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

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

B E T W E E N:

Jennifer Chan

COMPLAINANT

A N D:

Beth Haverkamp, David Farrar, Jon Shapiro, Robert Tierney and the University of British Columbia

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Sections 27(1)(b), (c), (d)(ii), (f)

Tribunal Member:	Norman Trerise
Counsel for the Complainant:	Joanna Gislason
Counsel for the Respondents:	Jennifer S. Russell

I INTRODUCTION

[1] Jennifer Chan filed a complaint alleging that Beth Haverkamp, David Farrar, Jon Shapiro, Robert Tierney and the University of British Columbia (collectively the "Respondents") discriminated against her with respect to the appointment of the David Lam Chair in Multicultural Education in the Faculty of Education at the University of British Columbia (the "Lam Chair") on the basis of race, colour, ancestry, and place of origin, contrary to s. 13 of the *Human Rights Code*. The Respondents deny there has been any such discrimination and apply to dismiss the complaint pursuant to ss. 27(1)(b), (c), (d)(ii) and (f), which provide:

> (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
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> (b) the acts or omissions alleged in the complaint...do not contravene this Code;
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> (c) there is no reasonable prospect that the complaint will succeed;
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> (d) proceeding with the complaint or that part of the complaint would not:
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> ...
>
> (ii) further the purposes of this Code.
>
> (f) the substance of the complaint ... has been appropriately dealt with in another proceeding.

[2] The Respondents, in the alternative, apply to dismiss the complaint against the individual respondents.

II FACTUAL BACKGROUND TO THE COMPLAINT AND APPLICATIONS

[3] I make no findings of fact in this decision except as necessary to determine the s. 27(1)(f) application.

[4] Jennifer Chan is an Associate Professor in the Department of Educational Studies in the Faculty of Education (the "Faculty") at the University of British Columbia ("UBC"). She is of Chinese descent and immigrated to Canada from Hong Kong in 2001.

[5] UBC is a statutory corporation constituted under s. 3(3) of the *University Act*, R.S.B.C. 1996, c.468 (the "Act").

[6] Dr. Farrar is the Provost and Vice-President Academic of UBC. He reports directly to the President and Vice-Chancellor and is vested with statutory decision-making authority over matters of academic governance of UBC, including the appointment of the Lam Chair.

[7] Dr. Tierney is the former Dean of the Faculty and a former professor in the Language and Literacy Education Department. He held the responsibility for all academic appointments at UBC including the Lam Chair.

[8] Dr. Shapiro is Associate Dean in the Faculty. In addition, he became Dean *pro tem* of the Faculty in or about February 2010.

[9] Dr. Haverkamp is an Associate Professor in the Faculty and was appointed Associate Dean of Graduate Programs and Research in July 2009. She was chair of the Advisory Selection Committee for the Lam Chair (the "Committee").

[10] Dr. Shapiro was in charge of the Lam Chair appointment process from March 2009 to July 2009. Dr. Haverkamp succeeded him and became chair of the Committee in July 2009. Their respective roles were performed under the authority of Dr. Tierney. The request for applications for the Lam Chair was posted in March 2009. The posting required that applicants provide "a current c.v., the names of three referees, a statement of research interest in the multi-cultural/race relations area, and a statement regarding what Faculty-wide activities the Lam Chair might sponsor."

[11] The posting set out four criteria for the position:

1) Breadth of representation of multicultural education;

2) Vision for the Lam Chair;

3) Record of scholarship; and

4) Potential to provide integration or linkages across faculty (the "Criteria").

[12] Dr. Chan maintains that multiculturalism is a recognised field of academic study. She describes it as the study of the interaction between the state (Canada) and racial/cultural minority groups who seek recognition and accommodation of their cultural identification and identity. She states that the concept of race is central to multiculturalism.

[13] Given that definition of multiculturalism, she maintains that she has taught more courses and supervised more students in the area of multiculturalism than the successful candidate (the "Candidate"). She also points out that she articulated a vision for the Lam Chair directly pertaining to multiculturalism, has published more on multiculturalism/race relations and has a more established record of linkages and integration across the Faculty pertaining to multiculturalism.

[14] Dr. Chan's work focuses on multiculturalism as described above. The Candidate's work focuses on youth and gender.

[15] The Committee was struck in approximately July 2009 and first met in August 2009. It was chaired by Dr. Haverstock and was comprised of five additional members.

[16] Dr. Chan alleges that the posting breached a UBC policy which requires all postings to state that "UBC hires on the basis of merit and is committed to employment equity."

[17] On April 20, 2009, Dr. Chan applied for the Lam Chair and submitted the required information.

[18] Dr. Chan asserts that the Committee selection process differed from established procedure in many ways including:

1) Five of the six members had either tangential or no research experience in multiculturalism and were not experts in the field;

2) Only two of the four departments in the Faculty had representatives on the Committee;

3) One member of the Committee was external to the Faculty;

4) No external referees were contacted by the Committee although they were requested;

5) The Committee's final decision was by a vote rather than by consensus;

6) There was a paucity of notes or records kept of the Committee's meetings;

7) No information was provided to the candidates respecting the progress of the deliberations after the final interview for almost six weeks; and

8) Shifting and unformulated criteria were applied throughout the selection process.

[19] Only one member of the Committee was from a visible minority. Dr. Chan asserts that the Candidate was better known to two members of the Committee than she was and that her public presentation was scheduled in a less familiar location than the public presentations of the other candidates.

[20] Four candidates were shortlisted for the Chair, one of whom was Dr. Chan. She was the only minority candidate shortlisted.

[21] On October 29, 2009 the Committee met to determine its recommendation for the Lam Chair. Dr. Chan was one of two finalists. The matter was determined by a vote and the Candidate prevailed by a vote of 3 to 2. Negotiations took place with the Candidate respecting the terms under which she could accept the Lam Chair. On December 9, 2009, Dr. Chan was advised that she was not the successful candidate.

[22] Dr. Chan requested the reasons for the Committee's decision. Dr. Haverkamp wrote on December 9, 2009 to Dr. Chan and advised that the Candidate's application had prevailed because of "her established status as a senior scholar, as reflected in her sustained record of scholarship and success at obtaining competitive funding, the consistent acknowledgement of her work through prestigious national and international honours and her investigation of multicultural and diversity issues in a global context".

[23] Dr. Chan points to other references in the notes of Dr. Haverkamp (the only notes respecting the Committee's process) to her own "junior", "unfamiliar" and "too new" status. She points to the fact that, in academia, seniority is measured by rank, years of service and record of contribution in a specific field of inquiry. She points out that she and the Candidate are both Associate professors, joined the Faculty at approximately the

same time and, in the area of multicultural studies as she defines the term, she is more senior.

[24] On December 15, 2009, Dr. Chan filed a formal complaint against Dr. Tierney and Dr. Haverkamp under UBC's Discrimination and Harrasment Policy (the "Policy") alleging racial discrimination in the selection process. UBC retained an investigator pursuant to the terms of the Policy to conduct an investigation into Dr. Chan's complaint.

[25] The investigator's terms of reference directed her to consider whether the Respondents engaged in conduct which discriminated against Dr. Chan on the basis of race in that her race was a factor in her not being selected for the Lam Chair. She was not engaged to provide her opinion respecting the relative merits of the candidates or as to whether the Committee's decision was correct.

[26] The investigator concluded that the Respondents did not discriminate, contrary to the Policy, in offering the Lam Chair to the Candidate rather than to Dr. Chan.

[27] Dr. Chan asserts that she has exhausted the internal complaint mechanism of UBC and that it was flawed because both Dr. Farrar and Mr. Patch expressed to her that they had decided the matter against her. Mr. Patch denies that the internal complaint mechanism was exhausted.

[28] Dr. Chan also alleges systemic discrimination as demonstrated by:

1) Twice being denied the Killam Teaching Award despite being nominated on each occasion and meeting the merit requirements;

2) Being "forgotten" in her Tenure and promotion schedule and being accused of plagiarism during her promotion and tenure review;

3) Being required to carry a disproportionate "student of colour" supervision load;

4) Being subjected to a discriminatory institutional culture;

5) The fact that visible minorities are under-represented in the Faculty in general and almost entirely absent from leadership positions.

[29] UBC appointed a panel, pursuant to the Policy, to review the Investigator's Report and determine whether discrimination had taken place (the "Panel").

[30] The Panel was comprised of an experienced neutral in the field of discrimination and harassment as chair, and two internal members.

[31] The Panel concluded, among other things that:

1) No discrimination had occurred in the composition of the Committee;

2) There were no guidelines or requirements regarding utilising external referees;

3) There was no requirement for an agenda, minutes or a record of the Committee's deliberations;

4) There was no established connection between Dr. Chan's systemic allegations and the allegations of discrimination by the Committee;

5) The notes of deliberations of the Committee do not disclose any racial stereotyping; and

6) The reference to Dr. Chan as "junior" refers to a shorter tenure period than the candidate and does not constitute racial stereotyping. Other candidates were also referred to as "junior".

[32] The Panel recommended that Dr. Chan's Equity Office complaint be dismissed and that Dr. Chan and the Respondents meet with a facilitator to re-establish effective working relationships.

[33] UBC accepted the conclusion of the investigator and the Panel that Dr. Chan's complaint be dismissed. The recommendations were accepted by UBC; however, the implementation of the second recommendation was postponed until the resolution of this complaint to the Tribunal.

[34] The Policy contains, as a term, the following:

> 2.5.4. **Appeal**
>
> 2.5.4.1. A student who denies that a violation of the policy took place or who disagrees with a proposed penalty has recourse through the Senate Committee on Appeals on Academic Discipline. A member of staff or faculty has recourse through the provisions of the collective agreement or terms and conditions of employment. To the extent provided for in collective agreements, complainants also

> may have recourse to appeal the decision. As well, the complainant and respondent may have recourse to extra-University processes.
>
> 4.6. **Multiple Proceedings**
>
> 4.6.1. A complaint under this policy may also be pursued in extra-University processes.
>
> 4.6.2. The fact that a complaint is being pursued under these procedures does not preclude the complainant from pursuing an extra-University process.

[35] The policy is accompanied by a Guide to the Policy entitled Guide to UBC's Policy No. 3: Discrimination and Harassment (the "Guidelines"). It specifically deals with appeals, stating:

> If either party disagrees with the decision of the above resolution options, they may appeal the decision through grievance procedures established by the collective agreements or by the UBC Senate, and/or by agencies outside UBC, such as the provincial Ombuds Office or the B.C. Human Rights Tribunal. In addition, all students, staff members, and faculty can seek legal redress on their own behalf.

[36] Tom Patch is the Associate Vice-President Academic of UBC. He reports directly to Dr. Farrar. He swore an affidavit in this proceeding to which he attaches both the Policy and the Guidelines as exhibits. Respecting the Policy, he deposes that it "establishes a formal proceeding for the investigation and resolution of complaints of harassment and discrimination at UBC". Respecting the Guidelines, he deposes that it "provides a useful overview of the Equity Office formal investigation procedure".

[37] Also attached to the affidavit of Mr. Patch as an exhibit is the Policy No. 2, a policy of employment equity to advance the interests of visible minorities, in addition to other groups, in UBC's recruitment and its retention of faculty and staff.

III THE APPLICATION TO DISMISS

[38] The Respondents, as stated above, rely on ss. 27(1)(b), (c), (d)(ii), and (f) of the *Code.*

IV THE COMPLAINT HAS BEEN DEALT WITH IN ANOTHER PROCEEDING, S. 27(1)(F)

The Respondents' Position

[39] The Respondents submit that the complaint should be dismissed because the substance of the complaint has been appropriately dealt with in the Equity Office Proceeding.

[40] They argue that the Equity Office Proceeding is "another proceeding" within the meaning of s. 27(1)(f) of the *Code* and that the Equity Office appropriately addressed the substance of the complaint.

The Complainant's Position

[41] Ms. Chan says that UBC's Policy on Harassment and Discrimination is not a proceeding under s. 27(1)(f). She argues that, to be so, it must be clothed in a grant of legal authority and it is not.

[42] She further argues that the Respondents are presenting an estoppel argument which cannot succeed because the decision is not a final judicial decision, it does not decide the same question as is before the Tribunal and the parties are not the same as those before the Tribunal.

Analysis and Decision Regarding s. 27(1)(f) Application

[43] I have considered all of the submissions, materials and affidavits filed in support of these applications. I note that they have largely been submitted prior to the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. The Respondents have requested that I consider *Figliola* in my deliberations.

[44] I have considered the extremely able arguments presented on this issue by counsel for each of the parties. I have decided it is neither necessary to consider the issues of whether UBC's Harassment and Discrimination Policy is a proceeding as contemplated by s. 27(1)(f) nor to consider whether it addresses the substance of the matter before the Tribunal.

[45] In *Figliola*, the Supreme Court of Canada is clearly expressing concern about litigants' propensity to relitigate issues before an alternative adjudicative body rather than through the appeal or judicial review processes that are intended by the legislature. They are clear that s. 27(1)(f) is not intended to provide the Tribunal with a power to "judicially review" another tribunal's decision (para. 38). Rather, it is the job of the Tribunal to satisfy itself that there was concurrent jurisdiction to address human rights issues, that the issues addressed are essentially the same as those before the Tribunal and that the complainant had an opportunity to know the case to be met and were provided with a chance to meet it (para. 37). The Court expressed particular concern about parties circumventing the appropriate review mechanism (para. 35).

[46] *Figliola*, therefore, is about honouring the finality of the judicial process.

[47] A reading of the extracts from the Policy set out above suggests to me that the Policy is not intended to provide a final adjudication of a complainant's harassment or discrimination at all. Instead, it specifically contemplates an appeal avenue from the conclusions reached through its process. That appeal mechanism, for students, is to the Senate Committee on Appeals on Academic Discipline. The Tribunal has determined that the Senate Committee process pursuant to that authority does constitute "a proceeding" pursuant to another Act within the meaning of s. 27(1)(f): *Baharloo v. UBC and another*, 2011 BCHRT 290, para. 45. The Senate Committee in question is established pursuant to s. 37(1)(v) of the *University Act*, RSBC 1966, c. 468, which provides the Senate with the authority to "establish a standing committee of final appeal for students in matters of academic discipline."

[48] The same extract from the Policy provides an appeal mechanism from a panel decision respecting harassment or discrimination for faculty members such as Dr. Chan. That appeal mechanism is expressed as a grievance under the collective agreement or a recourse to an extra-University process. The Guideline, which is intended to "overview" the Policy, clearly establishes that an aggrieved complainant, unhappy with the results of the Policy process, can appeal the decision of the Panel to the Tribunal or other agencies outside UBC.

[49] In the circumstances, I cannot determine that there has been a final judicial decision which should be respected as contemplated in *Figliola*. On the contrary, UBC's Policy, which has resulted in the decision relied upon, clearly contemplates freedom for any party to have the matter determined at the Tribunal if they are unsatisfied with the determination under the Policy.

[50] Further, it strikes me that it would be fundamentally unfair to allow UBC's application on this ground. A faculty member may rely on the Policy in determining the preferred route for redress. To allow UBC to set out an appeal process in its Policy and then deny it through an application to dismiss, on this basis, essentially pulls the rug out from under that faculty member.

[51] I decline to dismiss Dr. Chan's complaint as appropriately dealt with under the Policy.

V PROCEEDING WITH THE COMPLAINT WILL NOT FURTHER THE PURPOSES OF THE CODE: S. 27(1)(D)(II)

The Respondents' Position

[52] The Respondents present, as an alternative argument, that the complaint should be dismissed pursuant to s. 27(1)(d)(ii) because it would not further the purposes of the *Code* to proceed with the complaint, given that a reasonable resolution was imposed by UBC pursuant to the Policy.

The Complainant's position

[53] Dr. Chan submits that her complaint has not already been adequately addressed by the investigation and decision under the Policy.

Analysis and Decision Regarding s. 27(1)(d)(ii) Application

[54] The circumstances of Dr. Chan's case are fundamentally different than those found in cases such as *Williamson v. Mount Seymour Park Housing Co-operative and others*, 2005 BCHRT 334 or *Horner v. Concord Security Corp*., 2003 BCHRT 86, in which the respondents, regardless of the outcome of their investigation processes, implemented some form of redress for the alleged discrimination. In this case, as

previously stated, the complaint was rejected and no redress was implemented to address the alleged discrimination because it was determined not to have occurred.

[55] In my view, as stated above, the combination of the provisions directed to appeal of decisions respecting faculty in the Policy and the Guidelines, when read together, establish that the decision under the Policy is not a final decision which provides an adequate remedy to Dr. Chan. Dr. Chan does not accept the decision and the Policy anticipates that, in such circumstances, the complainant or the respondent may appeal the decision of the Panel by laying a complaint with the Tribunal. In such circumstances, it would be inappropriate to judge the outcome of the process prior to the process running its course.

[56] In the circumstances before me, I am not prepared to dismiss the Complaint on the basis that it has adequately been addressed by the process under the Policy when the process has not yet run its course. The current complaint to the Tribunal represents Dr. Chan's appeal under the Policy and I will not deprive her of it under this ground of application to dismiss.

VI THE COMPLAINT HAS NO REASONABLE PROSPECT OF SUCCESS, (S. 27(1)(C)

VII THE ACTS OR OMISSIONS OF THE RESPONDENTS DO NOT CONTRAVENE THE CODE, S. 27(1)(B)

The Respondents' Position

[57] The Respondents submit that the Investigation Report and the Panel Report find that Dr. Chan was not the victim of racial discrimination in the selection process for the Lam Chair. They submit that there is no reasonable basis to suggest that the Tribunal will arrive at a different conclusion on the same allegations and evidence.

[58] The Complainant submits that, even if UBC did fail to apply employment equity principles to the selection process, that does not constitute a breach of the *Code*. They assert that UBC's Equity Policy does not require it to give employment preference to visible minorities. UBC points out that their Employment Equity Plan has been approved pursuant to s. 42 of the *Code*.

[59] It is submitted that, if the *Code* impliedly required employers to adopt employment equity hiring programs, there would be no reason for the Tribunal to require prior approval of employment equity programs or to place time limits on those approved programs. It is further submitted that the Tribunal has demonstrated a reluctance to impose employment equity programs as a remedy for *Code* violations.

[60] UBC further submits that Dr. Chan and the Candidate were not viewed as equal candidates but rather the Candidate was viewed as the more meritorious candidate.

[61] They further submit that the Tribunal has confirmed that a complaint of systemic discrimination must be supported by evidence of discriminatory patterns and trends in the respondent's practices, attitudes, policies or procedures. They submit that the allegations relate solely to the treatment of Dr. Chan and that such evidence cannot support a complaint of systemic discrimination.

The Complainant's Position

[62] Dr. Chan submits that the threshold for defeating an application to dismiss is not high, relying on *Workers Compensation Appeals Tribunal v. Hill*, 2011 BCCA 49.

[63] She further says that the Tribunal cannot defer to the Investigation Report and the Panel conclusions because to do so would constitute a "total deferral of statutory decision making power".

[64] On the s. 27(1)(b) application, she submits that the facts in the Complaint, if proved, would establish a contravention of the *Code*.

1. Section 27(1)(c): Is there no reasonable prospect that the complaint will succeed?

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

> [t]he role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor

> to determine the *bona fides* of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.
>
> The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet. Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the Information available to it. (*Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, paras. 11 and 12)

[66] Thus, the Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed. The Tribunal's role in this regard was most recently described by the Court of Appeal in *Workers Compensation Appeals Tribunal v. Hill* 2011 BCCA 49, at para. 27:

> It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 [reported 55 C.H.R.R. D/450] at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 [CHRR Doc. 10-1031] at para. 31

[67] As stated above, the complaint alleges discrimination on the basis of race, colour, ancestry and place of origin.

[68] In *Stephenson v. Northern Concord Industries and others*, 2011 BCHRT 100, paras. 47 and 48 the Tribunal considered the application of s. 27(1)(c) to allegations of discrimination on the basis of race and colour. It stated:

> One of the difficulties of complaints based on race is that most people in North America are aware of the unacceptability of racism and therefore do not openly make such remarks. There are several decisions pointing out the difficulties of proving discrimination in these types of cases and the consequential need to make inferences from the conduct of Amichi in order to establish a prima facie case.
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> In *Lee v. British Columbia (Attorney General*), 2003 BCSC 1432, the British Columbia Supreme Court said in respect of establishing a prima facie case:
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> > In *Kennedy*, supra, the requirements are stated at paras. 58–60 as follows:
> >
> > > The Complainant must prove on a balance of probabilities that the Ministry discriminated against him because of his race, colour or ancestry. He need not establish that a prohibited ground was the sole or even the most significant factor, merely that it was a factor that contributed to the discrimination. His initial evidentiary burden is to establish a prima facie case. That is, he must provide evidence from which it is reasonable to infer that the Ministry discriminated against him because of one of the listed characteristics.
> >
> > Human rights tribunals and boards of inquiry have frequently noted that the initial burden [sic] complainants is not an onerous one: see, for example, *Mbaruk v. Surrey School District No. 36* (1996), 30 C.H.R.R. D/182 (B.C.C.H.R.) at para. 41 and cases cited therein. This is so because it is recognized that discrimination is rarely displayed openly. Rather, discrimination must be inferred from circumstantial evidence.
> >
> > If the Complainant establishes a *prima facie* case, the evidentiary burden then shifts to the Ministry to provide evidence of a credible non-discriminatory reason for its conduct.

[69] It appears that the scope of the definition of multiculturism applied by the Committee was significant to the outcome of the Committee's determinations in the selection process. Dr. Chan submits that the concept of race is central to multiculturism. The Respondents applied an expanded definition to the term that resulted in broader educational focus and experience, such as gender and age, being as material to the selection of a suitable candidate as the concept of race. In doing so, it appears that the

playing field for Dr. Chan (and perhaps others) was shifted to her detriment, raising a question about the basis for the Committee's decision.

[70] It is certainly possible to envisage an approach to the analysis of what the selection process should encompass which would not violate the *Code*.

[71] The employment equity issues strike me as a red herring and unlikely to be determinative of the issues in this proceeding, as do the issues of departure by the Committee from the prescriptive process outlined in the Policy. It is possible, however, that they, in conjunction with the broadening of the concept of multiculturism, might, in the light of fully-developed evidence in a hearing, lead to an inference of a violation of the *Code*.

[72] The issues raised in this complaint are of significance to the UBC community as a whole. I am alive to the difficulties expressed in *Lee* in identifying racism and related offensive behaviour. I am also alive to the low hurdle which the complainant needs to overcome on a s. 27(1)(c) application. In the circumstances of this case, I am of the view that, only after a full hearing, is it possible to determine whether the Committee's process was tainted by prohibited motivations. Ultimately all Tribunal decisions under s. 27(1)(c) of the *Code* are discretionary decisions. I am not persuaded that there is no reasonable prospect that the individual complaint will succeed.

2. The Complaint of Systemic Discrimination

[73] Dr. Chan includes a complaint of systemic discrimination against visible minorities in her complaint. As previously stated, she particularises that complaint as follows:

1) Twice being denied the Killam Teaching Award despite being nominated on each occasion and meeting the merit requirements;

2) Being " forgotten" in her Tenure and promotion schedule and being accused of plagiarism during her promotion and tenure review;

3) Being required to carry a disproportionate "student of colour" supervision load;

4) Being subjected to a discriminatory institutional culture;

5) The fact that visible minorities are under-represented in the Faculty in general and almost entirely absent from leadership positions.

[74] In *Buchner v. Emergency and Health Services Commission*, 2008 BCHRT 317, paras. 358 to 360, the Tribunal stated:

> Mr. Buchner's complaint is an individual rather than representative complaint. As the case law makes clear, an individual complaint can allege systemic discrimination: *Creuzot v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2007 BCHRT 93; and *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302.
>
> The proof necessary to establish systemic discrimination is different from that necessary for individual discrimination. As stated in *British Columbia v. Crockford*, 2006 BCCA 360:
>
> > Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct. (para. 49)
>
> The Supreme Court of Canada defined "systemic discrimination" in *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (*"Action Travail des Femmes")* with reference to the *Report of the Commission on Equality in Employment, 1984* by (now) Justice Rosalie Abella:
>
> > Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

> That is why it is important to look at the results of a system …. (para. 34)

[75] The particulars provided by Dr. Chan do not advance allegations, let alone evidence, that could establish a systemic claim with the exception of an allegation that "visible minorities are under-represented in the Faculty in general and almost entirely absent from leadership positions". There is no evidence advanced to support that allegation. I must determine the application to dismiss this allegation on the basis of the materials before me. Given that the particulars presented are largely individual to Dr. Chan and that there is no evidence to support the single factual allegation supporting systemic discrimination in this complaint I am satisfied that there is no reasonable prospect that the systemic aspect of this complaint will succeed. Accordingly, I dismiss the systemic aspect of the Complaint.

3. Section 27(1)(b): There is no contravention of the *Code*?

[76] The Respondents aim their submissions respecting dismissal under s. 27(1)(b) at Dr. Chan's allegations that the Committee failed to apply employment equity principles to the selection process. I do not read the complaint as being limited to alleged failure to provide employment equity.

[77] Rather, the complaint appears to cast the Committee's process and resultant decision as being the product of subtle racial bias and stereotyping, including the failure to apply employment equity principles. Whether or not UBC was bound by its Employment Equity Plan to apply such principles as contended by Dr. Chan will not be dispositive of the issues in this complaint – they are cast far broader than that. While I recognise that s. 27 of the *Code* contemplates that a part of a complaint may be dismissed on application, I also recognise that a failure to apply employment equity **may** be rooted in racial bias.

[78] In *Radek v. Henderson Development (Canada) and Securigard Services (No. 3),* 2005 BCHRT 302, paras. 479 to 482 the Tribunal, in discussing the difficulties surrounding analysis of racial discrimination, said:

> The decisions in *Smith*, *Brown* and *Johnson* echo in many respects the recent decision of the British Columbia Supreme Court in *Troy v. Kemmir*

Enterprises Inc., 2003 BCSC 1947. In that case, the Court rejected an application to quash the decision of the British Columbia Human Rights Commission to refer a complaint of racial discrimination to the Tribunal for hearing. The complainant, a Black man, alleged that he had been discriminated against on the basis of his race when a gas station attendant called the police due to his allegedly suspicious behaviour at that gas station. Mr. Troy argued that he had been the victim of racial stereotyping. The respondent gas station argued before the Court that discrimination had to be conscious on the part of the gas station attendant and a motivating factor in her call to the police. The Court unequivocally rejected that argument, relying on the decision of the Supreme Court of Canada in *R. v. Williams*, [1998] 1 S.C.R. 1128. I find it helpful to reproduce the passage which the Court in Troy referred to in this connection:

> In *R. v. Williams*, [1998] 1 S.C.R. 1128, McLachlin J. (as she then was) commented on the insidious nature of racism, and stated at p. 1142-3:
>
> > To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it. As Vidmar, supra, [Vidmar, Neil. "*Pretrial prejudice in Canada: a comparative perspective on the criminal jury"* (1996), 79 Judicature 249] points out, racial prejudice interfering with jurors' impartiality is a form of discrimination. It involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. For this reason, it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice: see Johnson, supra. Doherty J.A. recognized this in *Parks*, supra, at p. 371:
> >
> > > In deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized. For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are engrained in an individual's subconscious, and reflected in both individual and

> institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event.
>
> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. … (quoted at para. 30 of *Troy*)

The Court in *Troy* also restated the basic general principles which apply to the question of proof in a case of this kind:

> Mr. Troy complained that he was discriminated against based on racial stereotyping. He does not need to show that discrimination comprised the sole factor in the conduct complained of, and he only needs to raise a prima facie case that it was a factor. The burden is not an onerous one. This is because the case law recognizes that discrimination is rarely openly displayed, and in most cases, must be inferred from circumstantial evidence. (at para. 25)
>
> In making these statements, the Court relied upon a decision of this Tribunal, *Kennedy v. British Columbia (Ministry of Energy and Mines)*, 2000 BCHRT 60, which was also relied upon by the British Columbia Supreme Court in *Lee v. British Columbia (Attorney General)*, 2003 BCSC 1432. *Kennedy* is one of many decisions in which the difficulties associated with proving allegations of racial discrimination have been remarked upon by this Tribunal: see, for example, *Seignoret v. British Columbia Rehabilitation Society*, [1999] B.C.H.R.T.D. No. 16 at para. 49, and the cases cited therein.
>
> Taking all these cases into account, I would summarize the applicable principles as follows:

1. The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;

2. There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;

3. The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;

4. There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and

5. Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

[79] If the evidence supports that the Committee was influenced by improper considerations as alleged (but which the Respondents clearly deny) the selection would constitute a violation of the *Code*. On the material before me, a hearing will be required to ascertain whether discrimination has occurred. I am not prepared to dismiss the complaint on the basis that the acts alleged do not contravene the *Code*.

VIII SHOULD THE COMPLAINT BE DISMISSED AGAINST THE INDIVIDUAL RESPONDENTS UNDER S. 27(1) (D)(II) OF THE *CODE* ON THE BASIS THAT IT WOULD NOT FURTHER THE PURPOSES OF THE CODE TO PROCEED WITH IT?

[80] The Respondents submit that hearing the Complaint against the individual respondents does not further the purposes of the *Code*.

[81] The Tribunal set out the test respecting the determination of whether the purposes of the *Code* would be furthered by proceeding against individual respondents in *Daley v. British Columbia (Ministry of Health)*, 2006 BCHRT 341, paras. 60-62:

> In my view, there are circumstances in which it would not further the purposes of the Code to name individual respondents. In particular, where the complainant names the corporate or institutional employer as a respondent, and that respondent has the capacity to fulfil any remedies that the Tribunal might order, little useful purpose may be served by also naming the individuals who were involved in the events in issue on behalf

> of that respondent. A significant factor to be taken into account is whether the institutional respondent, as in Marc, and in the present case, has acknowledged the acts and omissions of the individual in question 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.
>
> Also significant will be the nature of the conduct alleged against the individual. Without attempting to provide an exhaustive list, consideration should be had as to whether the conduct alleged was within the course of that person's employment or whether there is anything in the allegations made against that person which would take his or her conduct outside of the normal scope of his or her duties. It may also be relevant to consider whether the person is alleged to have been the directing mind behind the discrimination alleged or to have had the ability to influence substantially the course of action taken.
>
> Finally, it may also be appropriate to consider whether the conduct alleged against the individual has a measure of individual culpability. The clearest example of such conduct is where an individual is accused of sexual harassment or other similar behaviour. In such a case, no plausible argument can usually be made that the harasser was acting within the scope of his or her authority. While the employer is, in such cases, still liable for the harassment engaged in, as it occurred in the course of the harasser's employment, broadly defined, the individual harasser also has a measure of individual culpability. Such a person is not merely performing the duties of their employment, albeit in a manner which is ultimately found to have resulted in discrimination. It tends to further the purposes of the Code in such circumstances for the individual harasser to be subject to individual liability.

[82] The *Daley* factors have been consistently applied by the Tribunal over time: *Frick v. University of British Columbia*, 2007 BCHRT 395, *Desjardins v. Overwaitea Food Group*, 2009 BCHRT 314, *Masters Student A v University B, Faculty Member C and Faculty Member D*, 2011 BCHRT 113.

[83] Dr. Chan argues that the fact that employers are responsible for the acts or omissions of their employees acting within the scope of their authority does not mean that individuals are not responsible for their own acts and omissions. She argues that individual accountability for human rights violations will further the purposes of the *Code* by leading individuals to change their behaviour. She relies on *Daley* in support of these arguments. Of course, in *Daley*, the actions of the individuals in question were

viewed as potentially taking them outside the scope of their employment, as opposed to merely performing the duties of their employment, albeit in a manner which could ultimately be found to have resulted in discrimination.

[84] There is nothing in the facts alleged by Dr. Chan which suggests that the individual Respondents were engaged in activities or decision-making which took them outside the scope of their employment. While each of the individuals in question held positions of authority respecting the appointment of the Lam Chair, the decisions complained of were either adoptions of the Committee's recommendations (Dr. Tierney), or decisions which the University expected them to make in the course of carrying out their roles in the selection of the Lam Chair and the management of Dr. Chan's complaint under the Policy.

[85] I am unable to identify any allegations or facts in Dr. Chan's Complaint which point to overt culpability on the part of any of the individuals in question which would support retaining them in the Complaint under the *Daley* criteria.

[86] Ms. Watters deposes that, at all times, the individual respondents were acting "solely in the normal course of their employment with UBC, within the scope of their authority, and in furtherance of their duties and responsibilities as employees of UBC."

[87] UBC assumes complete responsibility for the individual respondents' conduct as alleged in the complaint and agrees to be bound by any remedies ordered by the Tribunal in relation to the conduct of the individual respondents.

[88] The Tribunal has stated in *Daley*, para. 54 that:

> The Tribunal's experience shows that naming individual respondents has a marked tendency to complicate and delay the voluntary resolution of complaints, the Tribunal's pre-hearing processes, and eventual hearings.

[89] In these circumstances, I am of the view that it will not serve the purposes of the *Code* to retain the individual respondents in this Complaint. I dismiss the complaints against Beth Haverkamp, David Farrar, Jon Shapiro and Robert Tierney.

IX CONCLUSION

[90] As stated above, I decline to dismiss Dr. Chan's personal complaint against UBC. The systemic complaint is dismissed. I also dismiss the complaints against Dr. Haverkamp, Dr. Farrar, Dr. Shapiro and Dr. Tierney.

Norman Trerise, Tribunal Member