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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:

University of British Columbia

RESPONDENT

REASONS FOR DECISION
RECONSIDERATION

Tribunal Member:	Norman Trerise
Counsel for the Complainant:	Lindsay Waddell
Counsel for the Respondent:	Jennifer Russell

I INTRODUCTION

[1] Jennifer Chan filed a complaint alleging that the University of British Columbia ("UBC") and others 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 "Complaint").

[2] UBC denied that it discriminated and applied to dismiss the Complaint without a hearing on various grounds.

[3] In January 2012, in *Chan v. UBC and others (No. 2)*, 2012 BCHRT 12, the Tribunal determined that UBC's application to dismiss should be denied. The relevant determinations of the Tribunal were that the Complaint should not be dismissed on the basis that it had been dealt with in another proceeding pursuant to s. 27(1)(f) because the University's discrimination and harassment policy and its attendant guidelines specifically contemplated that a faculty complainant could appeal a review panel's decision respecting harassment or discrimination to an "extra-University process", including the Tribunal.

[4] The Tribunal further declined to dismiss Dr. Chan's complaint pursuant to s. 27(1)(c) of the *Code* because there were issues respecting the basis for the committee's determination, the answers which might, in light of fully developed evidence in a hearing, lead to an inference of a violation of the *Code* and because of the low hurdle which the complainant needed to overcome on a s. 27(1)(c) application. The Tribunal was therefore of the view that only after a full hearing would it be possible to determine whether the committee's process was tainted by prohibitive motivations.

[5] UBC applied for judicial review of that decision. In *University of British Columbia v. Chan*, 2013 BCSC 942, the BC Supreme Court found that, in *Chan v. UBC and others (No. 2)*, the Tribunal had failed to turn its mind to s. 27(1)(f) and determine whether the substance of the complaint had been appropriately dealt with in another proceeding.

[6] Further, the Court found that the Tribunal's decision not to dismiss Dr. Chan's complaint under s. 27(1)(c) was based on a misapprehension of the evidence and on irrelevant factors.

[7] The Court directed the Tribunal to reconsider its decision.

[8] In response to an invitation from the Tribunal, both parties made submissions on scope of the reconsideration. I will address those submissions below.

II SCOPE OF THE RECONSIDERATION

[9] In *University of British Columbia v. Chan*, the Court, beyond identifying the aforementioned errors in the Tribunal's reasoning in *Chan v. UBC and others (No. 2)*, and directing the Tribunal to reconsider its decision, did not otherwise provide directions for the reconsideration.

[10] The parties agree that the issues that were considered by the Supreme Court of British Columbia on judicial review were the Respondent's applications to dismiss pursuant ss. 27(1)(c) and 27(1)(f) of the *Code*.

[11] The parties, however, disagreed on what material the Tribunal may consider during the reconsideration process. The Respondent submitted that, on reconsideration, the Tribunal must be limited to the evidence and material before it at the time of the original application. The Complainant submitted that the Tribunal should consider supplemental submissions and materials during the reconsideration of the application to dismiss.

[12] The Tribunal determined that the reconsideration would proceed on the basis of the materials and submissions before the Tribunal on the original s. 27 application, with one exception.

[13] The Tribunal invited the parties to provide submissions respecting whether the Tribunal has the discretion to decline to dismiss the complaint under s. 27(1)(f), even if the requirements of that subsection are met, on the basis of the language of ss. 2.5.4.1 and 4.6.2 of Policy No. 3 of UBC's Board of Governors.

[14] Such submissions were received but are not considered herein as a result of the basis for my decision pursuant to s. 27(1)(f) of the *Code*.

III BACKGROUND

[15] The background to the complaint is set out in *Chan v. UBC and others (No. 2)*, at paras 4-37 and is set out for convenience of reference below:

> [4] Jennifer Chan is an Associate Professor in the Department of Educational Studies in the Faculty of Education (the "Faculty") at 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.
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> [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 Harassment 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.

IV UBC'S APPLICATION TO DISMISS: SECTION 27(1)(f)

[16] UBC's application was brought pursuant to ss. 27(1)(c) and (f) of the *Code*, 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:
>
> ...
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> ...
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[17] I will deal with the s. 27(1)(f) application first.

[18] In assessing the background information above, I do not make any findings of fact and I do not address the merits of the complaint.

[19] UBC submits that the Equity Office proceeding, which is the focus of this aspect of the application to dismiss, is "another proceeding" within the meaning of s. 27(1)(f) of the *Code*.

[20] The term "proceeding" is not defined in s. 27(1)(f) but is described as follows in s. 25:

> (1) In this section and in section 27, "proceeding" includes a proceeding authorized by another Act and a grievance under a collective agreement.

[21] The Tribunal has interpreted the term "proceeding" in the following manner:

> ... s. 25 does not apply in the circumstances of this case as the November AGM is not a "proceeding" for the purposes of the Code. I find that the term "proceeding" refers to a formally established system of dispute resolution: for example, redress mechanisms established by other laws, actions taken in the judicial system, and privately contracted dispute resolution systems such as grievances, commercial arbitration, or the application of formal redress mechanisms. *Reed v. Strata Plan NW2056*, 2004 BCHRT 64, para. 10.

[22] Referring to that case, UBC points out that the Tribunal has often confirmed that a grievance may be "another proceeding" for the purposes of s. 27(1)(f). Further, UBC points out that in *Urbayo v. Vancouver Coastal Health Authority (Dogwood Lodge)*, 2006 BCHRT 109, the Tribunal granted a respondent's application to defer pending the outcome of another "proceeding". They further point out that the "proceeding" in that case was an industry troubleshooter which was characterized by the Tribunal as an "alternate method of dispute resolution to grievance arbitration".

[23] UBC goes on to submit that the Equity Office proceeding is established by Policy No. 3. They state that the Policy sets out a detailed set of rules intended to achieve the Policy's goals and objectives. They argue that the Equity Office proceeding contains processes and procedures which mirror the Tribunal's procedures but also contains a detailed investigative process by external investigators who are charged with investigation allegations of discrimination and harassment. It is, says UBC, a "formally established system of dispute resolution" and therefore qualifies as a proceeding for the purposes of s. 27 of the *Code*. They also point out that it is a "proceeding authorized by another Act". In that regard, they say the *University Act*, R.S.B.C. 1996, c. 468, s. 27, sets out, amongst other powers of the Board of Governors of UBC, powers relating to "the management, administration and control of the property, revenue, business and affairs of the university".

[24] They say that the Board of Governors in turn has established the policy and the procedures which were applied to Dr. Chan. They say therefore that the Equity Office proceeding is created by the exercise of statutory powers vested in UBC by the legislature through the *University Act*.

V DR. CHAN'S POSITION RESPECTING WHETHER POLICY NO. 3 IS "ANOTHER PROCEEDING" WITHIN THE MEANING OF SECTION 27(1)(f) OF THE *CODE*

[25] Dr. Chan submits that the Equity Office proceeding amounts to no more than the "diligent efforts of an employer to meet its obligations to investigate and address complaints of discrimination and harassment in its workplace". She says it is not a judicial or quasi-judicial proceeding.

[26] Dr. Chan submits that the issue is not the quality of UBC's investigative process but whether the legislature intended to confer upon UBC's Equity Office statutory authority to adjudicate or determine the outcome of human rights complaints.

[27] Dr. Chan challenges that there has been any such grant of authority to UBC.

[28] Dr. Chan contrasts the powers of the Board of Governors of UBC with the powers bestowed by the legislature upon the Senate. She points out that the management obligations of the University are vested in the Board while the UBC Senate is vested with the academic governments of the University.

[29] She says that the powers of the board of Governors under the *University Act* do not provide the power to determine the issues which are the focus of the Chan complaint under Policy No. 3.

[30] Dr. Chan points out that there is no power expressly or implicitly conferred upon the Board of Governors of UBC to adjudicate or decide a human rights complaint and no authority to establish a "proceeding" to do so.

[31] She points to the difference between s. 27(2)(y) of the *University Act* which gives the Board of Governors the power to "do and perform all other matters and things that may be necessary or advisable for carrying out and advancing, directly or indirectly, the purposes of the university and the performance of any duty by the Board or its officers prescribed by this Act" and s. 27(2)(r) which allows the Board to determine with the approval of the senate, the number of students that may in the opinion of the Board be accommodated in the university, s. 37(1)(c) which allows the senate to "determine all questions relating to the academic and other qualifications required of applicants for admission", or s.37(1)(d) which allows the Senate to "determine the conditions under

which candidates must be received for examination... and to determine the conduct and results of all examinations". I note that s. 27(2)(x) allows the Board of Governors to make rules consistent with the powers conferred on the Board by the *Act*. S. 27(2)(x.2)(i) allows the Board of Governors to provide for the hearing and determination of disputes arising in relation to the contravention of rules or instruments made in the exercise of a power or the imposition of a penalty in relation to the contravention of a rule or other instrument made in the exercise of a power. The position of Dr. Chan therefore is that the legislature never intended to empower the Board of Governors with powers to determine questions of liability under the *Code*.

[32] Dr. Chan further points out that of the 25 administrative bodies to which the *Administrative Tribunal Act*, SBC 2004, c. 45 ("ATA") applies, ten of them are denied jurisdiction to apply the *Code* and another seven have limited jurisdiction to apply the *Code* only to consider whether, in the circumstances, there is a more appropriate forum in which the *Code* may be applied. She points out that the Workers Compensation Appeal Tribunal and the Employment Standards Tribunal lack jurisdiction to apply the *Code*.

[33] In summary, Dr. Chan disputes that UBC has statutory authority such that its Policy No. 3 process can be reasonably construed to be a proceeding authorized by another Act.

[34] Further, Dr. Chan submits that s. 25 is exhaustive respecting the definition of a proceeding under s. 27 of the *Code*. She says that the plain wording of s. 25(1) states that the definition of "proceeding" includes two discreet concepts being a grievance proceeding under a collective agreement or a proceeding authorized by another Act. She says therefore that if the word "proceeding" is defined contextually as required by the Supreme Court of Canada, then the plain meaning of "proceeding" is, as set out in *British Columbia (Forensic Psychiatric Services Commission) v. British Columbia (Mental Health Act Review Panel)*, 2001 BCSC 1658, paras. 34 and 35 a "legal action or process, any act done by authority of a court of law, or any step taken in the cause by either party". The sole exceptions, she says, are grievances and other statutorily authorized proceedings.

[35] Dr. Chan concedes that the Tribunal has accepted a university's internal academic appeal process as a proceeding within the meaning of s. 27(1)(f) in three cases. These are *E v. An Institution and others*, 2010 BCHRT 212, *Franco v. Vancouver Community College*, 2004 BCHRT 6, and *Alexander v. UBC*, 2010 BCHRT 124.

[36] Dr. Chan says that in all three cases the proceeding involved student grade appeals and was authorized expressly by statute.

VI ANALYSIS AND DECISION – IS POLICY NO. 3 "ANOTHER PROCEEDING" UNDER SECTION 27(1)(f)?

[37] I agree generally with Dr. Chan's submission on this issue and am not persuaded that the Equity Office process is a proceeding within the meaning of s. 27(1)(f) of the *Code*. First, I am not persuaded that the process is a "proceeding authorized by another Act". I accept that s. 27 of the *University Act* gives the Board of Governors powers relating to the management and administration of the University that would encompass establishing the policy and the process there under. This is not the same, however, as a decision-making process that is established by legislation.

[38] UBC has relied on two court decisions to support their position that the Equity Office proceeding is "another proceeding" within the meaning of s. 27(1)(f) of the *Code*. It relies on *Faculty Assn. of the University of British Columbia v. University of British Columbia*, 2010 BCCA 189 for the proposition that the power to establish policy is a statutory power. In that decision, the Faculty Association (the "Association") had appealed an arbitrator's decision respecting a grievance against UBC. The Association alleged that the UBC senate policy respecting student evaluation of teaching violated the parties' collective agreement. The arbitrator had determined that senate policies were not arbitral and that he therefore lacked jurisdiction. The Court of Appeal found that the policy's purpose was within the statutory mandate of the senate and that the arbitrator correctly determined he had no jurisdiction to make an award detracting from or altering the policy. In the process, the Court said:

> [5] UBC is a statutory corporation continued under s. 3(3) of the *University Act*, R.S.B.C. 1996, c. 468 (the "Act"). It operates under a bicameral model of governance whereby the Board of Governors (the

"Board") is primarily responsible for business affairs and the Senate is responsible for academic matters.

...

[11] There is no dispute that the Senate was acting within its statutory authority over academic governance pursuant to the Act in promulgating the Policy. The Association has not, and does not, taken the position that the Policy, or any part of it, is *ultra vires* the Senate such that it is amenable to challenge by judicial review.

...

[49] Part 10 of the Act deals with "Powers and Duties of a University" and states, in s. 46.1, that "A university has the power and capacity of a natural person of full capacity." One of the university's stated functions (s. 47(2)(f)) is to "generally, promote and carry on the work of a university in all of its branches, through the cooperative effort of the board, senate and other constituent parts of the university." Thus, the Act contemplates cooperation between the Board and the Senate in carrying out the work of the university, but it does not provide for a "tie-breaker", or the equivalent of a paramountcy provision, if the exercise of powers by the Board and Senate, respectively, come into conflict, as here. By way of contrast, s. 70 of the Act provides:

(1) If a question arises respecting the powers and duties of the convocation, chancellor, president, faculties or an officer or employee of the university, that is not provided for in this Act, the board must settle and determine the question.

(2) A decision of the board under subsection (1) is final.

[39] After a review of the powers of the Board of Governors at UBC bestowed by the *University Act*, I am unable to conclude that the Board of Governors has been bestowed by the legislature with power to adjudicate issues of discrimination and harassment. That does not mean that the Board does not have the power to create Policy No. 3 to establish procedures for the investigation of discrimination and harassment issues and to create a process for such. Section 27(2)(y) provides the Board with power:

(y) to do and perform all other matters and things that may be necessary or advisable for carrying out and advancing, directly or indirectly, the purposes of the university and the performance of any duty by the board or its officers prescribed by this Act.

[40] That provision in conjunction with s. 27(2)(x) which states:

(x) to make rules consistent with the powers conferred on the board by this Act

authorizes the Board to do what is necessary or advisable for advancing the purposes of UBC which include providing instruction, providing a program of continuing education in all academic and cultural fields in British Columbia and generally promoting and carrying on the work of a university and all its branches, through the cooperative effort of the Board, Senate and other constituent parts of the university. (s. 47 (2)(b), (e) and (f)).

[41] In my view, being bestowed with the power to do what may be necessary or advisable for carrying out the purposes of the university and the performance of any duty by the Board or its officers prescribed by the *Act* includes the right to deal with conflict which arises in the course of the university exercising its functions. The Board therefore has the authority to create the policy which is the focus of this application.

[42] However, the implementation of the Equity Office process, while within the powers of the Board, is not specifically authorized by the *Act*.

[43] I see a difference between the statutory power to establish a policy and a statutory power to determine a matter. I read the case as standing for the proposition that the Senate's power to establish a policy is a statutory power. I read s. 70 of the *Act* as a concrete example of how the legislature bestowed on the Board a power to determine an issue.

[44] UBC relies upon *Attaran v. University of British Columbia*, [1998] B.C.J. No. 115 for the proposition that when the Board issues a policy, it is acting under its statutory power of decision.

[45] The case was an application for a judicial review of UBC's fee increases.

[46] In relation to UBC, the Court said:

> [5] The respondent is a statutory body continued under the *University Act*, R.S.B.C. 1996, c. 468. The Board of Governors are empowered by the *University Act* to govern....
>
> [6] The President's office at the University publishes a number of policies in a Policy Handbook which is distributed to administrators, faculty and staff....

[47] The Court, respecting the exercise of a statutory power of decision within the meaning of the *Judicial Review Procedure Act* ("JRPA"), said:

[40] The amount of the fee is however not a matter of contractual bargaining. The fees to be charged, and thereby form part of any contact between the student and University, arise from exercise of a statutory power vested in the Board under the University Act. Section 27(2)(m)(i) empowers the Board "to set, determine and collect the fees to be paid for instruction, research and all other activities of the University".

[41] The Board when it "determines" the fee which will later be contractually binding upon a student is exercising a "statutory power". Section 1 of the Judicial Review Procedure Act defines "statutory power" to include "a power or right conferred by an enactment; (b) to exercise a statutory power of decision".

[42] The Judicial Review Procedure Act in turn defines a "statutory power of decision" in Section 1 as "... a power or right conferred by an enactment to make a decision deciding or prescribing; (a) the legal rights, power, procedures, immunities, duties or liabilities of a person".

[43] When the Board decides upon the fees to be charged a student, or an increase to those fees, it is imposing upon a student a "liability" for payment of that fee, and the payment is enforced as a contractual duty in the contract formed upon registration.

[44] In *Re Webb and Simon Fraser University* (1978), 83 D.L.R. (3d) 244 (B.C.S.C.), Macdonald J. decided that in setting such fees the Board of a University was exercising a public duty **which could be controlled and enforced by the courts.** I do not accept the argument advanced by counsel for the respondent attempting to distinguish this decision, nor that it was wrongly decided.

[45] I accept the Board in setting fees was exercising a "statutory power of decision".

[46] The cost to a student of tuition is a significant criteria in the availability of higher education to the public. The persons comprising the Board are performing an extremely important public duty when they decide upon tuition fees. I would be surprised if Board members considered their duty otherwise.

[47] I am of the opinion that the decision of the Board setting fees is subject to judicial review upon proper grounds. (emphasis added).

[48] I read the case as deciding that the Board under s. 27(2)(m)(i) of the *Act*, was exercising a power conferred by the *Act* to make a decision prescribing the legal liabilities of a person. When the Board decided that liability it was exercising a statutory

power of decision, Further the exercising of that statutory power of decision could be controlled and enforced by the Courts and such control and enforcement is exercised by way of judicial review upon proper grounds.

[49] I read the Court as saying essentially that where a statutory power of decision is exercised, judicial review is available.

[50] It is also clear to me that the Court's decision does not go so far as to suggest that when the Board issues a policy it is acting under a statutory power of decision. Certainly, there is a difference between issuing a policy under a broad statutory power such as set out in s. 27(2)(y) to do and inform all other matters and things that may be necessary or advisable for carrying out and advancing, directly or indirectly, the purposes of the university and the performance of any duty by the Board or its officers prescribed by this *Act* and issuing a policy under a direct power to determine a specific question such as that set out in s. 70 of the *Act* or that set out in s. 27(2)(x.2) which states:

> (2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:
>
> (x.2) to provide for the hearing and determination of disputes arising in relation to
>
> (i) the contravention of a rule or other instrument made in the exercise of a power under this section; and
>
> (ii) the imposition of a penalty under paragraph (x.1);

[51] In my view, under the *University Act*, a statutory power of decision is invoked when the Board of Governors exercises a power of determination such as that in ss. 70 or 27(2)(x.2). The mere administration of a policy is not *per se* the exercise of a statutory power of decision.

[52] Further, the determination of fees in *Attaran v. University of British Columbia*, while a statutory power of decision, does not translate directly into a finding that the determination arose out of a proceeding. It merely represented a finding that the exercise of that statutory power is subject to judicial review. As stated previously, I am satisfied that the Court is saying that a statutory power of decision will be capable of being controlled and enforced by the Courts by way of judicial review.

[53] UBC has correctly pointed out that this Tribunal has accepted, on three previous occasions, in *Baharloo v. University of British Columbia and another (No. 2)*, 2011 BCHRT 290; *Alexander v. UBC*, 2010 BCHRT 124 and *E v. An Institution and others*, 2010 BCHRT 212 that s. 27(1)(f) applied. All three decisions were based on arguments that the Senate Appeals Committee decision in each case was "another proceeding" which had appropriately dealt with the subject of a complaint to the Tribunal. The difference between those decisions and the issue before the Tribunal in this instance is that the Senate is given the power under s. 37(1) to:

> (a) determine all questions relating to the academic and other qualifications required of applicants for admission as students to the university or to any faculty, and to determine in which faculty the students pursuing a course of study must register (s. 37(1)(c));
>
> (b) determine the conditions under which candidates must be received for examination, to appoint examiners and to determine the conduct and results of all examinations (s. 37(1)(d));
>
> (c) establish a standing committee to consider and take action on behalf of the senate on all matters that may be referred to the senate by the board (s. 37(1)(c)(q));
>
> (d) establish a standing committee of final appeal for students in matters of academic discipline (s. 37(1)(v));

[54] In *Baharloo*, an application was made to dismiss a complaint brought by a PhD student in UBC's Department of Dentistry. That complaint arose when the Faculty of Graduate Studies required the complainant to withdraw from his PhD program. The UBC Senate Appeals Committee rejected Mr. Baharloo's appeal.

[55] *Alexander* arose from a complaint from an applicant to the Faculty of Law who alleged that her denial of admission by a Faculty Admissions Committee was discriminatory. The Faculty Admissions Committee's decision was appealed to the UBC's Senate Admissions Appeal Committee which denied the complainant's appeal.

[56] *E* arose when a nursing student, having received two failing grades and being dissatisfied with the results of her appeal of those grades, appealed to the institution's senate committee on student appeals and standing. Her appeal was rejected.

[57] In each case, the *University Act* provided expressly that the Senate had authority to conduct a final appeal.

[58] The *Code* states in s. 25(1):

> In this section and in section 27, "proceeding" includes a proceeding authorized by another Act and a grievance under a collective agreement.

[59] The processes which were the subject of the three Tribunal decisions, *Baharloo, Alexander* and *E* were each proceedings authorized by another Act and were indisputably therefore proceedings within the meaning of s. 27(1)(f).

[60] Although the parties did not rely on it, I note that it is clear from *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, that a proceeding may be established in the legislation governing universities. In that case, a student at the University of Regina was required by the university to discontinue his studies. The *University Act* provided an appeal to a committee of the University Council which was obligated to "hear and decide". The committee heard only the university and decided adversely to the student who then sought judicial review. The university argued that the student had a further appeal to a committee at the university senate, also charged to "hear and decide".

[61] The student was successful at first instance but the Court of Appeal for Saskatchewan held where there is a right of appeal, certiorari should not be granted except under special circumstances. The Supreme Court of Canada agreed. On the issue of adequate alternative remedy, the Court said that the senate was required to hear the appellant. The Court said:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors included the burden of a previous finding, expeditiousness and costs.

[62] The Court commented on the governing bodies functioning as tribunals as follows:

> The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute

and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens, as was held in *Polten,* its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university. Thus, s. 55 provides:

> The senate may make provision for the hearing and final determination of all appeals and complaints respecting the election of its members and the election of the chancellor.

Section 66 has a similar purpose:

> Where any question arises respecting the powers and duties of convocation, the senate, board, council or any officer or servant of the university, the question shall be settled by a committee composed of the chancellor, the president and the board chairman.

Furthermore, s. 78(1)(c) contains within itself the qualification that the power of the council committee to hear and decide upon all applications and memorials by students, is "subject to an appeal to the senate". These words give weight to the proposition that the legislator attached importance on the student proceeding through the stages established by the Act for the protection of student interests.

Sections 78(1)(c) and 33(1)(e) are in my view inspired by the general intent of the Legislature that intestine grievances preferably be resolved internally by the means provided in the Act, the university thus being given the chance to correct its own errors, consonantly with the traditional autonomy of universities as well as with expeditiousness and low cost for the public and the members of the university. While of course not amounting to privative clauses, provisions like ss. 55, 66, 33(1)(e) and 78(1)(c) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means. In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the university. They simply exercise their discretion in such a way as to implement the general intent of the Legislature. I believe this intent to be a most important element to take into consideration in resolving the case, and indeed to be a conclusive one, when taken in conjunction with the others.

[63] It is clear from *Harelkin* that the Court is deferring to the legislature's intent regarding the resolution of grievances by means provided in legislation. However,

ultimately, these decisions are subject to judicial review. I believe this is supported in *British Columbia (Workers Compensation Board) v. Figliola*, 2011 SCC 52. Abella J., speaking for the majority, introduced the judgment as follows:

> Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. **Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding.** What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation. (emphasis added)

[64] The Equity Office process does not specifically provide for judicial review. Under Policy No. 3, the paragraph related to appeal reads as follows:

> **2.5.4. Appeal**
>
> 2.5.4.1. ... 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.

[65] It is axiomatic that in order for a member of staff or faculty to have recourse through the provisions of the collective agreement, a term of the collective agreement would need to be contravened. There is no information before me as to whether or not the collective agreement provides for recourse to appeal an arbitrator's decision under the collective agreement. If so, if Dr. Chan had disagreement with the arbitrator's decision, she would ultimately have a right to judicial review through that process just as she would if she were unhappy with the results of a Tribunal decision. Neither constitutes a classic appeal process. Each would involve a *de novo* hearing.

[66] UBC has submitted that the recourse to the Tribunal is not an appeal process contemplated by the policy. The provisions of the collective agreement are no more so.

[67] The guide to Policy No. 3 states, with respect to appeals from the process, that:

> If either party disagrees with the decision of the above resolution options, they may appeal the decision through grievance procedures established by 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.

[68] The guide cannot create a status for a Tribunal hearing which is not created either by the *Code* itself or by the policy. Either the complaint to the Tribunal is a valid part of the process established by Policy No. 3 or it is not. If it is not, then I am driven to the conclusion that the collective agreement redress discussed in the policy is not either. In such circumstances, there is no appeal process contemplated by the policy.

[69] Nor is there express recourse to judicial review provided by the Equity Office process. Although UBC relied on *Attaran*, it did not directly argue that, as in *Figliola*, Dr. Chan's proper recourse was through either judicial review or appeal of the outcome of the Equity Office process. Based on the evidence and submissions before me, I cannot conclude that there is other recourse.

[70] UBC points out that in *Reed v. Strata Plan NW2056*, 2004 BCHRT 64, the Tribunal has interpreted the term "proceeding" to mean:

> ... a formally established system of dispute resolution: for example, redress mechanisms established by other laws, actions taken in the judicial system, and privately contracted dispute resolution systems such as grievances, commercial arbitration, or the application of formal redress mechanisms. (para. 10)

[71] The Equity Office process is not a redress mechanism established by other laws, actions taken in the judicial system, a grievance or commercial arbitration. While I agree that the Equity Office process is a formal redress mechanism, for the reasons set out above, I am not persuaded that it is a proceeding within the meaning of s. 27(1)(f). I leave for another case the question of whether a proceeding within the meaning of s. 27(1)(f) may include a formal redress mechanism that is not authorized by law and ultimately subject to review or appeal.

[72] In all of the circumstances, I am satisfied that the Equity Office process is not a proceeding within the meaning of s. 27(1)(f) of the *Code*.

[73] It is unnecessary for me therefore to address the question of whether the Equity Office process appropriately dealt with the crux of Dr. Chan's complaint.

[74] I am not prepared to dismiss Dr. Chan's complaint pursuant to s. 27(1)(f).

VII IS THERE NO REASONABLE PROSPECT OF SUCCESS – SECTION 27(1)(c)

POSITION OF UBC

[75] UBC submits that the Iyer report and the Panel report constitute persuasive and relevant evidence that Dr. Chan was not the victim of racial discrimination in the selection process for the Lam Chair. They submit that, given the results of the two reports, there is no reasonable basis to suggest that the Tribunal will arrive at a different conclusion when confronted with the same allegations and evidence.

VIII POSITION OF DR. CHAN

[76] Dr. Chan points out that she has, as of the date that she had made her submissions on UBC's application to dismiss, not received any documents from UBC other than a large number of heavily-redacted documents she obtained independently through her own Freedom of Information request and the written submissions and attachments associated with the investigation process. She says that most, if not all relevant documents, are within the possession and control of UBC.

[77] Dr. Chan submits that the Tribunal cannot defer to the Iyer and Panel process in this analysis. She says that the Tribunal cannot determine that a third party has satisfactorily resolved the complaint because that would constitute a deferral of statutory decision-making power. She further says that the Iyer and Panel process are irrelevant to the prospects of the complaint's success before the Tribunal.

IX ANALYSIS AND DECISION

[78] 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 role of the Tribunal on such an application is to make an assessment, based on all of the material before it of whether there is a reasonable prospect the complaint will succeed: *Wickham and Wickham v. Mesa Contemporary Folk Art and others,* 2004 BCHRT 134, paras. 11 and 12.

[79] Section 27(1)(c) creates a gate-keeping function which allows the Tribunal to remove those complaints that do not warrant the time and expense of a hearing. A Tribunal member evaluates the material before the Tribunal to determine whether there is no reasonable prospect that the complaint will succeed. A complainant's hurdle to defeat a s. 27(1)(c) application is low. The complainant must only show that the evidence takes the case out of the realm of conjecture. *Workers Compensation Appeals Tribunal v. Hill*, 2011 BCCA 49, para. 27.

[80] This complaint alleges discrimination on the basis of race, colour, ancestry and place of origin.

[81] I repeat here what I said in my original Reasons for Decision. In *Stephenson v. Northern Concord Industry 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 a respondent in order to establish a *prima facie* case.
>
> In *Lee v. British Columbia (Attorney General)* 2003 BCSC 1432 the British Columbia Supreme Court said in respect of establishing a *prima facie* case:
>
> > 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.

[82] I reject the position of UBC that the Iyer and Panel reports should be persuasive to the Tribunal that there is no reasonable prospect that the Tribunal might come to a different conclusion than those panels. I concur with UBC's submission that both Ms. Iyer and Ms. Butler are highly competent to carry out the analysis which was before them. That, however, strikes me as somewhat irrelevant. One need only look at virtually any decision of the Supreme Court of Canada to understand that judges at the absolute pinnacle of hierarchy in our judicial system are quite capable of arriving at contrary results on the same facts or at the same result by entirely different reasoning processes. A significant case in this arena, *British Columbia (Workers Compensation Board) v. Figliola*, 2011 SCC 52 is illustrative of that fact.

[83] I am equally unpersuaded by Dr. Chan's submission that she has not received disclosure documents from UBC. If I were to rest my decision on that fact, I would be committing precisely the same error that the Supreme Court found existed in the original decision. I refer to the Court's observation that "the fact that it may be difficult to prove racial discrimination does not change the requirement that the application to dismiss must be based on the evidence before the Tribunal at the time of that application, and not based on what evidence might be adduced if the matter proceeded to a full hearing".

[84] On the material before me, the posting for the Lam Chair required the applicants to provide, amongst other things, a statement of research interest in the multicultural area.

[85] The posting set out four criteria for the position. Those criteria included breadth of representation of multicultural education and the candidate's vision for the Lam Chair.

[86] Dr. Chan maintains that multiculturalism is a recognized field of academic study which she describes as the study of the interaction between the state and racial/cultural minority groups who seek recognition and accommodation of their cultural identification and identity. She asserts that the concept of race is central to multiculturalism. She says this without supporting it with any academic support for her position.

[87] The material discloses that the selection committee applied a broader definition of multiculturalism than merely race and cultural minority in the selection process.

[88] A brief foray into the Oxford and Webster dictionaries reveals that either definition could find support.

[89] Dr. Chan points out that her work focuses on multiculturalism as she states it should be defined. She points out that the successful candidate's work focused on youth and gender.

[90] A factor in Dr. Chan's allegation that she has been discriminated against is her allegation 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".

[91] UBC's Policy No. 2 which is titled Employment Equity reveals that the focus of the policy is to remove any discriminatory barriers to the development of employees' career, abilities, aspirations and potential. What it does not do is set as a priority the correction of under-representation of certain groups including visible minorities.

[92] Dr. Chan has also asserted that the selection committee process departed from established procedure as set out in paragraph 18 above.

[93] Dr. Chan asserts that the successful 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. Dr. Chan was the only minority candidate short-listed.

[94] Dr. Chan points to references in the notes of Dr. Haverkamp (the only notes respecting the committee process) to her "junior" status and other similar observations which she interprets as stereotypical discriminatory comments respecting a visible minority candidate.

[95] Dr. Chan also relies upon evidence of peripheral events including:

1) Twice being denied the Killam 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) That visible minorities are under-represented in the Faculty in general and almost entirely absent from leadership positions.

X ANALYSIS AND DECISION

[96] A review of the materials makes it clear that the selection of the definition for multiculturalism was probably significant to the outcome of the selection process. There is no material before the Tribunal which suggests how the definition applied by the selection committee was arrived at.

[97] Having said that, the material demonstrates that, given the definition that was applied, there is really nothing to support that race, colour, ancestry or place of origin played a role in the outcome of the selection process.

[98] I have reviewed the notes of Dr. Haverkamp and I am unable to say how it is that Dr. Chan asserts that the various references in those notes, in the context in which they are used, could reasonably be interpreted as stereotypical terms applied to members of a visible minority. On the material before me, the terms are used purely in terms of differentiating between Dr. Chan and the successful applicant on the basis of length of tenure and degree of profile in the UBC community, both relevant considerations under the criteria for the posting. Contrary to Dr. Chan's assertions, the Candidate had more tenure at UBC than Dr. Chan.

[99] As stated previously, Policy No. 2, the Equity policy, does not require correction of the under representation of visible minorities. Consequently, the failure to incorporate the phrase "UBC is committed to employment equity" in the request for applications is unlikely to give rise to a finding of discrimination in the circumstances, nor would its incorporation in the process likely have affected the outcome.

[100] Neither does the departure from established procedures in the selection committee's process appear to support in any material way a finding of discrimination.

[101] Ultimately, it appears that there are two issues raised by Dr. Chan which might support an allegation of discrimination, those being:

1. The definition of multiculturalism applied by the selection committee; and
2. Allegations of other instances of discrimination against Dr. Chan.

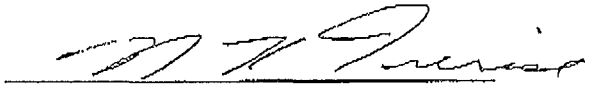
[102] I have already dismissed the allegation of systemic discrimination pursuant to s. 27(1)(c) in the previous decision. That decision was made because systemic discrimination requires allegations that go beyond discrimination affecting a single complainant, a hurdle Dr. Chan's material did not meet.

[103] There is insufficient material put forward by Dr. Chan respecting the circumstances of these various allegations of discrimination against her in other instances. The Tribunal does not investigate and relies upon parties to put forward all of the information that they need to support their positions in a s. 27 application. Ultimately, no information was received with respect to these other alleged discriminatory incidents beyond what was incorporated into the initial complaint.

[104] In the circumstances, it appears that these alleged instances of discriminatory conduct would probably not be persuasive, particularly given that there is no material connecting any of them with the members of the selection committee, in supporting this complaint of discrimination in respect of the application of Dr. Chan for the Lam Chair.

[105] I am left only with the issue of the lack of information respecting the basis of defining multiculturalism in the context of the Lam Chair. I am unable to see any likelihood that the explanation by the selection committee of their basis for establishing a broader interpretation of multiculturalism would support, even in the context of the other deficiencies alleged by Dr. Chan, that the selection was contaminated by discrimination on the basis of race, colour, ancestry or place of origin contrary to s. 13 of the *Code*. I find that there is no reasonable prospect that the Complaint will succeed.

[106] Accordingly, I dismiss the complaint of Dr. Chan.



Norman Trerise, Tribunal Member