Date Issued: June 7, 2005
File: 2427

Indexed as: Allan v. Jones Emery Hargreaves Swan, 2005 BCHRT 243

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:

Elizabeth F. Allan

COMPLAINANT

A N D:

Jones Emery Hargreaves Swan

RESPONDENT

REASONS FOR PRELIMINARY DECISION
APPLICATION TO DISMISS COMPLAINT

Tribunal Member:	Abraham R. Okazaki
On her own behalf:	Elizabeth F. Allan
Counsel for the Respondent:	Michael J. Hargreaves

I INTRODUCTION

[1] On January 17, 2005, Elizabeth F. Allan filed a Complaint in which she alleges that Jones Emery Hargreaves Swan ("Jones Emery") discriminated against her in her employment because of mental disability, contrary to s. 13 of the *Human Rights Code*, and by retaliating against her for having previously filed a human rights complaint under the *Code*, contrary to s. 43. The Tribunal did not accept the Complaint with respect to the allegation of discrimination in employment, but it accepted the Complaint with respect to the allegation of retaliation.

[2] Ms. Allan amended the Complaint on February 18 to add further details of the alleged retaliation, and on February 21 and March 24 to correct her calculations of wage loss. Jones Emery filed its Response to the Complaint on March 7, denying the allegations against it.

[3] On April 13, Jones Emery filed an Application to dismiss the Complaint pursuant to ss. 27(1)(b) and (c) of the *Code*. Ms. Allan filed a Response to the Application, and Jones Emery filed a Reply. Ms. Allan then filed a sur-reply on April 25, to which Jones Emery responded on April 28 with a sur-sur-reply.

II BACKGROUND INFORMATION

[4] These Reasons deal only with the Application to dismiss the Complaint. In the following, I do not make any findings with respect to either the allegations of retaliation made by Ms. Allan or the denials of those allegations by Jones Emery. In order to put the issues before me in their factual context, I provide the following detailed background information.

[5] Ms. Allan says that she was employed as a legal secretary by Jones Emery, a Victoria law firm, in a temporary capacity from October 2000 through February 2001, and then as a permanent employee, commencing June 2001. After working for a number of Jones Emery lawyers, Ms. Allan agreed to an assignment as secretary to a partner, Peter Vaartnou, in March 2002. According to Ms. Allan, she was praised for her work

and received a 10% raise shortly after beginning work for Mr. Vaartnou. She indicates that all was well until she became ill.

[6] Ms. Allan says that she was diagnosed with bipolar disorder in 1987, and describes her efforts to cope with her condition over the years. She suffered from the disorder throughout her employment with Jones Emery, but says that she was completely functional and able to keep her illness from her co-workers and employers until October 2002 when she was forced by her illness to leave work. Ms. Allan describes several attempted suicides and one unsuccessful return to work during the next three months, following which she says she "was incarcerated for several weeks". She describes the subsequent events in the following:

> By April 2003, [Ms. Allan] had completely recovered and was ready to return to work. She telephoned Mr. Vaartnou to advise him of this and he explained that she was not welcome to return. As she was now without work, she then asked Mr. Vaartnou if he would provide her with a letter of reference so that she could seek work elsewhere. Mr. Vaartnou agreed to provide her with a reference, however, he also warned her that such a reference would have to state that she was mentally ill as prospective employers had a right to know.
>
> Jones Emery then sent [her] a letter dated April 30, 2003 confirming that her position had been terminated and that Mr. Vaartnou would give her a reference on the terms he had already discussed with her. [Ms. Allan] replied to this with her own letter which alleged that Jones Emery had committed discrimination on the basis of mental disability.

[7] Ms. Allan filed a complaint against Jones Emery under the *Code* (the "first complaint") and retained counsel. Jones Emery also retained counsel. Negotiations resulted in a settlement of the first complaint in December 2003 or January 2004. Although Ms. Allan now suggests that she was coerced by her then spouse, acting under a power-of-attorney, into accepting the settlement, she does not submit that the settlement agreement should be set aside. Neither party submitted a copy of the settlement agreement to the Tribunal. However, the parties agree that it included, presumably as an appendix, a reference letter from Jones Emery, a copy of which was submitted to the Tribunal by Jones Emery with its Response to the Complaint. Jones Emery asserts:

> It was part of the settlement that the Respondent would issue, and did issue, a standard written reference letter, in language agreed upon between the parties. A copy of that letter is attached.
>
> The settlement further provided that any verbal inquiry of the Respondent would be replied to in a manner "consistent with" the letter. In particular, the Respondent agreed that it would make no reference to the Complainant's "illness" beyond the description contained in the letter.

[8] In her amended Complaint, Ms. Allan alleges that Jones Emery has exhibited hostility toward her ever since she retained counsel and pursued the first complaint. She says that, as a result:

> The Complainant remained unemployed (except for occasional temporary contract work) after the settlement until January 24th, 2005. The Complainant alleges that the reason for her long period of unemployment … was that the Respondent prevented her from finding new employment by refusing to give her decent and fair telephone references (as they were obligated to do by the terms of settlement) and by disparaging her to other members of the Victoria Bar. The Complainant is now therefore alleging retaliation.
>
> At the hearing of this matter, the Complainant will be calling several Victoria lawyers to testify as to what sort of employment reference they received from the Respondent, and what effect any such reference had upon the Complainant's desirability as a potential employee. The Complainant will also be calling two Victoria lawyers to testify as to information and rumours regarding the Complainant's medical condition and her prior human rights complaint that they received from third parties, which information she alleges could only have originated from the Respondent.

[9] According to Ms. Allan, in December 2004, she removed the reference to Jones Emery from her resume, and within three weeks she was employed.

[10] On January 6, 2005, Ms. Allan made a written request to Jones Emery under the *Personal Information Protection Act* (the "*PIPA*") for, *inter alia*:

> … copies of any memos or other documents relating to any reference enquiries with respect to me made by any law firm including, but not limited to: [eleven named law firms]… I also demand copies of any and all documents relating to me in your possession and control, together with a list of any individuals with whom you have discussed me, detailing the nature of their discussions, and including copies of all relevant emails…

[11] According to Ms. Allan, Michael Hargreaves, a partner in Jones Emery, replied on January 12. Mr. Hargreaves stated that the *PIPA* does not, by its terms, compel disclosure of any documents or information created prior to October 23, 2003, and continued:

> We have no record of any discussion with any prospective employer after October 23, 2003. I am not in a position to say that no such discussion took place but I am in a position to say that no one in this office has a record of such a discussion … You have asked for copies of "any memos or documents relating to any reference inquiries … made by any law firm including, but not limited to …" You then go on to list eleven specific law firms. The information that I have obtained from my discussion with the partners in this office is that none of us were contacted by the majority of those law firms. Please note that in any event we do not see any discussions that we had with prospective employers as being covered by the provisions of the statute. Such discussions may have consisted of expression by us of our opinion of your suitability as an employee, based upon your experience with this firm. However, we do not believe that the "information" contemplated by the [*PIPA*] is supposed to extend to "opinion". Furthermore, such "opinion" was not "collected" by us from you.

[12] Ms. Allan then sets out the text of the ensuing correspondence between herself and Mr. Hargreaves, consisting of seven letters or e-mails dated January 13 and 14, in which allegations and counter-allegations were exchanged, and demands for particulars of Ms. Allan's allegations were made by Mr. Hargreaves. It would be fair to say that each exchange involved increasingly emotive language and expressions of frustration, but that little helpful information was offered by either party.

[13] In its Response to the Complaint, filed on March 7, Jones Emery does not take issue with the text of the correspondence between Ms. Allan and Mr. Hargreaves, as set out by Ms. Allan. However, it denies her allegations of retaliation, and asserts that she had "steadfastly refused to provide" particulars of same. Jones Emery states:

> Working with what little information the Complainant provided, the Respondent has made inquiry amongst all of the partners within the Respondent firm. None of the partners have any current recollection of any conduct, post-settlement, inconsistent with the terms of the settlement. More particularly, none of the partners within the Respondent firm have discussed the Complainant's employability, or indeed the Complainant at

all, with any third party other than in strict accordance with the terms of the settlement agreement.

…

The Respondent submits that this Complaint should not be permitted to proceed until and unless the Complainant identifies:

a. the "several Victoria lawyers" from whom she says she will be calling evidence;

b. who, within or on behalf of the Respondent, is said to have actually done or said anything that could conceivably be construed as either retaliatory or discriminatory conduct with respect to the Complainant; and

c. when these alleged wrongs took place.

Without these particulars the Respondent cannot meaningfully prepare for any hearing. It is against the rules of natural justice to permit a complaint of this nature to proceed to hearing without disclosure to the Respondent of what it is the Respondent is said to have done wrong.

Furthermore, until and unless the Respondent knows which of its members is said to have done what, the Respondent cannot meaningfully instruct counsel nor prepare for any hearing. How many partners of the Respondent have to appear? If the Respondent does not know what the evidence is going to be, and which partner or partners is said to have done anything wrong, how can the Respondent know which partners to have available? Is the entire firm to be shut down for a matter of what might be several days simply because the Complainant gives voice to non-particularized allegations?

[14] The Tribunal wrote to the parties on March 8, setting out, *inter alia*, the deadlines for disclosure and the exchange of witness lists. Citing *Rule* 18 of the Tribunal's *Rules of Practice and Procedure*, the letter stated that, at least 60 days before the hearing of the Complaint, Ms. Allan must deliver to Jones Emery a list of the witnesses she intends to call at the hearing, and Jones Emery must deliver to Ms. Allan its witness list at least 30 days before the hearing. The Notice of Hearing was issued by the Tribunal on March 24, setting the hearing dates as September 15 and 16, 2005.

[15] In the meantime, Jones Emery wrote to the Tribunal on March 14, maintaining that it had "absolutely no idea of the case that we are being called upon to meet", and that:

> The advice from the Tribunal to the effect that Ms. Allan will have to give us a list of witnesses is of no consolation to us. A list of names of individuals with whom we have had no dealing (in terms of Ms. Allan) hardly helps us to prepare for the hearing.

[16] When Jones Emery wrote that letter, Ms. Allan had not yet disclosed her witness list. She did so on March 15, stating in a letter, addressed to Jones Emery and copied to the Tribunal, that she intended, with certainty, to call Mr. Hargreaves and Philip Penner, both partners in Jones Emery, and Richard Pipes, a Victoria lawyer. Ms. Allan also stated that she may call another Jones Emery partner, Patrick Trelawny, as well as two other witnesses, one of whom is also a Victoria lawyer.

[17] Mr. Hargreaves again wrote to the Tribunal on the following day, March 16, saying that he had spoken to Mr. Pipes and outlined what Mr. Pipes had told him. Mr. Hargreaves invited the Tribunal to telephone Mr. Pipes, and concluded: "In these circumstances it seems extraordinary that the Tribunal would put a business organization to enormous expense to answer allegations that even the Complainant cannot state with any degree of precision". The March 16 letter, which was copied by Mr. Hargreaves to Ms. Allan, triggered a response from her, which, in turn, prompted a further letter from Mr. Hargreaves.

[18] On March 23, the Tribunal wrote to Mr. Hargreaves, pointing out that changes to the *Code* on March 31, 2003 had eliminated the Human Rights Commission and made the Tribunal a "direct access" tribunal which does not have an investigatory mandate. The letter, which was copied to Ms. Allan, referred to the provisions in the *Rules* with respect to applications to dismiss a complaint, for further and better particulars, and additional disclosure. Finally, the Tribunal requested the parties to refrain from copying the Tribunal with further correspondence to each other.

[19] Notwithstanding the Tribunal's letter, Ms. Allan wrote a further letter to the Tribunal dated April 11. It does not appear that she copied it to Jones Emery, and I will not consider it in making my decision on the Application.

III RELEVANT PROVISONS OF THE *CODE*

[20] Ms. Allan alleges that Jones Emery contravened s. 43 of the *Code* which provides:

> A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code.

[21] On April 13, Jones Emery filed its Application to dismiss Ms. Allan's Complaint pursuant to ss. 27(1)(b) and (c) 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:
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;

IV SUBMISSIONS

A. Jones Emery

[22] Together with its Application, Jones Emery filed seven affidavits sworn by: George F. Jones, Terrance Swan, Patrick Trelawny, Philip J. Penner, Peter Vaartnou, John Waldie, and Michael J. Hargreaves. Each identifies himself as a partner in Jones Emery, and, with minor variations in the affidavits of Messrs. Vaartnou and Hargreaves, each states:

> I have not, since the beginning of 2004 and February 23, 2005, disparaged Ms. Allan in any communication with any prospective employer of Ms. Allan nor to any members of the Victoria Bar outside of this firm.

[23] Messrs. Jones, Swan, and Waldie attest to having no recollection of responding to any inquiry made by any prospective employer with respect to Ms. Allan since the beginning of 2004 to and including February 23, 2005, that being the date of the Tribunal's letter notifying Jones Emery of Ms. Allan's Complaint. Mr. Vaartnou states: "No inquiry has been made of me by any prospective employer with respect to Ms. Allan since the beginning of 2004 to and including February 23, 2005". Mr. Trelawny says in his affidavit:

> I have not received any inquiry made by any prospective employer with respect to Ms. Allan since the beginning of 2004 to and including February 23, 2005 and have not, since January 14, 2004, discussed Ms. Allan with any member of the British Columbia bar, other than partners of [Jones Emery].

[24] Mr. Penner states that he had a telephone conversation with Christopher Considine, a Victoria lawyer, on January 25, during which he advised Mr. Considine that: "I could only say that we had agreed to provide Ms. Allan with a reference in an agreed form. I gave no further comment." Mr. Penner states that the conversation was initiated by a voicemail message from Mr. Considine's assistant, indicating that Mr. Considine was advertising for a secretary and Ms. Allan had given Mr. Penner's name as a reference. Although the message requested Mr. Penner to call Mr. Considine's assistant, he instead spoke to Mr. Considine.

[25] In his affidavit, Mr. Hargreaves says that he spoke to Mr. Pipes on March 16, because his name was disclosed the day before in Ms. Allan's witness list. Mr. Hargreaves attests that:

> …I was and remain satisfied that Mr. Pipes will not be testifying with respect to any "reference" that he requested or received from the Respondent with respect to the Complainant. Nor will he be testifying that any member of the Respondent disparaged the Complainant to him.
>
> I do not know whether he will be testifying that he heard "rumours". However, I anticipate arguing that rumours, especially the rumours alleged by the Complainant, are not admissible and are not probative if admissible.

Mr. Hargreaves then suggests in his affidavit that the "rumours" concerning Ms. Allan's "mental illness" may be attributable to her website in which he asserts Ms. Allan

"described in considerable detail, many of the consequences of her mental illness". Although in its submissions, Jones Emery sets out the website address, Mr. Hargreaves states in his affidavit that the website "is apparently no longer available".

[26] Jones Emery submits that there is, or can be, no suggestion that it contravened any of the specific provisions of s. 43, and specifically that:

> The Complainant had no "right" vis a vis the Respondent, so there can be no suggestion that the Respondent denied any such "right".
>
> Equally, the Complainant has no entitlement to any "benefit" from the Respondent so there can be no complaint that the Respondent withheld such a non-existent benefit.
>
> It seems that the basis of the Complaint must be the default or fallback provision in Section 43: that the Respondent in some way "otherwise discriminated" against the Complainant.
>
> The difficulty which both the Tribunal and the Respondent have in assessing this is that the Complainant simply does not state that the Respondent ever did anything that in any way constitutes discrimination against the Complainant.
>
> It is conceded that the Complainant says that the conduct happened. However, despite numerous and repeated requests, the Complainant has been unable to specify anything that the Respondent actually did.

[27] Jones Emery then argues that, although Ms. Allan states in her Complaint that she "will be calling several Victoria lawyers to testify as to what sort of employment references they received from the Respondent", she has only identified one Victoria lawyer, Mr. Pipes, and that, "unless Mr. Pipes lied to Mr. Hargreaves, the Complainant is unable to produce any witness to 'testify as to what sort of employment references they received from the Respondent' during the relevant time".

[28] Similarly, Jones Emery notes that Ms. Allan states in her Complaint that she will be calling "two Victoria lawyers to testify as to information and rumours regarding the Complainant's medical condition and her prior Human Rights Complaint that they received from third parties, which information she alleges could only have originated with the Respondent". Jones Emery argues that Ms. Allan "has not listed or identified

two such lawyers", although it acknowledges that Mr. Pipes "might want to give evidence of that nature". Jones Emery submits that:

> … it is contrary to the rules of natural justice that the Complainant could be subjected to penalty based on what is pure hearsay. Moreover, based on the particulars given so far by the Complainant, the hearsay does not even go so far as to suggest that the Complainant played any role in the creation of the rumours. (Reproduced as written)

Finally, Jones Emery argues that, through her website:

> … the Complainant has made it known to the entire world (at least that part of it on the Internet) that she has a mental illness. There is thus no basis for an inference that rumours circulated by unidentified third parties logically had their origin with the Respondent.

[29] On that basis, Jones Emery submits that the Complaint should be dismissed under s. 27(1)(b) of the *Code*.

[30] Jones Emery also submits that all of its arguments under s. 27(1)(b) "apply perhaps with even more force" to its Application under s. 27(1)(c), maintaining that:

> Absent particulars of alleged conduct and absent identification of any witnesses who might substantiate such particulars, there can be no prospect of this Complaint succeeding. It should end now.

[31] In support of its argument, Jones Emery complains of "a considerable disruption of the practice of each of the partners" if the matter proceeds to a hearing. It then says:

> The Respondent, or more accurately the partners comprising the Respondent, vary in their emotional response to the complaints being made but all recognize that the Complainant continues to wrestle with a very serious mental illness which may well be playing a role in her attacks upon the Respondent.

B. Ms. Allan

[32] Ms. Allan submits that the rights referred to in s. 43 include her rights under the agreement made between her and Jones Emery in settlement of her first complaint, and that those rights, which she says include "decent and fair telephone references" to be given by the law firm to prospective employers, have been denied by Jones Emery. She

ascribes the denial to retaliation by her former employer because she had pursued the first complaint.

[33] Ms. Allan asserts that she has advised Jones Emery "over and over again what the firm did wrong; they prevented me from finding alternative employment" by "failing to provide honest and fair employment references".

[34] With respect to Jones Emery's position that she has failed to provide names of her witnesses, in accordance with her statements in her Complaint, Ms. Allan states that she will provide a further witness list prior to the deadline for delivery of same (at least 60 days before the hearing which is set to commence September 15), and that it will include Mr. Considine. Ms. Allan also asserts that Mr. Pipes will be called as a witness, but that she is not obliged to disclose in advance what his evidence will be. She submits that, in the meantime, Jones Emery's Application is premature.

[35] Ms. Allan voices strong objection to the references by Jones Emery to her website. She asserts that it is irrelevant to her Complaint, and that prospective employers would not normally search the internet for an applicant's website.

[36] She disputes Jones Emery's assertion that it will suffer considerable disruption of its partners' practices, noting that the hearing will be held in Victoria, and challenges the characterization by Jones Emery and Mr. Hargreaves of her condition as a "mental illness".

C. Jones Emery's Reply

[37] The Reply was brief. It said:

> The Complainant's allegations appear to boil down to:
>
> a. I have been unable to find work;
>
> b. It must be due to the conduct of the Respondent;
>
> c. The Tribunal should punish the Respondent even though I cannot identify any specific acts or omissions.

> In other words, the Complainant's response merely exemplifies the concerns that the Respondent has had throughout. Where are the particulars of the conduct alleged? The simple answer is, as demonstrated by the Respondent's Affidavits, that the Respondent has done absolutely nothing. The discrimination or retaliation exists only in the mind of the Complainant.

D. Further Submissions

[38] Ms. Allan filed a sur-reply on April 25. Jones Emery responded with a sur-sur-reply on April 28. Neither sought leave from the Tribunal to file these documents; nor were they invited to do so by the Tribunal, which had only requested Ms. Allan's Response to the Application and Jones Emery's Reply. As a general rule, the Tribunal does not accept such additional submissions. It is necessary to limit the number of submissions that parties are allowed to submit to the Tribunal in order to avoid what might otherwise be a time-consuming but unproductive exchange of arguments and counter-arguments, assertions of facts and denials. A submitting party may apply to the Tribunal for acceptance of such an additional submission, and, where appropriate, the Tribunal may accept it.

[39] In the circumstances of this case, I have read the sur-reply and the sur-sur-reply in order to determine their places in the context of the Application. I will not accept or consider either. Both speak to matters previously raised and addressed.

V ANALYSIS AND DECISION

[40] Jones Emery submits that Ms. Allan's Complaint should be dismissed under s. 27(1)(b) because the acts or omissions alleged therein do not contravene s. 43 of the *Code*, and under s. 27(1)(c) because there is no reasonable prospect that the Complaint will succeed. Its submissions apply to both sections.

[41] Jones Emery first argues that there is nothing to indicate that it committed any of the prohibited acts set out in the first part of s. 43 (e.g.: evicting, discharging, or suspending Ms. Allan), and Ms. Allan does not dispute that. However, I agree with Ms. Allan that, in her Complaint, she alleges that Jones Emery has denied her rights (which might also be characterized as "benefits", as that term is used in s. 43) to which she says

she is entitled pursuant to the agreement made by them to settle her first complaint. That agreement is not before me, in either a literal or figurative sense, so it remains to be seen whether or not Ms. Allan will ultimately succeed in her Complaint, but her allegations bring the Complaint within the ambit of s. 43.

[42] The remainder of Jones Emery's argument under s. 27(1)(b) is, in essence, its ongoing complaint that Ms. Allan has failed to provide sufficient particulars, and its argument that the particulars she has provided are refuted by the affidavits sworn by seven partners of the firm. Firstly, at least some of the particulars demanded by Jones Emery have been supplied by Ms. Allan in the list of eleven law firms she supplied to Jones Emery in her January 2005 written request to the firm for information under the *PIPA*. Ms. Allan also provided Jones Emery with a witness list on March 15, and she correctly indicates that she has until 60 days before the commencement of the hearing on September 15 to produce her final list. Although, through provisions governing such matters as witness lists and disclosure of documents, the Tribunal's *Rules* aim to prevent "trial by ambush", they do not require a party to divulge, in advance and to every other party, every detail of its case and the evidence it intends to adduce. Secondly, in some cases, particularly those involving employment relationships, relevant evidence may be in the possession and control of one party, and it is only through the complaint process that that evidence, and the particulars they include, can be obtained by the adverse party. Finally, in earlier correspondence, the Tribunal has pointed the parties to its *Rules* dealing with applications for particulars and disclosure. It is up to the parties to make such an application.

[43] I turn now to the affidavits of the seven partners of Jones Emery. I accept the truth of their contents. However, I note the limitations, including chronological and geographic limitations, contained in each, and also note that there are some variations in their contents. In this regard, most of the affidavits refer to communications with members of the Victoria Bar, but do not refer to communications with non-lawyer staff or outside agencies employed by law firms. Indeed, in his affidavit, Mr. Penner stated that he received a voicemail message from "Sue", whom he took to be Mr. Consodine's assistant, enquiring about Ms. Allan, and that "Sue" asked Mr. Penner to call her back.

This indicates that communications about a prospective law firm employee may be handled, not by a lawyer, but by others. I also observe that there is nothing before me to indicate if all of the partners of the firm have sworn and filed affidavits, or if there are other partners, past and present, who have not done so. Furthermore, the named respondent is the law firm of Jones Emery, not the individual partners of the firm. If Jones Emery employs associate lawyers and non-lawyer staff, it is possible that Ms. Allan's allegations may relate to their acts, as well as, or in lieu of, acts of the seven partners who have sworn affidavits in this matter. And again, both past and present employees may be involved. In light of such factors, it is possible to accept as true, as I do, the contents of the affidavits filed by Jones Emery, and yet, at the same time, accept that at least some of Ms. Allan's allegations may also be true.

[44] In the same vein, both Mr. Hargreaves, on behalf of Jones Emery, and Ms. Allan express confidence that Mr. Pipes will offer evidence that will be supportive, or at least, not offer evidence that will be unhelpful, to their respective positions. It remains to be seen who will be proven correct, or perhaps that both, in some elements, will be correct.

[45] I turn now to the applicable case law. First, I refer to the principle relating to the application of s. 27(1)(b), articulated in *Pegura et al* v. *School District No. 36*, 2003 BCHRT 53. The Tribunal there stated (at para. 28):

> I do not propose to outline exhaustive criteria with respect to the application of s. 27(1)(b). However, given the absence of any investigatory process under the *Code*, as amended, and the absence of any evidence (either *viva voce* or by affidavit) from either party, I find that a decision on an application such as this should be made on the basis of facts which are assumed to be true, based either on the complainants' statements or an agreed statement of facts between the parties.

[46] The Tribunal in *Pegura* then noted that the parties held conflicting views about the facts and how the facts should be interpreted, and concluded (at para. 29):

> … In my view, this conflict cannot be resolved on a preliminary basis, but can only be resolved after hearing the evidence at a hearing. Therefore, the Respondent's application pursuant to s. 27(1)(b) is dismissed.

[47] In the matter before me, Ms. Allan and Jones Emery have submitted conflicting views about the facts and their interpretation, and the evidence that may be adduced to prove those views. Although, unlike the parties in *Pegura*, Jones Emery has filed affidavits in support of its positions, I have observed above that that, in itself, does not necessarily resolve the conflicts. In my view, those conflicts cannot be resolved without a hearing at which the evidence of witnesses is presented under oath and tested in cross-examination. If Ms. Allan is able to establish, through her evidence, that some or all of her allegations are true, this may establish a contravention of s. 43 of the *Code*. Therefore, I dismiss Jones Emery's Application made under s. 27(1)(b).

[48] With respect to s. 27(1)(c), the Tribunal stated in *Bell* v. *Dr. Sherk and others*, 2003 BCHRT 63 at paras. 22 and 23:

> Section 27(1)(c) gives the Tribunal the discretion to dismiss a complaint where "there is no reasonable prospect that the complaint will succeed". In *Mis* v. *Alberta (Human Rights Commission)*, [2001] A.J. No. 1094 (Alberta C.A.) (Q.L.), the Court stated
>
> > The determination of whether a complaint should be dismissed as "without merit" is a screening or gatekeeping function performed as a paper review. We are disinclined to set the specific test as low as 'arguable case' or as high as 'reasonable prospect of success'. In our view, the standard is somewhere in between. The question the Director or Chief Commissioner [who are empowered under the Alberta *Human Rights, Citizenship and Multiculturalism Act* to dismiss complaints] must ask is whether there is a reasonable basis in the evidence for proceeding to the next stage.
>
> In other words, the 'reasonable prospect of success' appears to be a higher standard than was the previous standard in the *Code*, a 'reasonable basis in the evidence' to justify referring the complaint to a hearing.

[49] The Tribunal also stated in *Bell*:

> Further, when the Tribunal is considering whether to dismiss a complaint on the basis that there is no reasonable prospect the complaint will succeed, more than the mere assertion that the other party's version of events is untrue is required. In other words, if a respondent, in its application to dismiss the complaint on the basis that there is no reasonable prospect the complaint will succeed, merely asserts that everything the

> complainant has alleged is untrue, it is unlikely the application will be successful. (at para. 27)
>
> This evaluation or weighing of the evidence for the purpose of determining whether there is a reasonable prospect the complaint will succeed is not of the same nature as that which occurs at a hearing before a tribunal, where the tribunal would make an assessment of the evidence on the balance of probabilities. The weighing or assessing at the s. 27 stage should relate solely to the question of whether there is a reasonable prospect that the complaint will succeed: *Rogers* v. *British Columbia (Council of Human Rights)* (1993), 21 C.H.R.R. D/67 (B.C.S.C.) at paras. 23-24. (See also *Yuan*, *supra*, where the Court states that the Commissioner's delegate (by analogy, now, the Tribunal) "must, in order to consider the statutory obligation concerning no reasonable basis [now, no reasonable prospect the complaint will succeed] weigh or assess or evaluate the evidence in its entirety.") (at para. 29)

[50] Having considered the material before me in its entirety, I am of the view that, at this stage of the proceedings, I am unable to determine that the Complaint has no reasonable prospect of success. Therefore, I dismiss Jones Emery's Application made under s. 27(1)(c).

VI CONCLUSION

[51] I dismiss the Application of Jones Emery made under ss. 27(1)(b) and (c) of the *Code*.

Abraham R. Okazaki, Tribunal Member