Princess Resort breached s. 12 of the *Westbank Tenancy Law*. Section 12 of that law sets out that if the breach s. 12, the tenant may apply to an arbitrator for an order requiring the landlord to comply with their obligations and / or requiring the landlord to compensate the tenant for loss that has been or will be suffered as a direct result of the breach. This is a different legal issue than the one raised in the complaint.

[96] I have now explained why Princess Resort has not proven that the substance of the complaint has been appropriately dealt with in the arbitration proceedings under the *Westbank Tenancy Law*. Next, I move on to why Westbank First Nation has not proven that the complaint

against Mr. Brewer should be dismissed because continuing with that part of it would not further the purposes of the *Code*.

IX SHOULD THE COMPLAINT AGAINST BILL BREWER BE DISMISSED UNDER S. 27(1)(d)(ii) OF THE *CODE*?

[97] Under s. 27(1)(d)(ii) the Tribunal may dismiss a complaint if proceeding with it would not further the purposes of the *Code*. Those purposes are set out in s. 3 of the *Code*. Deciding whether a complaint furthers the purposes of the *Code* includes considering both the interests in the individual complaint and broad public policy issues like the efficiency and responsiveness of the human rights system and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73 at para. 59; *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15. This is because s. 3 of the *Code* articulates both the general public interest in fostering a society free of impediments and discriminatory behaviour, and a specific purpose in providing a means of redress for persons who have been discriminated against: *Carter v. Travelex Canada Limited*, 2009 BCCA 180 [***Carter***] at para. 36.

[98] When it comes to individual respondents, on the one hand, there are strong policy reasons that favour complaints against them. As the Supreme Court of Canada has acknowledged, "the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions": *British Columbia Human Rights Tribunal v. Schrenk,* 2017 SCC 62 at para. 56. On the other hand, naming individual respondents can complicate and delay the resolution of complaints, exacerbate feelings of personal animosity, and cause needless personal distress to individuals who are accused of discrimination: *Daley* at para. 54. Because employers and institutional respondents are liable for the acts of their agents, they will be responsible for any remedy ordered by the Tribunal against an individual respondent who acted as an agent for them: *Code*, s. 44(2); *Robichaud v. Canada*, [1987] 2 SCR 84. In these types of situations, the remedial aims of the *Code* may be fairly and efficiently fulfilled without holding the individual respondent liable.

[99] The Tribunal balances these considerations when it decides whether proceeding with a complaint against an individual respondent as well as an institutional respondent furthers the purposes of the *Code*. It has identified the following factors as relevant, each of which I consider in this application:

a. whether the complaint names an institutional respondent;

b. whether that institutional respondent has the capacity to fulfill any remedies that the Tribunal might order;

c. whether that institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and

d. the nature of the conduct alleged against the individual, including whether:

e. their conduct took place within the regular course of their employment;

f. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and

g. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

Daley v. BC (Ministry of Health), 2006 BCHRT 341 [***Daley***] at paras. 60 to 62.

[100] Westbank First Nation argues that the complaint against Mr. Brewer should be dismissed because Mr. Brewer’s conduct in relation to the complaint occurred while he was performing his duties as its Law Enforcement Officer, so the conduct in the complaint occurred within the regular course of Mr. Brewer’s employment. It also argues that Westbank First Nation accepts liability for Mr. Brewer’s conduct and that it will fulfill the remedies if the complaint is successful.

[101] First, I recognise that Ms. Stefanishion has named Westbank First Nation in the complaint. As such, I am satisfied that she's named an institutional respondent in the complaint.

[102] Second, in Mr. Brewer's affidavit, he sets out that he is the Law Enforcement Officer of Westbank First Nation, so I am also satisfied that Mr. Brewer's conduct took place in the course of his employment.

[103] However, Westbank First Nation has not provided any evidence that it, through its Chief and Council or otherwise delegated officials, acknowledges the acts and omissions of Mr. Brewer as its own, that it irrevocably acknowledges its responsibility to satisfy any remedies the Tribunal may order regarding Mr. Brewer's conduct, or that it has the capacity to fulfill any remedies the Tribunal may order. Westbank First Nation's legal counsel provided its submissions to the Tribunal, and I accept that Westbank First Nation would have directed her to do so. However, the application and the submissions attached to it are not evidence. They are not signed by Westbank First Nation officials who have the power to legally bind its word. If they were, I could have treated them as evidence. Instead, there is no written statement, affidavit, or other evidence from Westbank First Nation officials setting out that it makes these acknowledgments or commitments.

X CONCLUSION

[104] I have now explained why I deny each of the respondents' applications. As such, the complaint will move forward in the Tribunal's processes.

Sonya Pighin
Tribunal Member