

Date Issued: May 14, 2024

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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:

Ralph West

COMPLAINANT

AND:

Pitka Logging Ltd., Jean Yves Martineau, David Philips, Roland Martineau, Gordon Reid,
and Dallas Everett

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(a),(b),(c),(f) and (g)

Tribunal Member:

Theresa Etmanski

Counsel for the Complainant:

Daniel C. Gallant

Counsel for the Respondents:

Douglas McLauchlan

I INTRODUCTION

[1] Ralph West is an Indigenous man with decades of experience operating heavy machinery. He was employed full-time by Pitka Logging Ltd. [Pitka] during a period of significant community division surrounding the extraction of natural resources on unceded Indigenous traditional territories by government and private enterprise. He says the Respondents perceived him to share the political opinions of the local First Nations who oppose this industry. He alleges that during his employment he experienced and reported discriminatory treatment by his colleagues, but his employer failed to respond and ultimately terminated him. Mr. West now brings a complaint against Pitka and five individual respondents under s. 13 of the *Code*, based on his ancestry, colour, place of origin, race and political belief.ⁱ

[2] In the circumstances of this case, when Mr. West's race, ancestry, place of origin, and colour are taken together they can be appropriately characterized as his Indigeneity or his Indigenous identity. I will refer to them as such throughout this decision.

[3] The respondents Pitka, David Philips, Dallas Everett, and Gordon Reid [together, the **Respondents**] apply to dismiss the complaint under s. 27(1)(c) of the *Code* because they say it has no reasonable prospect of success. The Respondents acknowledge that Mr. West experienced adverse treatment when his employment was terminated, but state that he has no reasonable prospect of proving that his protected characteristics were a factor in the termination. Further, the Respondents state that Mr. West has no reasonable prospect of proving that the individual respondents subjected him to any adverse treatment, or that his protected characteristics were a factor in any alleged treatment.

[4] In addition, the Respondents apply to dismiss the complaint against Mr. Everett under s. 27(g) of the *Code*, because they say the alleged discriminatory conduct occurred more than one year before the complaint was filed.

[5] With respect to the allegations against Pitka, Mr. Philips and Mr. Reid, the Respondents further apply to dismiss the complaint under ss. 27(1)(a), (b) and (f) of the *Code*, because they say that part of the remedy sought by Mr. West: "loss of EI benefits" and "Change of Record of

Employment to accurately reflect what happened,” have been conclusively and finally litigated through Service Canada. The substance of the Respondents’ submissions on this issue focusses on a decision made in another proceeding. The Respondents have not made submissions regarding jurisdiction or whether the alleged acts or omissions contravene the *Code*. I have therefore found it most appropriate to consider their arguments under s. 27(1)(f) of the *Code*.

[6] Although the Respondents indicate that they also bring this application under s. 27(1)(d) and (e), they have not explained the basis for raising these provisions. They will not be considered in this decision.

[7] Mr. West opposes this application and says he has met the low threshold for his complaint to proceed to a hearing. He says his allegations against Mr. Everett form part of a continuous pattern of discrimination, and Service Canada did not deal with the substance of this complaint, or the compensation he is entitled to. He argues it will further the purposes of the *Code* to proceed with his complaint.

[8] The individual respondents Roland Martineau and Jean Yves Martineau have not responded to the complaint and are not involved in this application. Theresa Philips affirms that after receiving Mr. West’s complaint form, she telephoned both these individuals who were no longer employed with Pitka and informed them about the complaint. She states that she has tried without success to determine the current address for both of them, and believes they have “washed their hands” of this complaint.

[9] Two preliminary matters related to additional materials also arise in this application. The Respondents have filed additional pages in their reply without applying for permission to do so. Mr. West has also made an application to file a sur-reply to address what he says is a new argument raised by the Respondents. As explained below, I have decided to allow both of these additional submissions.

[10] For the following reasons, I deny this application to dismiss the complaint without a hearing. To make this decision, I have considered all the information filed by the parties.

Because the evidence of the parties is in conflict on fundamental issues, a hearing is required. In these reasons, I only refer to what is necessary to explain my decision.

II BACKGROUND

[11] The following is a summary of relevant information taken from the materials provided by the parties. I make no findings of fact.

[12] Mr. West is a member of the Takla First Nation. He was employed by Pitka from on or around July 16, 2018, to on or around February 14, 2019.

[13] Pitka is a family owned and operated logging company located in central British Columbia. Mr. Philips and Ms. Philips own Pitka's shares, and oversee production and administration, respectively. According to Mr. West, Pitka "operates and conducts business within and on unceded territories of local Indigenous peoples," including the Unist'o'ten.

[14] According to Ms. Philips, in the fall of 2018, there was:

a great deal of discussion on social media and the local news about the blockades in Burns Lake and in Hazelton. Non-native residents expressed frustration with the blockade and some First Nations residents expressed frustration with non-native residents exploiting natural resources and logging rights on unceded territory. Some of the comments by non-First Nations posted on social media were racist and extremely offensive. [...] [T]his heightened political hostility prevailed for over a year.

[15] Ms. Philips says that Pitka employees also discussed the blockade during this period but describes the conversation as "the expression of competing political opinions."

[16] Mr. West's primary role with Pitka was a buncher operator. A buncher is a piece of heavy equipment that goes into the trees before the other machines and breaks roads and trails by falling trees on raw forest land. Buncher operators typically work in teams of two, each operating their own machines around the same defined area. The buncher operators usually drive to the work site together.

[17] Mr. Everett, Jean Yves Martineau and Roland Martineau were also buncher operators employed by Pitka throughout Mr. West's employment. Jean Yves Martineau and Roland Martineau are brothers [the **Martineau brothers**].

[18] Mr. West had previously worked with the Martineau brothers, and the Respondents say they recommended him for the position at Pitka.

[19] The Respondents state that Mr. West was hired, in part, because he had an expired Level 3 First Aid certification. At the beginning of his employment, Pitka paid for Mr. West to renew this certification. Mr. West says that he subsequently became the Level 3 First Aid attendant on each job site. He says that Pitka informed him that his new duties included reporting unsafe work incidents to his supervisors: Mr. Reid, the foreman, and Mr. Philips.

[20] At the beginning of his employment, Mr. West drove to the work site with Mr. Everett.

[21] The Respondents say that Mr. West did not attend work on September 20, 2018. When Mr. Reid contacted him for an explanation, Mr. West said he did not want to ride to work with Mr. Everett anymore because he was very "negative". Mr. Reid's log notes from that day state: "Ralf never showed up for work text him and he texted back he did not want to ride with Dallas for one trip. Man I love these spoiled brats." [As written.]

[22] In contrast, Mr. West alleges that, sometime on or around September 21, 2018, Mr. Everett told him that he no longer wanted Mr. West to ride in his vehicle.

[23] On or around September 21, 2018, Mr. West and Ms. Philips discussed his relationship with Mr. Everett. The Respondents say he told her that Mr. Everett was "very negative" and that it was not good for his spirit to be around such negativity. Mr. West disagrees, and states that he told Ms. Philips that he believed he was experiencing racism from Mr. Everett. He says that Ms. Philips ignored his report and said: "people are free to believe what they want."

[24] Pitka arranged for Mr. West to start driving to the work site with the Martineau brothers on September 23, 2018.

[25] Mr. West alleges that approximately two weeks later, he overheard dialogue on the company CB radio. He says Mr. Reid and Mr. Philips were giving instructions to Mr. Everett and other employees to leave a pile of wood on the edge of the worksite because some local residents would be coming to cut it into firewood. He says immediately after, Mr. Everett “went into a tirade” stating that they should not be leaving wood for the “Indians who get everything for free”, and other discriminatory comments about the Unist’o’ten and Indigenous peoples in general. He says no one else commented on the radio about Mr. Everett’s comments. Mr. Everett denies these allegations.

[26] Mr. West further alleges that while driving with the Martineau brothers, they also made comments about the Unist’o’ten, calling them “Indians” who were “blockading roads” and other discriminatory statements about “those Indians” and other Indigenous people in general. He says he reported these comments to Mr. Reid in January 2019, but that Mr. Reid ignored them. Mr. West also alleges that he reported incidents of unsafe workplace conduct by the Martineau brothers to Mr. Reid, but Mr. Reid ignored these reports as well. Mr. Reid denies that Mr. West ever reported these issues to him. He only recalls Mr. West commenting that the Martineau brothers spoke French during the commute to work.

[27] On or around January 21, 2019, Mr. West alleges that Mr. Philips attended the job site, and Mr. West reported the same incidents of unsafe work and discrimination to him. He states that he explained that the Martineau brothers had made untrue comments about how “Indians” were receiving large amounts of royalties and sponging off society. He states that he also mentioned the comment that Mr. Everett had made over the radio and that nobody did anything about it. He says he also pointed out safety concerns about the Martineau brothers’ driving. Mr. West says that Mr. Philips commented that he had not heard about the incidents from Mr. Reid. He also says that Mr. Philips told him to “wear [his] headphones and ignore the Martineaus comments,” and to ask them to speak to each other in French so he would not have to listen to them.

[28] Mr. Philips says that in January 2019, Mr. West told him that he did not like riding with the Martineau brothers because they spoke French and he thought they were talking about

him. Mr. Philips says that French is the Martineau brothers first language, so he did not think there was anything he could do. He agrees that he suggested that Mr. West wear headphones and listen to music while riding to work.

[29] Mr. West says that during this conversation with Mr. Philips, he expressed that he wanted to use his own vehicle to get to work. Mr. Philips agrees that this was discussed, but states that it was him who first raised this as an option and asked Ms. Philips to draft a vehicle rental agreement for Mr. West. Upon review of the agreement, Mr. West decided that it was not in his interests to drive his own vehicle because he believed he would not make as much as anyone else using their own vehicle for work. Mr. West alleges that Pitka was treating him unfairly compared to the travel compensation he had received while attending the Level 3 First Aid training at the beginning of his employment.

[30] On or around February 11, 2019, Mr. West alleges that he made a verbal report to Mr. Reid about Jean Yves Martineau's continued unsafe driving, and that he was still being subjected to ongoing discriminatory and racist comments. He says Mr. Reid seemed annoyed with him and dismissive.

[31] On or around February 12, 2019, Mr. West alleges that he was left at a machine in the cold by the Martineau brothers and another colleague. He states that this was contrary to normal procedure where they would start the machines, and then wait in the crew trucks until they warmed up.

[32] Mr. Reid says that Mr. West informed him about the Martineau brothers driving away before the machine had warmed up. He says he spoke to Jean Yves Martineau, who informed him that Mr. West always stood outside his machine and smoked, so he did not see the sense in waiting around for the machine to warm up. Mr. Reid says he told Jean Yves Martineau to wait anyway, and he said he would. Mr. Reid also says that the machines have a "pro-heat" feature which allows the cab to heat up within minutes.

[33] Mr. West says the Martineau brothers became angrier toward him when they were travelling to and from work, saying that he was causing problems for them. He says they told him he should quit his job and go work somewhere else.

[34] On or around February 13, 2019, Mr. West alleges that he was again left outside in the cold at his machine alone.

[35] Mr. West states that the situation became very stressful, and the Martineau brothers became more aggressive and “nasty” towards him. He says he told them to “quit making accusations about [him] or [he] would use the stuff that could hurt them”. He says Jean Yves Martineau began to yell at him saying that Mr. West had threatened them and that he can “play this game too.”

[36] On February 14, 2019, Jean Yves Martineau reported to Mr. Reid that Mr. West had threatened to kill him, his brother, his wife, and his dog. Mr. Reid states that Jean Yves Martineau sounded scared when he told him this. Mr. Philips also spoke to Jean Yves Martineau with Ms. Philips in the room, and they both agreed that Jean Yves Martineau sounded “genuinely scared” during this call. Ms. Philips suggested that they should report the threat to the police.

[37] Mr. Reid called Mr. West and told him not to attend work while this matter was investigated. He says Mr. West denied threatening the Martineau brothers.

[38] The Martineau brothers reported Mr. West’s alleged threat to the RCMP. The RCMP report dated February 15, 2019, states:

The MARTINEAU’s stated that WEST told them he was capable of killing both of them. The MARTINEAU’s reported the incident to their boss who promptly fired WEST. Supervisors at Pitka Logging Limited recommended that the MARTINEAU’s report the incident to the RCMP to address any safety concerns. R. and Y. Martineau stated that they had no concerns over what WEST said but that they wanted to report the incident to satisfy their bosses. Neither R. nor Y. MARTINEAU wanted charges.

[39] The RCMP followed up with Mr. West on February 17, 2019, and reported:

WEST was upset by the way that Yves MARTINEAU was acting and so he told Yves that he had stuff that could hurt him. WEST stated that he meant that to mean that he had evidence on Yves MARTINEAU that could get him fired (evidence that Yves was driving recklessly in a work truck and being careless at work). WEST state that he did not threaten to harm Yves or Roland and that he had no intention of harming either of them. [...] Cst. DE MOLITOR informed WEST that he had no concerns about anyone's safety concerning the incident and that the RCMP's involvement in the file ends at speaking with WEST.

[40] The Respondents state that Ms. Philips investigated the alleged threat, including speaking with Mr. West. She states that he admitted to saying "I have stuff that can hurt you guys" to the Martineau brothers. By "stuff" he said he had videos on his phone to prove that Jean Yves Martineau was an unsafe driver. She further states that Mr. West said that he had threatened the Martineau brothers because they had left him to wait in the cold while his machine warmed up, and he thought he could die. Mr. West also raised concerns about "inappropriate banter" on the radio, such as people using the word "cocksucker" which reminded him of residential school. Ms. Philips says she reminded him that he also had a reputation for engaging in "inappropriate banter" on the radio. She says he also raised for the first time allegations that the Martineau brothers had made racist comments about the blockade; to which she replied that he should have discussed this problem with her sooner.

[41] Ms. Philips was not convinced by Mr. West's allegations against the Martineau brothers. Both Mr. and Ms. Philips also thought the "threat" that he had admitted to was sufficient to terminate his employment. They informed Mr. West of this decision.

[42] Mr. West applied for Employment Insurance benefits following his termination. His claim was denied on the basis that he had been dismissed for his own misconduct related to threatening the Martineau brothers.

[43] In May 2019, Mr. West unsuccessfully campaigned to become Chief of his First Nation. The parties disagree on whether Mr. West ever informed anyone at Pitka that he intended to campaign in this election while he was an employee.

[44] Mr. West filed this human rights complaint in October 2019.

[45] In July 2020, the parties agree that Mr. West encountered Mr. Philips in a public setting, and Mr. Philips greeted him as “Chief”. Mr. Philips says he started calling Mr. West by this title after learning he was running in the election, and Mr. West had never previously objected. Mr. West disagrees that Mr. Philips had ever previously called him “Chief,” and says this use of a stereotypical term was racist and humiliating.

III PRELIMINARY MATTERS

[46] Generally speaking, the Tribunal’s application process involves three submissions: the application, the response, and the reply: Rule 28(2). The Tribunal may accept further submissions where fairness requires that a party be given an opportunity to respond to new issues raised in reply: Tribunal *Rules of Practice and Procedure [Rules]*, Rule 28(5); *Kruger v. Xerox Canada Ltd (No. 2)*, 2005 BCHRT 24 at para. 17. The overriding consideration is whether fairness requires an opportunity for further submissions: *Gichuru v. The Law Society of British Columbia (No. 2)*, 2006 BCHRT 201, para. 21.

[47] The Tribunal’s Practice Direction on “Page Restrictions on Applications to Dismiss a Complaint” limits a respondent’s written argument to 15 pages, a complainant’s response argument to 15 pages, and a respondent’s reply argument to five pages, subject to leave of the Tribunal. These page restrictions apply to argument only and not to evidence.

[48] The Respondents have attached a 19-page document titled “Schedule B” to their reply argument. The document provides a table containing what they describe as a summary of the Respondents’ evidence in response to the information contained in Mr. West’s sworn statement, as drafted by counsel. The Respondents say this additional material is necessary because Mr. West’s 24-page sworn statement is largely argumentative, yet they are limited in

their reply to five pages to respond to both the evidence and Mr. West's 15-page response submission.

[49] It is not clear if "Schedule B" is more appropriately considered as additional argument, or as evidence, as it appears to contain some aspects of both. To the extent that these additional pages amount to simply a summary of the Respondent's evidence, I have considered this material: *Malagoli v. City of North Vancouver and another*, 2023 BCHRT 42 at paras. 42-53. However, where the material veers into editorial commentary or legal argument, I have declined to consider those portions in this decision. The Respondents' have not applied to make additional submissions beyond the five-page limit for a reply.

[50] Upon receiving the Respondents' reply, Mr. West applied to make further submissions to respond to what he says is a new argument raised by the Respondents for the first time. Mr. West says that the attack on his credibility in the Respondents' reply is a new allegation against him, and he was unaware that the Respondents were intending to take the approach of attempting to discredit him. He says that it would be procedurally unfair for him not to have the opportunity to reply to this argument. He says that there would be no prejudice to the Respondents if he were allowed to make further submissions, whereas he would be prejudiced by not having the opportunity to further respond. Mr. West has included a two-page sur-reply with his application. The Respondents' have not provided a response.

[51] While the Respondents raised credibility arguments in the initial application, I agree that the particularized nature of their arguments on reply are new, and fairness requires that Mr. West be given the opportunity to respond. I therefore allow Mr. West's sur-reply to be admitted for consideration in this application to dismiss.

IV DECISION

A. Section 27(1)(c) – No reasonable prospect of success

[52] The Respondents apply to dismiss Mr. West’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on the Respondents to establish the basis for dismissal.

[53] Section 27(1)(c) is part of the Tribunal’s gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[54] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal 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.

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

[56] Many human rights complaints raise issues of credibility. This is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. However, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para 67.

[57] To prove his complaint at a hearing, Mr. West will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[58] The Respondents deny some of the alleged conduct and offer a non-discriminatory explanation for the other conduct alleged as discriminatory by Mr. West. They say Mr. West's allegations that his Indigeneity was a factor in any of the alleged treatment is no more than speculation.

[59] The parties have provided conflicting evidence which directly relates to key issues of what occurred during Mr. West's employment, how the Respondents' responded to his alleged reports of discrimination, and the events surrounding his termination. For example, there are contradictions in the evidence about whether:

- a. Mr. Everett refused to let Mr. West ride with him to and from the work site because of his Indigeneity, or if Mr. West simply did not want to ride with him because of his "negativity".
- b. The Martineau brothers made discriminatory comments to Mr. West and about Indigenous people generally.
- c. The Martineau brothers made false allegations to Pitka and the RCMP about Mr. West having threatened them with violence, in a plan to have his employment terminated.
- d. Mr. West reported any workplace safety concerns or discriminatory comments to Mr. Reid and/or Mr. Philips, and if so, whether Mr. Reid and/or Mr. Philips ignored and failed to investigate or act on those reports.
- e. Pitka terminated Mr. West's employment based on false allegations by his coworkers, rather than responding to his allegations against them.

[60] If Mr. West were to prove that he reported discriminatory comments by his coworkers and the Respondents failed to appropriately respond or reasonably investigate, his complaint could succeed, regardless of whether the underlying conduct is found to be discriminatory: *Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at para. 272; *Jamal v. TransLink Security Management and another (No. 2)*, 2020 BCHRT 146 at para. 106. Further, a violation of the *Code* could be established if Mr. West can prove that Pitka's response to his reports, including his termination, was influenced by his Indigeneity: *Donaldson v. Universal Flagging Inc.*, 2021 BCHRT 109 at para. 115-116; *Lawrence v. Canadian Aboriginal AIDS Network and another*, 2023 BCHRT 155 at para. 35.

[61] Some of Mr. West's allegations include explicit racist statements directed at him and others sharing his personal characteristics. Other allegations in this complaint may require the Tribunal to draw an inference of a nexus to his personal characteristics based on all the circumstances of the complaint.

[62] The Tribunal has acknowledged that discrimination on the basis of race is frequently subtle, and direct evidence is rarely available: *Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)*, 2006 BCHRT 60 at para. 28.

[63] A contextual examination of all relevant circumstances is often required to identify the "subtle scent of discrimination": *Kennedy v. British Columbia (Energy and Mines) (No. 4)*, 2000 BCHRT 60 at para. 168. Individual acts, viewed in isolation, may be ambiguous or explained away. However, the social context and an understanding of how racial discrimination may take place can support a finding that a person has experienced an adverse impact, and that protected characteristics such as race, colour, ancestry, place of origin, and religion were factors in that adverse impact: *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 at paras. 104-105; *Martinez Johnson v. Whitewater Concrete Ltd. and others (No. 2)*, 2022 BCHRT 129 at para. 20.

[64] If explicit racist statements are proven, that would amount to direct evidence of discrimination. However, in the absence of direct evidence of racial discrimination, complaints

before the Tribunal often turn on an inference. An inference of discrimination may arise “where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses”: *Vestad v. Seashell Ventures Inc*, 2001 BCHRT 38 at para. 44.

[65] It is open to the Respondents to rebut any such inference by providing a reasonable non-discriminatory explanation for their conduct: *Probyn v. Vernon Dodge Jeep*, 2012 BCHRT 87 at para. 28. However, due to the unresolved conflicts in the parties’ evidence, I am unable to conclude that Respondents have done so on this application.

[66] While the parties have provided extensive submissions including affidavit and documentary evidence, I find there are core issues that cannot be resolved at this stage where findings of fact cannot be made. I have listed examples of those core issues above. These issues are central to the complaint and the response to the complaint. I am therefore unable to conclude that Mr. West’s complaint has no reasonable prospect of success. A hearing is required so that the evidence can be weighed and tested through cross-examination.

[67] The Respondents’ application under s.27(1)(c) is denied.

B. Section 27(1)(f) – Substance of complaint appropriately resolved in another proceeding

[68] The Respondents further apply to have the complaint dismissed on the ground that all or part of the remedy he seeks - “loss of EI benefits” and “Change Record of Employment to accurately reflect what happened” - have conclusively and finally been litigated through Service Canada.

[69] The Tribunal may dismiss a complaint under s. 27(1)(f) of the *Code* if the substance of the complaint has been appropriately dealt with in another proceeding. The principles underlying s. 27(1)(f) flow from the doctrines of issue estoppel, collateral attack and abuse of process, and include finality, fairness, and protecting the integrity of the administration of justice by preventing unnecessary inconsistency, multiplicity, and delay: *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52 at paras. 25 and 36.

[70] To decide whether the substance of a complaint has been appropriately dealt with in another proceeding, the Tribunal must ask itself three things:

- a. Did the other proceeding have jurisdiction to decide human rights issues under the *Code*?
- b. Was the previously decided legal issue essentially the same as what is being complained of to the Tribunal?
- c. Did the complainant have the opportunity to know the case to be met and have a chance to meet it, regardless of whether the previous process mirrored the Tribunal's?

Figliola at para. 37

[71] Ultimately, the Tribunal must decide “whether it makes sense to expend public and private resources on the re-litigation of what is essentially the same dispute”: *Figliola* at para. 37.

[72] The Respondents say that Service Canada determined that Mr. West was not qualified for regular Employment Insurance [EI] benefits due to “misconduct”. The Respondents further say that Service Canada determined that Mr. West knew that his actions in threatening Jean Yves Martineau and Roland Marineau would adversely affect his employment and that there was no connection between the alleged discriminatory conduct and the reasons for his dismissal. Mr. West requested a reconsideration of that decision, but declined to provide further information, and as a result Service Canada upheld the initial decision. Mr. West did not appeal. The Respondents state that Mr. West subsequently agreed to forego any further application for regular benefits founded on hours of employment earned while working at Pitka and abandoned that claim irrevocably. In this proceeding, the Respondents say that Mr. West seeks to re-litigate the Service Canada decision. The Respondents argue that he is barred from doing so by operation of issue estoppel or cause of action estoppel. They rely on *Figliola*; *Sharrock v. Nanaimo Forest Products and PPWC, Local 8 (No. 2)*, 2009 BCHRT 339.

[73] Mr. West denies seeking to relitigate a decision of Service Canada. He says that Service Canada's decision does not have any bearing on the determination of the merits of whether the discrimination alleged in this complaint occurred. Service Canada did not hear a complaint of discrimination. Rather, he says they based their assessment on inaccurate information constructed by the Respondents. Mr. West says that he was clear during that process that he intended to pursue separate human rights proceedings.

[74] Further, Mr. West says that the argument put forward by the Respondents lends itself to submissions to be heard before the Tribunal regarding an appropriate remedy to this complaint. He says that he is seeking compensation for losses including damage to dignity, loss of income, as well as loss of employment insurance benefits.

[75] Finally, Mr. West argues that the cases relied upon by the Respondents do not support their argument, as the facts between this matter and those cases are different.

[76] I am not persuaded the complaint has been appropriately dealt with in another proceeding. For the following reasons, I deny the Respondents' application under s. 27(1)(f) of the *Code*.

[77] Service Canada makes its decisions pursuant to the *Employment Insurance Act [ESA]* and *Regulations*. The legal issue it had to determine was whether Mr. West was ineligible for Employment Insurance benefits because his employment was terminated due to reports of his own misconduct: ESA s. 30.

[78] The legal issue before the Tribunal is whether the Respondents discriminated against Mr. West based on his Indigeneity. The Tribunal must determine whether the Respondents subjected Mr. West to adverse treatment in the workplace, including discriminatory comments, and terminated his employment based on his protected characteristics. While Mr. West also alleges that he was ineligible for EI benefits because of the discriminatory nature of his termination, this is only a peripheral aspect of his complaint.

[79] Neither party has made submissions on whether Service Canada has the jurisdiction to decide human rights issues under the *Code*. However, a review of the EIA suggests that Service Canada’s jurisdiction to apply human rights legislation appears to be limited to determinations of eligibility for benefits whether an employee voluntarily left their employment due to difficult circumstances, such as sexual or other harassment, discrimination within the meaning of the *Canadian Human Rights Act*, practices of employer that are contrary to law, et cetera: EIA s. 29(c).

[80] Mr. West appears to have provided some information about the alleged discrimination he experienced to Service Canada, and Service Canada appears to have considered some of this information when determining whether Mr. West’s employment was terminated due to his misconduct. However, I am not persuaded that Service Canada had the jurisdiction to apply the *Code* in the context of the legal question it had to decide.

[81] In these circumstances, I am not persuaded that the substance of this complaint has been appropriately dealt with in another proceeding. The interests of fairness require that Mr. West have the opportunity to have his human rights issues considered in a proceeding with jurisdiction under the *Code* to decide them. The parties can revisit the issue of appropriate remedies if Mr. West makes out his case of discrimination at a hearing.

C. Section 27(1)(g) – Timeliness of the complaint

[82] There is a one-year time limit for filing a human rights complaint: *Code*, s. 22. Section 22 is meant to ensure that complainants pursue their human rights remedies promptly so that respondents can go ahead with their activities without the possibility of a dated complaint: *Chartier v. School District No. 62*, 2003 BCHRT 39 at para. 12.

[83] Section 27(1)(g) permits the Tribunal to dismiss a late-filed complaint. The Respondents argue that the allegations against Mr. Everett are untimely and should be dismissed. Specifically, the Respondents state that the two allegations against Mr. Everett are alleged to have occurred on September 21, 2018, and “within two weeks” of that date. The Respondents assert that all of Mr. West’s allegations against Mr. Everett therefore occurred before October

4, 2018. Mr. West filed his complaint on October 12, 2019. They say the allegations occurred more than one year before the complaint was filed.

[84] A complaint is filed in time if the last allegation of discrimination happened within one year, and older allegations are part of a “continuing contravention”: *Code*, s. 22(2); *School District v. Parent obo the Child*, 2018 BCCA 136 at para. 68. A continuing contravention is “a succession or repetition of separate acts of discrimination of the same character” that could be considered separate contraventions of the *Code*, and “not merely one act of discrimination which may have continuing effects or consequences”: *Chen v. Surrey (City)*, 2015 BCCA 57 at para. 23; *School District* at para. 50.

[85] The assessment of whether discrete allegations are a continuing contravention is a “fact specific one which will depend very much on the individual circumstances of each case”: *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 at para. 17. A relevant consideration is whether there are significant gaps between the allegations: *Dickson* at paras. 16-17. Whether or not a gap is significant will be assessed contextually, considering the length itself and any explanations for the gap: *Reynolds v Overwaitea Food Group*, 2013 BCHRT 67, at para. 28. A significant, unexplained, gap in time will weigh against finding a continuing contravention: *Bjorklund v. BC Ministry of Public Safety and Solicitor General*, 2018 BCHRT 204 at para. 14.

[86] Mr. West argues that the allegations against Mr. Everett are timely because they form part of a continuing pattern of discrimination and should not be viewed as singular incidents. For the following reasons, I agree.

[87] The overall nature of Mr. West’s allegations in this complaint is that as the only Indigenous employee working with a crew on Indigenous territories, he was subjected to discriminatory comments and adverse treatment from colleagues, directed both at him and at Indigenous people generally. He further alleges that management did not act on his reports about his colleagues, including unsafe work practices and discriminatory comments; but they were quick to terminate his employment when his colleagues made a false report about him.

This is alleged to have occurred during a period where the Respondents acknowledge community tensions around Indigenous land rights were running high.

[88] Mr. West's allegations against Mr. Everett are of the same nature. He alleges that Mr. Everett refused to let him ride in his vehicle because he is First Nations, and made disparaging comments on the company radio about the Indigenous community they were working in. Notably, these comments are not dissimilar to the alleged comments made about Mr. West and First Nations people generally by Jean Yves Martineau and Roland Martineau, which were filed in time. Mr. West states that Mr. Everett's conduct is also of a similar nature to the conduct of Mr. Philips, who employed a stereotypical and discriminatory representation of Indigenous people by calling Mr. West "Chief" in a public setting. This allegation was also filed in time.

[89] Further, the gap in time between all the allegations is not significant. Mr. Everett's conduct is alleged to have occurred in September 2018, while most of the other allegations are alleged to have taken place in or around January and February 2019.

[90] For these reasons, I deny the Respondents' application under s. 27(1)(g) of the *Code*.

V CONCLUSION

[91] The Respondents' application to dismiss under ss. 27(1)(a),(b),(c),(f) and (g) is denied.

[92] My decision to allow the complaint to proceed only means I am not persuaded at this stage that the complaint should be dismissed without a hearing. It does not mean Mr. West will necessarily be successful at a hearing. I encourage the parties to make use of the Tribunal's mediation services to try to resolve this matter by mutual agreement.

Theresa Etmanski
Tribunal Member

ⁱ Mr. West's complaint was filed before the *Code* was amended to introduce Indigenous identity as a protected characteristic in 2021.