Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

DR. CHRIS BART, DR. DEVASHISH PUJARI, DR. WILLIAM RICHARDSON, DR. JOE ROSE, DR. SOURAV RAY, DR. GEORGE STEINER, AND DR. WAYNE TAYLOR

Applicants

- and -

MCMASTER UNIVERSITY, THE BOARD SENATE HEARING PANEL FOR SEXUAL HARASSMENT/ANTI-DISCRIMINATION UNDER THE MCMASTER UNIVERSITY POLICY, THE SENIOR ADMINISTRATOR AT MCMASTER UNIVERSITY, AND CERTAIN UNNAMED INDIVIDUALS AT MCMASTER UNIVERSITY

Respondents

FRESH AS AMENDED FACTUM OF THE RESPONDENTS, MCMASTER UNIVERSITY, "SENIOR ADMINISTRATOR AT MCMASTER UNIVERSITY", AND "CERTAIN UNNAMED INDIVIDUALS AT MCMASTER UNIVERSITY"

Date: March 29, 2016

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PART I - OVERVIEW

1. In 2013, under the terms of McMaster University's ("**McMaster**" or the "**University**") *Anti-Discrimination Policy* (the "**Policy**"), an adjudicative panel consisting of the Applicants' peers (the "**Tribunal**") determined that the Applicants, other than Dr William Richardson ("**Dr Richardson**") had, to varying degrees of severity, committed over 30 instances of harassment and bullying in the workplace and/or otherwise contributed to a poisoned work environment at the DeGroote School of Business (the "**DSB**").[1] A chart

[1] Decision of the Board-Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy ("**Tribunal Decision**"), Record of Proceedings of the Board-Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy ("**Tribunal Record**"), Volume 2, Tab 2A at pp. 134 *et seq*. The complaint against the Applicants, other than Dr William Richardson, was brought by Dr Terry Flynn, Dr Milena Head, Dr Chris Longo, Dr Brian Detlor, Ms Linda

summarizing the Tribunal's findings against the Applicants, other than Dr Richardson, is attached as Appendix "1" to this factum. In addition, the Tribunal found that 3 of the Applicants - Drs George Steiner ("**Dr Steiner**"), Wayne Taylor ("**Dr Taylor**"), and Sourav Ray ("**Dr Ray**") - breached the Tribunal's Confidentiality Order, attempted to improperly influence witnesses or otherwise tamper with evidence, and engaged in reprisals.[2]

2. Having made findings of severe misconduct, the Tribunal ordered a number of remedies and sanctions against the Applicants, the purpose of which was to restore an acceptable work environment at the DSB. Based on the gravity of the Applicants' misconduct and their refusal to accept responsibility for their misconduct, the Tribunal would have recommended that each of Drs Steiner, Taylor, Chris Bart ("**Dr Bart**"), and Devashish Pujari ("**Dr Pujari**") be terminated from their employment.[3] It declined to make these recommendations because it found that the University, including the processes employed by Human Rights and Equity Services ("**HRES**"), contributed to the unacceptable work environment, albeit to a far lesser degree than Drs Steiner, Taylor, Bart, and Pujari.[4]

3. In 3 cases, the Tribunal recommended to the President of McMaster, Dr Patrick Deane ("**Dr Deane**"), that the faculty members be suspended for 3 years, largely because the Tribunal made findings of fact that these 3 individuals committed acts of misconduct that jeopardized the jobs and career aspirations of their victims. In another case, the Tribunal recommended to the President that a faculty member be suspended for 12 months for

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Stockton, Ms Rita Cossa, and Mr Peter Vilks, also referred to as the "**003 Complainants**").
[2] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 182-199 and 332-341.
[3] Remedy Decision of the Board-Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy ("**Remedy Decision**"), Tribunal Record, Volume 2, Tab 2B at pp. 476-477.
[4] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 476-477.

largely similar reasons. In addition, the Tribunal recommended to the President that one faculty member receive a suspension of one academic term, and another faculty member be issued a written reprimand.

4. Paragraph 211 of the Applicants' factum, which erroneously suggests that the Tribunal's findings were solely based on faculty members being unable to engage in vigorous debate, is a work of fiction that continues to highlight the Applicants' lack of credibility[5] and continued refusal to "truly accept responsibility for their conduct" or "come to grips with the seriousness, impact and effect of their misconduct".[6]

5. As the Tribunal found, the Applicants vehemently opposed the Dean of the DSB. As a consequence, other than Dr Richardson, they, among other things, "engaged in a course of vexatious comment or conduct…without reasonable cause or excuse",[7] "abused the fundamental privileges and responsibilities enjoyed by and entrusted to them",[8] and corrupted "established processes vital to the University community" which undermined or threatened various complainants' job security or career advancement.[9] These Applicants, other than Dr Richardson, improperly used their power as tenured faculty members to threaten the complainants' job security or career advancement for no credible reason other than because they either supported the Dean, Paul Bates – also known as the Senior Administrator of McMaster – ("**Mr Bates**" or the "**Dean**") or were perceived to support the Dean.[10]

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[5] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 270.
[6] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 475.
[7] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 282.
[8] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[9] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 273, 286, 407, 419-420, 434-435, 437, and 450.
[10] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 273, 286, 354, 367, 369-370, 404-405, 407-408, 419-420, 433-435, 437, 445-446, 450, and 462.

6. The Tribunal found that the Applicants lacked credibility. The reasons for these conclusions are found in the Tribunal's 320-page decision (the "**Tribunal Decision**").[11] The Applicants' lack of credibility can also be found in their affidavits filed in support of this Application. For example, under the guise of "background" facts, the Applicants rehash their 19 complaints against Mr Bates and the University without including the Tribunal's findings,[12] even though the Tribunal dismissed all of those complaints except for one finding against the University in the complaint brought by Dr Pujari.[13] A chart summarizing the Tribunal's findings dismissing the Applicants' complaints is attached as Appendix "2" to this factum.

7. Even though the Tribunal was clear that all of the Applicants − except Dr Richardson − breached the Policy, some of the Applicants mislead this Court in their affidavits and depose that the Tribunal made few or no findings against them. For example, Dr Joseph Rose ("**Dr Rose**") states 3 times in his affidavit that the Tribunal "did not find" that he had breached the Policy[14] even though the Tribunal found that he did.[15] Even when the

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[11] See, for example: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 186, 196, 218, 229, 237, 270, 326, 3742, 348, 354, 367, and 405-406.

[12] Affidavit of Dr. Chris Bart ("**Bart Affidavit**"), Application Record of the Applicants ("**Application Record**"), Tab 8 at paras. 14-32; Affidavit of Dr. Devashish Pujari ("**Pujari Affidavit**"), Application Record, Tab 9 at paras. 8 and 10-34; Affidavit of Dr. A. William Richardson ("**Richardson Affidavit**"), Application Record, Tab 10 at paras. 14 and 28-29; Affidavit of Dr. Joseph B. Rose ("**Rose Affidavit**"), Application Record, Tab 11 at paras. 12-24; Affidavit of Dr. George Steiner ("**Steiner Affidavit**"), Application Record, Tab 13 at paras. 10-19; Affidavit of Dr. Wayne Taylor ("**Taylor Affidavit**"), Application Record, Tab 14 at paras. 15-33. In Dr. Ray's case, he continued to raise complaints against Dr. Detlor, which were dismissed by the Tribunal: Affidavit of Dr. Sourav Ray ("**Ray Affidavit**"), Application Record, Tab 12 at paras. 26-27 and 51.

[13] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 152, 206-208 (summary of findings), with detailed reasons at pp. 211-212, 216-217, 221-226, 228, 231, 235-238, 242-245, 247, 250-253, and 255-256; Certified Transcript of the Cross-Examination of Dr. George Steiner on November 18, 2015 ("**Steiner Transcript**") at pp. 28-31 Q. 123-134; Certified Transcript of the Cross-Examination of Dr. Devashish Pujari on November 24, 2015 ("**Pujari Transcript**") at pp. 5-8 Q. 12-29; Certified Transcript of the Cross-Examination of Dr. Wayne Taylor on November 25, 2015 ("**Taylor Transcript**") at pp. 4-5 Q. 7-12; Certified Transcript of the Cross-Examination of Dr. Chris Bart on November 12, 2015 ("**Bart Transcript**"), pp. 9-11 Q. 31-47.

[14] Rose Affidavit, Application Record, Tab 11 at paras. 63-64 and 68.

[15] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 283, 419-420, 435, 437, 441, and 446.

Tribunal Decision was put directly to Dr Rose in his cross-examination, he refused to acknowledge this very obvious finding.[16]

8. Similarly, Dr Steiner provides a misleading affidavit in which he states that the Tribunal only made one finding against him,[17] when in fact the Tribunal found Dr Steiner to have committed at least 10 breaches of the Policy, which encompassed at least 16 incidents of harassment. When brought to the many other instances where the Tribunal found that he had breached the Policy during the cross-examination on his affidavit, Dr Steiner continued to be evasive and assign blame anywhere but to himself.[18]

9. Dr Ray also attempts to mislead this Court, stating in his affidavit that the Tribunal was "primarily concerned with its finding that [his] counter-complaint was without merit and vexatious".[19] To support his claim, Dr Ray cites pages 2-4 of the Tribunal's decision on remedies (the "**Remedy Decision**") when those pages actually reflect the Tribunal's finding that it had not exceeded its jurisdiction in finding Dr Ray's counter-complaint to be frivolous, vexatious, and entirely without merit. The Tribunal in fact made other findings that Dr Ray breached the Policy by directly harassing a vulnerable staff member.[20] Contrary to paragraph 330 of the Applicants' factum, the Tribunal's recommended remedy against Dr Ray was, in fact, anchored in findings of liability against Dr Ray for harassment. The Tribunal, among other things, noted that Dr Ray "did not have good insight into [his] own misconduct even when confronted with

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[16] Certified Transcript of the Cross-Examination of Dr. Jose [*sic*] Rose on November 24, 2015 ("**Rose Transcript**") at pp. 5-10 Q. 9-32.
[17] Steiner Affidavit, Application Record, Tab 13 at para. 73.
[18] Steiner Transcript at pp. 6-15 Q. 6-51.
[19] Ray Affidavit, Application Record, Tab 12 at para. 91.
[20] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 282-283, 294, and 300-301.

incriminating evidence during the hearing",[21] and that he "breached the Policy and exercised extremely poor judgment".[22]

10. Counsel for the Applicants before the Tribunal, Catherine Milne ("**Ms Milne**") and Jeff Hopkins ("**Mr Hopkins**"), also provide misleading affidavit evidence. In this judicial review Application, the Applicants, relying mostly on the evidence of Ms Milne and Mr Hopkins, have decided to challenge for the first time the Tribunal's jurisdiction and raise a variety of issues of procedural fairness and natural justice, including issues regarding the format of the complaints heard by the Tribunal, consolidation, scheduling, and the pre-hearing process.

11. While the Applicants now claim that the Tribunal did not have jurisdiction, or that they suffered procedural fairness and natural justice issues, the Applicants, Ms Milne and Mr Hopkins either fail to mention or have misleading explanations for, among other things, the following:

    a. that they consented to:
        i. consolidation;
        ii. one of the Tribunal members', Dr Bonny Ibhawoh's ("**Dr Ibhawoh**"), brief absence on 2 occasions; and
        iii. having a global hearing record;
    b. that although the hearing was scheduled to end on April 30, 2012, the Tribunal granted 4 additional dates in the 2 following months;
    c. that it was the Applicants who requested that the first 4 originally scheduled hearing dates be cancelled;

[21] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[22] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.

d. that they failed to bring a motion to:

i. object to the Tribunal's jurisdiction;

ii. sever the various complaints;

iii. adjourn the hearing for a mediation;

iv. object to Dr Ibhawoh's participation in the Tribunal Decision;

v. object to Mr Hopkins' capability to represent Drs Steiner and Rose; and

vi. object to the 21-day hearing schedule, which was set months after Mr Hopkins and Ms Milne were retained.[23]

12. Ms Milne and Mr Hopkins further mislead this Court by stating that the Tribunal provided "no accommodation for adjournments or re-scheduling",[24] when the Tribunal granted every adjournment requested by counsel and expressly stated it would "fully allow any adjournment" counsel thought was necessary to "prepare for…cross-examination, and/or consult with any of your impacted parties to prepare for that cross-examination" when a witness was called without an affidavit.[25] Mr Hopkins also states that the Applicants had to withdraw witnesses because the Tribunal "was unable or unwilling to sit any longer to receive that evidence",[26] when the Tribunal expressly told Mr Hopkins that it was not directing his clients to drop witnesses, emphasizing that it did not want his clients to later argue that dropping witnesses prejudiced their ability to present their case.[27]

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[23] This is not an exhaustive list of Ms Milne and Mr Hopkins' misleading evidence.
[24] Affidavit of Catherine Milne ("**Milne Affidavit**"), Application Record, Tab 4 at paras. 93 and 101; Affidavit of Jeff C. Hopkins ("**Hopkins Affidavit**") Application Record, Tab 5 at paras. 103, 110, and 116.
[25] Excerpt from Certified Transcript of April 12, 2012 Hearing Date, Supplementary Application Record of the Applicants ("**Supplementary Record**"), Tab 14c at p. 502.
[26] Hopkins Affidavit, Application Record, Tab 5 at para. 110.
[27] Affidavit of James Heeney ("**Heeney Affidavit**"), Application Record of the Respondents ("**Responding Record**"), Volume 2, Exhibit 2U at pp. 331-333; Audio Recording for May 8, 2012 Hearing Date, File No. 3, 00:01:27-00:04:24; Partial Transcript of April 30, 2012 Hearing Date, Supplementary Application Record of the

13. The Applicants always had the ability to bring a motion for an extension of time to serve materials or to seek an adjournment. They simply needed to "show cause" for their requests, as directed by the Tribunal and recommended by counsel for the Tribunal.[28] They never brought such a motion, and now complain about the timelines and the Tribunal's purported refusal to grant an extension of time to deliver their materials or to obtain an adjournment.

14. The remedies recommended by the Tribunal and accepted by the President were largely based on findings of fact, and were reasonable and proportionate to the severity of the Applicants' misconduct, their continued refusal to take any responsibility for their actions, and their continued trivialization of the nature and extent of their misconduct despite the Tribunal's detailed findings. The remedies recommended by the Tribunal are further justified by the materials submitted by the Applicants, where the Applicants not only attempt to mislead this Court, but have also tried to raise every technical argument possible, even though none of the alleged technical procedural anomalies would have impacted the outcome of the hearing.

PART II - THE FACTS

15. The Applicants provide several affidavits in support of this Application, which, in part, attempt to present the "facts" for "context" in their factum.[29] In the sections outlining these purported "facts", the Applicants never reference the Tribunal Decision or the

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Respondents ("**Supplementary Responding Record**"), Tab 3 at p. 40; Audio Recording for April 30, 2012 Hearing Date, File No. 2, 06:13:15-06:14:00. A minor correction was made to Exhibit 2U during Mr. Heeney's cross-examination: Certified Transcript of the Cross-Examination of James Heeney on December 1, 2015 ("**Heeney Transcript**") at p. 11 Q. 40-41; E-mail from C. Chow, dated November 30, 2015, Supplementary Responding Record, Tab 4 at p. 41.

[28] E-mail from M. Zega, dated December 9, 2011, Supplementary Record, Tab 4a; Procedural Order #1, Tribunal Record, Volume 1, Tab 1, at p. 7.

[29] Fresh as Amended Factum of the Applicants ("**Applicants' Factum**") at paras. 16-153.

Tribunal's findings. Further, these affidavits often contradict the Tribunal Decision and the material facts,[30] which the Tribunal summarizes throughout the Tribunal Decision,[31] and in particular sets out the Applicants', other than Dr Richardson, conduct at pages 123-140 of the Tribunal Decision.

i. McMaster's Anti-Discrimination Policy

16. The Policy's aim is to prevent discrimination and harassment at McMaster. HRES oversees the Policy and actively promotes an environment free from harassment and discrimination, receives inquiries and complaints concerning any form of discrimination, and attempts confidential resolutions.

17. The Policy provides a mechanism for individuals to consult the HRES Officer (the "**Officer**"), an impartial advisor, regarding their complaint. Under s. 37 of the Policy, the Officer may investigate the allegations to decide whether to assist in informal resolution of the matter, make a recommendation to the University to proceed as Complainant, or proceed by way of a fact-finding investigation.[32]

18. The Policy emphasizes confidentiality. The need for confidentiality is reiterated throughout the Policy regarding its various resolution processes and procedures.[33] Under s. 31 of the Policy, no one can be compelled to proceed with a complaint. Complainants have the option to withdraw their complaints at any time, including after formal

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[30] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 271-272.
[31] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 159-164, 206-212, 214-221, 224-228, 230-234, 236-242, 246-249, 251, 255, 271-300, 302-316, 318-321, 323-332, 342-353, 356-368, 370-404, 410-417, 420-423, 425-431, 433-436, 438-445, 447-450, and 461.
[32] *Anti-Discrimination Policy*, Exhibit A to the Affidavit of Milé Komlen ("**Komlen Affidavit**"), Responding Record, Volume 2, Tab 4 at s. 37(a).
[33] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at ss. 8, 23(a), 24(a) and (b), 32(a) and (b), 37(a), 40, 41(b), 45(d), and 46(c).

proceedings have begun.[34] Complainants may also directly file complaints on their own, without consulting with the Officer.[35]

19. The Policy provides comprehensive procedures for both informal and formal resolution. Complainants have the option to proceed through either or both processes. The formal process involves formal hearings held before 3 members chosen from a hearing panel, who constitute the panel of the Tribunal.[36] Members of the Tribunal receive training on the particular sensitivities surrounding discrimination and harassment issues, procedures which effect fair resolutions, penalties and sanctions that are appropriate to various breaches of Policy and which act as deterrents to further breaches of Policy, and the principles of academic freedom.[37]

20. The Policy provides an express list of sanctions and remedies the Tribunal may recommend or order if it finds that discrimination or harassment has occurred.[38] This list includes suspension or removal from the University.

ii. Background facts

21. Mr Bates was appointed as Dean of the DSB in 2004 for a 5 year term.[39] During his first term, a division emerged between the Dean's supporters and those opposed to him, and the environment at the DSB became increasingly toxic.[40]

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[34] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at ss. 46(b) and 47(b).
[35] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 23(a).
[36] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 48.
[37] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 50.
[38] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 71.
[39] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 273.
[40] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 273.

22. In 2007, an external review committee was struck to investigate the viability of expanding the DSB to Burlington, Ontario (the "**Burlington Expansion**").[41] In October 2007, 5 Area Chairs, including Dr Pujari, aired their opposition to the Burlington Expansion in a letter sent to all faculty members at the DSB, meant to undermine Mr Bates' authority and credibility,[42] and the then-Provost, Dr Ilene Busch-Vishniac ("**Dr Busch-Vishniac**") disciplined them for their insubordinate conduct.[43] The Area Chairs grieved this disciplinary action.[44]

23. After identifying broader problems at the DSB and recognizing that the issues were not solely attributable to the 5 Area Chairs, Dr Busch-Vishniac offered to remove the letter of reprimand, and the Area Chairs withdrew their grievance.[45]

24. In late 2007, Dr Pujari, with the assistance of the McMaster University Faculty Association ("**MUFA**"), asked HRES to investigate allegations of bullying and harassment, alleging that he was being pressured to vote in favour of the Burlington Expansion.[46] At the time, HRES interpreted the Policy as only covering harassment on grounds protected by the Ontario *Human Rights Code*.[47] HRES began interpreting the Policy more broadly, and started investigating general allegations of bullying and harassment in 2009, in contemplation of Bill 168 − a Bill amending the *Occupational Health and Safety Act*, RSO 1990, c. O.1 and requiring employers to develop and maintain a program to implement a Policy with respect to workplace harassment[48] −

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[41] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 159.
[42] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 244.
[43] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 252.
[44] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 252.
[45] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 252 and 275.
[46] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 248.
[47] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 4.
[48] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 4; Certified Transcript of the Cross-Examination

taking effect in June 2010.[49] The scope of the Policy and the mandate of HRES were then broadened in 2010 in response to the enactment.

25. The majority of the faculty of the DSB ultimately voted to approve the Burlington Expansion, which was then approved by the University Senate and Board of Governors.[50]

26. In 2008, the University was considering Mr Bates for a second term as the Dean of the DSB. Faculty members of the DSB who opposed Mr Bates, including most of the Applicants,[51] signed a "Performance Report" on Mr Bates. This "Performance Report" was drafted by some of the 21 faculty members, including most of the Applicants, and submitted to the University Senate and the Selection Committee for the Dean of Business.[52] The Tribunal found that the Performance Report was "flawed, speculative and filled with questionable facts", "riddled with false information [and] was part of a longer, self-serving agenda unbeknownst to the University at the time".[53]

27. The Tribunal further found that those who signed the Performance Report "generally were not concerned about the factual accuracy of the serious allegations in the Performance Report".[54] This reckless disregard for the truth was evidenced in Dr Taylor's email suggesting, "if we 'threaten' [then-President Dr Peter George ("**Dr George**")], Paul and Ilene then we must be prepared to go public if they call our bluff. I can think of

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of Milé Komlen on December 8, 2015 ("**Komlen Transcript**") at p. 8 Q. 32-26; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ["***OHSA***"] at ss. 32.0.1(1)(b) and 32.0.6.

[49] Komlen Affidavit, Responding Record, Volume 2, Exhibit 4B at p. 531.

[50] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 159.

[51] The Applicants, Dr William Richardson ("**Dr Richardson**") and Dr Sourav Ray ("**Dr. Ray**"), did not sign the Performance Report.

[52] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 162.

[53] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 464.

[54] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 464.

plenty of hyperbole to sell to the media (which is not interested in facts anymore anyways)".[55]

28. The 21 signatories to the Performance Report were known as the "G21". While the Applicants and Mr Hopkins, in their affidavits, indicate that the Tribunal "dubbed" them the G21,[56] the faculty members who submitted the Performance Report in fact self-identified as the G21.[57] Dr Ray was not a member of the G21, but was a member of the self-identified G21+, which included 7 additional members.[58]

29. Contrary to the affidavits of Mr Hopkins and Drs Bart, Taylor, and Rose, the G21 had much more in common than simply being on the same email distribution list.[59] As the Tribunal found, recruitment for the G21 was strategic, as individuals tried to "'rally the troops', reflecting the G21's own war analogies".[60] The G21's strategizing was covert and private, and "communications were controlled and limited to those who could be trusted rather than inviting debate" – the "antithesis of academic freedom".[61] The G21 engaged in block voting on important issues at the DSB, strategizing in an email that the G21 should ensure "all G21 and others of the same persuasion should be 'present' at the Faculty meetings. As well, should [sic] follow parliamentary traditions have an assigned 'whip'

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[55] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 276.
[56] Bart Affidavit, Application Record, Tab 8 at para. 27; Rose Affidavit, Application Record, Tab 11 at para. 19; and Taylor Affidavit, Application Record, Tab 14 at para. 35; Hopkins Affidavit, Application Record, Tab 5 at para. 42.
[57] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 63; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 198-200.
[58] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 162.
[59] Bart Affidavit, Application Record, Tab 8 at para. 27; Rose Affidavit, Application Record, Tab 11 at para. 19; and Taylor Affidavit, Application Record, Tab 14 at para. 35; Hopkins Affidavit, Application Record, Tab 5 at para. 42.
[60] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 275.
[61] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 275.

person. The role of this person would be to 'monitor' memberships and 'voting' integrity".[62]

30. In or around December 2008, the G21, including many of the Applicants, asked the MUFA Executive to conduct a vote among the 60 MUFA members in the DSB regarding the reappointment of Mr Bates.[63] This vote was non-binding and not part of the selection process. It was intended to provide the University Administration and Selection Committee with the opinions of faculty members in the DSB.[64] The G21 "rallied its troops",[65] resulting in a majority vote opposed to Mr Bates.[66]

31. The G21 discussed among themselves how to use the results of this MUFA vote. Dr Taylor said they needed to "leak this to the Globe and Post" as soon as possible, that "whoever is interviewed needs to stick to the 'script' even if as an anonymous source",[67] and that they could use it to "threaten" Dr George, Dr Busch-Vishniac, and Mr Bates with going public.[68] Dr Pujari stated that it should be "made public within and outside the campus before it is too late", including in the MUFA newsletter, MUFA website, and Hamilton Spectator.[69] Other G21 members suggested that the vote results be spread to

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[62] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 277.
[63] DSB-1670 and DSB-1671, Tribunal Record, Volume 14 at pp. 9471-9473. These documents can also be found in the Responding Record, Volume 3, Tab 5.
[64] DSB-1580, Tribunal Record, Volume 13 at p. 8660. This document can also be found in the Responding Record, Volume 3, Tab 6.
[65] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 275.
[66] DSB-1645, Tribunal Record, Volume 14 at pp. 9415; DSB-1874, Tribunal Record, Volume 14 at p. 10012; DSB-1869, Tribunal Record, Volume 14 at p. 10005. These documents can also be found in the Responding Record, Volume 3, Tabs 7-9.
[67] DSB-1609, Tribunal Record, Volume 13 at pp. 9090; DSB-1964, Tribunal Record, Volume 15 at pp. 10191. These documents can also be found in the Responding Record, Volume 3, Tab 10 at p. 816; Responding Record, Volume 3, Tab 11 at p. 824.
[68] DSB-1619, Tribunal Record, Volume 13 at pp. 9178. This document can also be found in the Responding Record, Volume 3, Tab 12 at pp. 827.
[69] DSB-1609, Tribunal Record, Volume 13 at p. 9092. This document can also be found in the Responding Record, Volume 3, Tab 10 at p. 818.

colleagues in other institutions so Dr George would hear the "news" from someone outside the University,[70] and to distribute it through the various faculty list-serves.

32. Dr Bart led the G21 charge to "proceed on 'internal dissemination' of the results as discussed and agreed", stating that the more widely the results were known, "the better",[71] while Dr Taylor considered posting the results on his door's bulletin board if they had not been posted elsewhere.[72] This was the same bulletin board where he put up other posters that contributed to the poisoned workplace.[73] Dr Taylor also asked whether staff and students had heard the results.[74] The results of this MUFA vote ultimately were posted throughout campus.

33. Mr Bates was appointed to a second term in May 2009.[75] Although Dr Rose, in response to the Tribunal Chair's specific question, testified that the G21's activities stopped when Mr Bates' reappointment was confirmed,[76] the Tribunal later discovered that Dr Rose's evidence was false − the G21's activities continued well after Mr Bates was re-appointed.[77] The Tribunal became aware of Dr Rose's false evidence when a witness inadvertently received an email sent by Dr Trevor Chamberlain ("**Dr Chamberlain**"), a member of the G21, which showed that the G21's activities continued after Mr Bates was reappointed.[78] This witness disclosed the document to the Tribunal, which then again

[70] DSB-1619, Tribunal Record, Volume 13 at p. 9178. This document can also be found in the Responding Record, Volume 3, Tab 12 at p. 827.
[71] DSB-1602, Tribunal Record, Volume 13 at p. 9029. This document can also be found in the Responding Record, Volume 3, Tab 13 at p. 837.
[72] DSB-1848, Tribunal Record, Volume 14 at p. 9978. This document can also be found in the Responding Record, Volume 3, Tab 14 at p. 847.
[73] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 389-391 and 406.
[74] DSB-1848, Tribunal Record, Volume 14 at p. 9978. This document can also be found in the Responding Record, Volume 3, Tab 14 at p. 847.
[75] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 159.
[76] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 263.
[77] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 263.
[78] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 263-264.

ordered production of all G21 and G21+ emails,[79] resulting in the production of approximately 150 additional G21/G21+ emails dated after Mr Bates' reappointment as Dean.[80] None of the Applicants previously disclosed these emails despite the Tribunal's production order.[81]

34. After delivering the Performance Report, the tactics of the G21 intensified.[82] A snapshot of the Tribunal's findings of the G21 and G21+'s activities is provided below.

iii. Background to the Tribunal being struck - the Preliminary Audit

35. In 2009, well before the Tribunal was struck, one DSB faculty member aired her complaints in a public forum alleging, among other things, that there was harassment and bullying from members of the DSB.[83] The University's Provost, Dr Busch-Vishniac, therefore asked the HRES Officer, Milé Komlen ("**Mr Komlen**"), to review postings on the public forum to explore these allegations.[84]

36. After reviewing the postings, Mr Komlen initiated a preliminary audit under s. 37 of the Policy, conducting extensive in-person interviews as part of the audit process.[85] During his audit, Mr Komlen learned that some faculty members opposed to the Dean referred to themselves as the "G21".[86] The audit resulted in a report authored by Mr Komlen (the "**Komlen Report**") and released on March 25, 2010.[87] In the Komlen Report, Mr Komlen

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[79] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 153, 263, and 462.
[80] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 462.
[81] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 153 and 263.
[82] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 276.
[83] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 159; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 5.
[84] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 5.
[85] Tribunal Decision, Responding Record, Volume 2, Tab 2A at p. 160; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 7.
[86] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 7.
[87] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 159; Komlen Affidavit, Responding Record, Volume

made clear that the audit was performed in contemplation of Bill 168 taking effect in June 2010.[88]

37. The Komlen Report found that the reported events indicated a dysfunctional work environment existed at the DSB.[89] The Komlen Report stated clearly that it was reporting only on the results of the preliminary audit, that a full-scale investigation was not contemplated in the preliminary audit process, and that its findings were not intended to be conclusive findings of fact or recommendations.[90]

38. While the Komlen Report referred to various complaints, it did not attribute any allegations to specific individuals, identify any complainants, or comment on the merits of the complaints. Instead, as mandated, the HRES Officer provided an analysis of the environment at the DSB, and reported that there were 2 key themes underlying the allegations: those who were opposed to or perceived to be opposed to the Dean alleged harassment and bullying by the Dean, and those who supported or were perceived to support the Dean alleged harassment and bullying by those opposed to the Dean.[91]

39. The Komlen Report also provided 2 main recommendations and 3 concurrent strategies.[92] The 2 main recommendations were to (1) invoke the Policy, which would involve either resolution of the complaints through informal procedures or, based on the 2 common themes, through formal complaints with the University acting as Complainant; and (2) invoke the *Group Conflict Policy* under which the University Senate and Board of

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2, Tab 4 at para. 7.
[88] Komlen Affidavit, Responding Record, Volume 2, Exhibit 4B at p. 531.
[89] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 7 and Exhibit 4B at p. 512.
[90] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 160; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 7; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 5.
[91] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 7.
[92] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 160-161; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 8 and 11.

Governors could, on the advice of the President and Provost and Vice-President (Academic), appoint a 3-member committee to manage the affairs of the DSB.[93]

40. After reviewing the Komlen Report, Dr George implemented the recommendations, invoking s. 37 of the Policy by asking HRES to conduct a further investigation into the specific complaints the Officer became aware of during his preliminary audit, and invoking the *Group Conflict Policy* and striking the President's Advisory Committee on the DSB ("**PACDSB**")[94].

iv. Mediation and informal resolution processes

41. Dr George also implemented the Komlen Report's recommended concurrent strategies, which included mediation by independent dispute resolution professionals and access to an onsite Ombuds service at the DSB.[95] None of the Applicants chose to use these resources to resolve their formal complaints against Mr Bates, other than Dr Steiner and Dr Rose[96] whose resolution attempt was limited to them seeking an investigation into a posting made by a student on the DSB's Facebook page, in their mistaken belief that the student would not have been able to post on the Facebook page without the assistance of faculty, the Dean, or Dean's Office.[97] After conducting an investigation, Mr Komlen determined that anyone with a Facebook account could post on the DSB Facebook page.[98]

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[93] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 8 and Exhibit 4B at pp. 525-528.
[94] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 161; Komlen Affidavit, Responding Record, Volume 2, Exhibit 4C at pp. 534-538 and Volume 3, Exhibit 4P at pp. 601-602.
[95] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 160-161; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 11 and Exhibit 4E at p. 542.
[96] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 12 and Exhibits 4F and 4G at p. 544-548.
[97] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 12 and Exhibits 4F and 4G at p. 544-548.
[98] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 13 and Exhibit 4G at pp. 546-547.

42. Ms Rita Cossa ("**Ms Cossa**"), Ms Linda Stockton ("**Ms Stockton**"), and Mr Peter Vilks ("**Mr Vilks**"), 3 faculty members who were ultimately complainants in the proceedings against most of the Applicants, sought Mr Komlen's assistance to coordinate mediation for them in an attempt to informally resolve their complaints against Dr Pujari.[99] Although Dr Pujari initially agreed that mediation was a good option and was well aware of what issue the mediation was intended to resolve,[100] upon meeting with the independent mediator provided by the University, he then refused to mediate, claiming that he did not know what the dispute was about.[101]

43. Ms Carolyn Colwell ("**Ms Colwell**") and Dr Brian Detlor ("**Dr Detlor**"), 2 other complainants in the proceedings below, attempted to mediate their dispute with Dr Ray.[102] While claiming that he was willing to mediate, Dr Ray simultaneously insisted that there was no role for a mediator in resolving the matter, and stated his belief that this was a concerted effort to "get even".[103]

v. The section 37 investigation - University as Complainant

44. In invoking s. 37 of the Policy, Dr George asked Mr Komlen to investigate the allegations of harassment and bullying uncovered during his preliminary audit to determine whether HRES could assist in informal resolution, or whether it should recommend formal proceedings be initiated with the University as Complainant.[104]

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[99] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 15 and Exhibit 4H at pp. 552-553.
[100] Pujari Transcript at pp. 21-24 Q. 104-125.
[101] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 16 and Exhibit 4H at pp. 549 *et seq*.
[102] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 17 and Exhibit 4I at pp. 563.
[103] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 20-21 and Exhibit 4J at pp. 568-571.
[104] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 22; *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 37.

45. As the Komlen Report revealed 2 distinct camps at the DSB,[105] one alleging harassment and bullying by Mr Bates, and the other alleging harassment and bullying by faculty members opposed to Mr Bates, HRES retained 2 investigators, Shari Novick ("**Ms Novick**") and Ms Milne. The investigators' mandates were to conduct fact-finding investigations to determine whether there were sufficient facts to support the specific allegations, and not to make findings of credibility and fact.[106] The process was therefore different from regular workplace investigations.[107] Ms Milne was responsible for investigating complaints against Dean Bates, while Ms Novick was responsible for investigating the inter-faculty disputes.[108]

46. Although Ms Milne now denies having knowledge of the inter-faculty disputes while she conducted her investigation, before she accepted the retainer, Ms Milne suggested at the relevant time that she and her associate conduct the investigation involving "the faculty and the tenure issues", as it would be "suited to a team investigation".[109] Upon being retained, Ms Milne also identified, unprompted, the likely existence of inter-faculty disputes, raising the potential overlap in evidence to Mr Komlen before starting her investigation.[110]

47. In response, Mr Komlen made clear to Ms Milne that this was the reason there were 2 investigators: there were 2 parallel investigations, and Ms Novick was responsible for

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[105] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 153; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 7 and 23.
[106] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 24; Affidavit of Shari Novick ("**Novick Affidavit**"), Supplementary Responding Record, Tab 1 at para. 7.
[107] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 24; Novick Affidavit, Supplementary Responding Record, Tab 1 at para. 7.
[108] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 25-26 and Exhibit 4K at pp. 576-577; Novick Affidavit, Supplementary Responding Record, Tab 1 at para. 6.
[109] E-mail from C. Milne to S. Novick, dated October 19, 2010, Supplementary Responding Record, Tab 5 at p. 45.
[110] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 26 and Exhibit 4K at pp. 576-577.

investigating the inter-faculty disputes Ms Milne had identified.[111] Mr Komlen further advised that they would meet to discuss any possible cross or counter-complaints arising out of their investigations.[112] Ms Milne was therefore well aware of the parallel investigations before she began her retainer. Similarly, Ms Novick was made aware of the reasons behind and purpose of her investigation from the outset.[113]

48. Mr Komlen provided clarification throughout the process to Ms Milne regarding her mandate, specifically, that she was to investigate whether the facts of each allegation met the definition of harassment in the Policy,[114] that she was not to coax anyone into making a complaint,[115] that it was up to each interviewee whether s/he wished to participate in this process, and that the primary purpose of the investigation was to provide a recommendation to the President on whether to initiate formal proceedings under the Policy with the University as Complainant.[116]

49. As the investigations progressed, it became apparent that informal resolution would not be successful and the reports were instead moving towards formal complaints with the University as Complainant.[117] Mr Komlen therefore advised Ms Milne and Ms Novick not to interview the respective respondents, given his understanding that it would be an abuse of process to prematurely inquire into the respondents' defences before formal complaints were submitted.[118] Although Mr Komlen invited Ms Milne to provide her

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[111] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 25-26 and Exhibit 4K at pp. 576-577.
[112] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 26 and Exhibit 4K at pp. 576-577.
[113] Novick Affidavit, Supplementary Responding Record, Tab 1 at paras. 6, 7, and 9.
[114] Komlen Affidavit, Responding Record, Volume 2, Exhibit 4K at p. 576-577.
[115] Komlen Affidavit, Responding Record, Volume 2, para. 28 and Exhibit 4N at p. 593.
[116] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 24.
[117] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 32.
[118] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 32-33; Novick Affidavit, Supplementary Responding Record, Tab 1 at para. 8.

views around the process,[119] Ms Milne never advised Mr Komlen that this was a breach of the Policy.[120] In fact, until the Applicants brought this judicial review Application, Ms Milne never expressed to Mr Komlen or the Tribunal that failing to interview a respondent was a breach of the Policy.[121]

50. Ms Milne initially did not understand how the concept of a group complaint would work.[122] She also indicated that some of her interviewees were concerned that Mr Bates would review her report.[123] Mr Komlen again explained the reasons behind and concept of the group complaint, and why she was not interviewing Mr Bates, reminding her that this investigation differed from a regular workplace investigation, and that the purpose of these reports was primarily to assist the President in deciding whether to initiate formal proceedings with the University as Complainant.[124]

51. After months of reviewing matters at the DSB, PACDSB released its report on December 16, 2010 (the "**PACDSB Report**").[125] That same day, Mr Bates announced his intention to resign as Dean pending the appointment of an interim Dean.[126] Upon the release of the PACDSB Report, Ms Milne contacted Mr Komlen to discuss the *Faculty Code of Conduct* referenced in the PACDSB Report, and the possibility that her interviewees,

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[119] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4S at p. 614.
[120] Certified Transcript of the Cross-Examination of Catherine Milne on November 11, 2015 ("**Milne Transcript**"), p. 39 Q. 201, p. 40 Q. 210, and p. 42 Q. 218.
[121] Milne Transcript, p. 43 Q. 226-227.
[122] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 34 and 36 and Volume 3, Exhibit 4R at p. 612.
[123] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 34 and 36 and Volume 3, Exhibit 4S at pp. 614-615.
[124] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 35-36 and Volume 3, Exhibit 4R at pp. 614-615.
[125] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 40.
[126] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 40.

which included all of the Applicants except Dr Ray (the "**Milne Complainants**"), might withdraw from the process since the Dean had resigned.[127]

52. By email dated December 17, 2010, Mr Komlen provided a copy of the *Faculty Code of Conduct* to Ms Milne, explaining that it did not apply, and suggested that the Milne Complainants proceed with their report to the President, as some of the Milne Complainants would likely be identified as allegedly having engaged in harassing behaviour.[128] Their complaint would therefore underscore the climate of dysfunction at the DSB, providing a possible defence against any such allegations.[129]

53. Ms Milne did not make any further objections to proceeding with the investigation or drafting her report.[130] Ms Milne also never advised HRES that she believed the process she was undertaking did not comply with the Policy or was otherwise improper.[131] Instead, Ms Milne stated in her report that it was prepared under s. 33 of the Policy, and, contrary to her affidavit evidence in this proceeding, expressly recommended that the allegations would "best be treated as a group complaint and proceed together under the provisions of the Policy".[132] Ms Milne later agreed to a new retainer to draft the formal complaint on behalf of the Milne Complainants and to represent them – as a group – before the Tribunal.[133]

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[127] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 40-42 and Volume 3, Exhibit 4V at p. 645.
[128] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 40 and 42 and Volume 3, Exhibit 4V at p. 644.
[129] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 40 and 42 and Volume 3, Exhibit 4V at p. 644.
[130] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 36 and 42; Milne Transcript, p. 41 Q. 216.
[131] Milne Transcript, p. 39 Q. 201, p. 40 Q. 210, and p. 42 Q. 218.
[132] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 37 and Volume 3, Exhibit 4T at p. 618, para. 6.
[133] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 59.

54. These investigations resulted in the Novick Report and Milne Report (collectively, the "**Milne and Novick Reports**").[134] After being reviewed and edited by Mr Komlen and the respective potential complainants, including the Applicants other than Dr Ray, the Milne and Novick Reports were submitted to the President on January 7, 2011.[135] When the Milne and Novick Reports were submitted to the President, neither investigator had interviewed potential respondents.

55. While the Applicants make an issue of the final Novick Report no longer containing a specific paragraph stating that the potential respondents had not been interviewed, the Novick Report specifically sets out at paragraph 5 the individuals Ms Novick interviewed.[136] This paragraph makes clear that the interviewees all "particularized the type of harassment and its effect on them independently…[and] each described being the recipient of vexatious comment and conduct, and/or intimidation from other faculty members…."[137] It was therefore clear that only potential complainants had been interviewed.

56. The President accepted the recommendations, announcing on February 18, 2011 that he was referring the "complaint files" (referring to the Milne and Novick Reports) to the Tribunal.[138] Contrary to paragraphs 58 and 302 of the Applicants' factum, the President did not "forward" the Milne and Novick Reports to the Tribunal "as formal complaints under the Policy". The potential complainants referenced in the Milne and Novick

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[134] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 37 and 43; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 8.
[135] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 48 and Volume 3, Exhibits 4T and 4W at pp. 617 and 649.
[136] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4W at p. 649, para. 5.
[137] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4W at p. 649, para. 5.
[138] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 48 and Volume 3, Exhibit AA at p. 718; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 9.

Reports needed to draft formal complaints with more details and facts regarding the specific instances of harassment if they wished to pursue their allegations as a group before the Tribunal.[139] Anyone who wished to pursue their complaints individually could do so at any time, as Mr Komlen had made clear to the Applicants.[140] None of the Applicants chose to proceed individually.

57. Less than a week after the President announced his referral − and even though Dr Steiner and the Applicants now allege they were pressured to pursue their complaint against Mr Bates − Dr Steiner sought out Mr Komlen on behalf of the Milne Complainants, which include all of the Applicants except Dr Ray, to ask for a meeting to discuss how the matters would proceed.[141] Dr Steiner then sent another email one week later copying all the Milne Complainants to advise that Mr Komlen had not yet responded.[142] Although Mr Bates had already announced his intention to resign in December 2010 when the PACDSB Report was released,[143] the Applicants, other than Dr Ray, remained eager to pursue their complaint against Mr Bates after the President referred the complaints to the Tribunal on February 18, 2011.[144]

58. Contrary to paragraph 56 of the Applicants' factum, no one discussed the allegations against Mr Bates with him before the 002 Complaint was filed.[145] It was reasonable for Mr Bates, as Dean of the DSB at the time, to be aware of the investigations, and to know

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[139] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 45 and 52.
[140] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4X at p. 670.
[141] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 53-58 and Volume 3, Exhibit 4EE; Steiner Transcript at pp. 45-52 Q. 210-244.
[142] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 54 and Volume 3, Exhibit 4EE; Steiner Transcript at pp. 51-52 Q. 240-244.
[143] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 40; Pujari Affidavit, Application Record, Tab 9 at para. 39; Pujari Transcript at pp. 16-17 Q. 71-78; Taylor Affidavit, Application Record, Tab 14 at para. 36. Dr Steiner refused to admit this obvious and agreed-upon fact during his cross-examination and contrary to his affidavit: Steiner Transcript at pp. 46-49 Q. 214-228; Steiner Affidavit, Application Record, Tab 13 at para. 37.
[144] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 54-55.
[145] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 50.

that he might meet with one or both of the investigators. However, Mr Bates was not advised of the specific complaints against him. While Mr Komlen stated on January 4, 2011 that the President "may also review the allegations with Mr Bates",[146] he clarified with the Applicants 3 days later that Mr Bates would not see the Milne Report.[147] There is no evidence that Mr Komlen or anyone at the University reviewed the complaints in the Milne Report with Mr Bates, other than the Applicants' speculation based on Mr Komlen's original comment which was later clarified.

vi. The complaints

59. Ms Milne was retained to represent the Milne Complainants against Mr Bates and the University (the "**002 Complaint**" and "**002 Complainants**"). Mr James Heeney ("**Mr Heeney**") was retained to represent the complainants against all of the Applicants, except Dr Richardson, and the University (the "**003 Complaint**" and "**003 Complainants**"; collectively, the 002 Complaint and 003 Complaint will be referred to as the "**Complaints**").[148]

60. On March 4, 2011, Mr Komlen met with the Milne Complainants at their urging to discuss the next procedural step of developing a formal complaint, and how the University acting as Complainant was an umbrella under which each individual complainant would drive the litigation of his or her respective complaint.[149] When the Milne Complainants considered whether, strategically, they wanted to pursue formal

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[146] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4X at p. 670.
[147] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4BB at p. 721.
[148] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 59-60.
[149] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 56. The concept of an "umbrella" complaint was later reiterated to Dr. Steiner: E-mail from M. Komlen to G. Steiner, dated June 22, 2011, Supplementary Responding Record, Tab 6 at p. 47.

complaints after Mr Bates had resigned,[150] Mr Komlen repeated what he had suggested to Ms Milne in his email of December 17, 2010 – that their complaints could support a defence if formal allegations of harassment and bullying were brought against them in the other "complaint file" Dr Deane referred to in his announcement initiating formal proceedings.[151]

61. On March 24, 2011, Ms Milne met with the 002 Complainants to discuss her theory of the case and her process moving forward, and to request the documents or evidence necessary to support their allegations.[152] Ms Milne was aware from the moment she was retained that Mr Heeney was representing the 003 Complainants.[153] No one was ever compelled to bring a formal complaint, and Mr Komlen never told the Applicants that it was in their or the University's best interest to proceed.[154]

62. On March 31, 2011, the 002 Complainants, represented by Ms Milne, filed a formal complaint against Mr Bates and the University with the Tribunal,[155] requesting sanctions and remedies against the respondents.[156] None of the Applicants, all tenured professors who had job security (other than Dr Richardson, who left his tenured position at the University in 1988),[157] was forced to proceed with their specific complaints at any point in the pre-hearing process or during the hearing.[158] In fact, while Dr Steiner was initially a complainant in the 002 Complaint, he withdrew his complaint in September, 2011.[159]

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[150] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 58.
[151] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 58 and Volume 3, Exhibit 4V at p. 644.
[152] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 65.
[153] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 61 and Volume 3, Exhibit 4FF at p. 759.
[154] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 66.
[155] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 69.
[156] DSB-001, Tribunal Record, Volume 3 at p. 522, para. 113.
[157] Heeney Transcript at pp. 67-68 Q. 331-332.
[158] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 68.
[159] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 150, footnote 1; Steiner Affidavit, Application

63. Also on March 31, 2011, the 003 Complainants filed their written complaint with the Tribunal.[160] Once again, no complainant was forced to pursue the 003 Complaint. In fact, the uncontradicted evidence was that there were individuals who chose not to be involved at all.[161]

64. Contrary to paragraph 72 of the Applicants' factum, Dr Ray's counter-complaint was not "folded into" the Complaints "at Mr Komlen's direction". To the contrary, Dr Ray wanted to pursue his counter-complaint before the Tribunal. On July 15, 2011, Mr Hopkins, as counsel to Dr Ray, brought a motion to the Tribunal requesting an order permitting him to initiate a counter-complaint against Dr Detlor specifically in Complaint 003 (the "**Counter-Complaint**").[162] In doing so, Dr Ray consented to consolidating his Counter-Complaint with the 003 Complaint.[163] Mr Heeney, counsel to Dr Detlor, consented to the late filing of Dr Ray's Counter-Complaint on the condition that he be able to argue it was retaliation contrary to the Policy.[164] Dr Ray did not object to Mr Heeney's position, and filed his Counter-Complaint on August 12, 2011.[165]

65. While the Complaints, responses to the Complaints, Counter-Complaint, and response to the Counter-Complaint were before the Tribunal as pleadings, the Tribunal never received the Milne and Novick Reports because they were not relevant to the proceedings before the Tribunal.

Record, Tab 13 at para. 68 and Exhibit 13E.
[160] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 150.
[161] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 10; Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 68 and Volume 3, Exhibit 4II at pp. 776, para. 12; Heeney Transcript at p. 72 Q. 350.
[162] Supplementary Record of Proceedings of the Board-Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy ("**Supplementary Tribunal Record**"), Volume 1, Tab 5.
[163] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 252.
[164] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 66.
[165] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 150.

66. While the Applicants now claim that the Tribunal committed a procedural error because the Novick Report was never disclosed to them, the Applicants never pursued a motion for disclosure even though they pursued other motions both before and during the hearing, and even though there were dates in February 2012 that were available for this motion to be heard.[166] Further, the Applicants never disclosed the Milne Report throughout the entire proceeding.[167]

vii. The pre-hearing matters

67. Between June 24, 2011 and March 3, 2012, the Tribunal held a number of pre-hearing conferences to resolve various procedural disputes between the parties to the Complaints. Many of these procedural disputes were resolved on consent, including consolidation of the Complaints.[168] The parties worked together to come to a mutually agreeable hearing schedule, and the Applicants never objected to the schedule of witnesses changing slightly to accommodate the progress of the proceedings.[169]

68. All of the Applicants had the ability to retain legal counsel at any time.[170] In the 002 Complaint, from the outset, all of the complainants had legal counsel paid for by the University. In the 003 Complaint, all of the parties - even though many were respondents - had legal counsel paid for by the University. While the University initially did not pay for legal counsel for certain parties because the allegations against them were not premised on them acting in any supervisory or managerial function, the University

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[166] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 15-16; Certified Transcript of the Cross-Examination of Jeff Hopkins on November 11, 2015 ("**Hopkins Transcript**") at p. 85 Q. 441-445; Milne Transcript at pp. 50-51 Q. 263-274.
[167] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 16; Milne Transcript at p. 45 Q. 243.
[168] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 31-32 and Exhibit 2L at pp. 267-269.
[169] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 44 and 47.
[170] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 65(a); Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 21; Milne Transcript at p. 88 Q. 516

ultimately agreed to pay the legal fees for all of the parties even though it had no legal obligation to do so.[171]

69. The University agreed to fund everybody's legal fees shortly after the first pre-hearing conference on June 24, 2011. While there were clearly discussions about the general process during the pre-hearing conference, as Ms Milne advised Mr Komlen of HRES in an email communication, nothing of substance was argued or decided at the time,[172] and all parties were represented by counsel before the next pre-hearing date. The Applicants therefore had counsel paid for by the University when dealing with motions, preparing their responses, drafting their affidavits, preparing for the hearing, and throughout the course of the hearing.[173]

70. Except for Dr Steiner, none of the Applicants ever sought to withdraw their 002 Complaint, even though the Policy expressly contemplates withdrawal of complaints at any time, including after formal proceedings begin.[174] Instead, the Applicants participated in drafting the 002 Complaint and vigorously prosecuted their case against Mr Bates and the University and, in Dr Ray's case, against Dr Detlor. Indeed, even though Mr Bates stated his intent to resign in December 2010 on the same day the PACDSB Report was

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[171] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 65(b); Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 20; Milne Transcript at pp. 85-90 Q. 493-516 and pp. 92-93 Q. 544; Hopkins Transcript, pp. 92-94 Q. 484-496; Bart Transcript, pp. 42-43 Q. 208-214; Pujari Transcript, pp. 45-47 Q. 235-255; Certified Transcript of the Cross-Examination of Dr. Sourav Ray on November 18, 2015 ("**Ray Transcript**"), pp. 14-16, Q. 67-82; Rose Transcript at p. 28 Q. 128-131 and pp. 31-33 Q. 145-153; Steiner Transcript at pp. 64-65 Q. 310-319 and pp. 72-75 Q. 348-362; Taylor Transcript at p. 40 Q. 249-254.

[172] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 72 and Volume 3, Exhibit 4JJ at p. 792; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 21.

[173] Bart Transcript at pp. 42-43 Q. 208-214; Pujari Transcript at pp. 45-47 Q. 235-255; Ray Transcript at pp. 14-16 Q. 67-82; Rose Transcript at p. 28 Q. 128-131 and pp. 31-33 Q. 145-153; Steiner Transcript at pp. 64-65 Q. 310-319 and pp. 72-75 Q. 348-362; Taylor Transcript at p. 40 Q. 249-254; Hopkins Transcript at pp. 92-94 Q. 484-496; Milne Transcript at pp. 85-90 Q. 493-516 and pp. 92-93 Q. 538-544. When asked, Drs Steiner and Rose were unable to articulate what prejudice they suffered during the pre-hearing conference other than feeling discomfort with the environment: Rose Transcript at p. 31 Q. 144; Steiner Transcript at pp. 70-72 Q. 340-345.

[174] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 47(b).

released, Dr Taylor indicated his displeasure that the PACDSB Report made no mention of disciplining Mr Bates,[175] and continues to this day to emphasize that he was willing to pursue his complaint against the Dean.[176] Further, although Mr Bates resigned as Dean of the DSB and assumed another position in February, 2011, the 002 Complainants continued to pursue the termination of his employment until the end of the hearing.[177]

71. Before the hearing started, the record was disclosed to all parties for comment and objection. The Applicants never brought a motion to sever the record.[178] The global hearing record was approved by all the parties. Ms Milne and Mr Hopkins fail to mention in their affidavits that, on consent, the contents of the record were entered as exhibits.[179] The parties then had the right to object to any document at the appropriate time, but the Applicants never objected to the content of the record, either on the basis of relevance or for any other reason.[180]

viii. The hearing

72. The consolidated hearing began on March 3, 2012. At the outset of the hearing, Tribunal Counsel specifically gave the parties an opportunity to object to the Tribunal's jurisdiction. The Applicants failed to do so.[181] The hearing took place over 21 days between March 3, 2012 and June 6, 2012, and included 2694 documents and testimony

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[175] E-mail from W. Taylor to C. Milne, dated December 16, 2010, Supplementary Responding Record, Tab 7 at p. 50.
[176] Taylor Affidavit, Application Record, Tab 14 at para. 56 and Exhibit 14E at p. 1003; Taylor Transcript at pp. 30-32 Q. 151-162.
[177] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 72 and Volume 2, Exhibits 2JJ and 2KK at pp. 421 and 423; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[178] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 23; Milne Transcript at pp. 104-105 Q. 616-622.
[179] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 23 and Exhibit 2E at p. 114.
[180] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 23 and Exhibits 2E and 2G at pp. 114 and 118 *et seq*.
[181] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 18 and Exhibit 2E at p. 114; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 154.

from about 65 witnesses.[182] Many hearing days lasted between 10-12 hours a day on consent of the parties.[183] Direct testimony was adduced first by affidavit.[184] This resulted in over 75 affidavits being filed into the record.

73. Based on the Tribunal's Procedural Order, counsel had 60 minutes for examination in chief to supplement the affidavits, and unlimited time for cross-examination and re-examination.[185] All parties had the right to ask the Tribunal for more time to complete an examination in chief.[186] Indeed, based on a request by counsel for Dr Steiner, the Tribunal granted extra time for Dr Steiner's examination in chief, in addition to his 62-page affidavit.[187]

74. Contrary to paragraph 108 of the Applicants' factum, the Tribunal granted adjournments when requested by the parties. For example, the Tribunal granted an adjournment when Dr Bart became ill immediately before he was going to be examined in chief by Ms Milne.[188] Similarly, the Tribunal also granted Ms Milne an adjournment before the end of a scheduled hearing day because she was not prepared for another witness on that

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[182] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 154.
[183] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 49.
[184] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 48.
[185] *Supplementary Procedural Order #3*, Exhibit J to the Heeney Affidavit, Responding Record, Volume 1, Tab 2 at p. 230.
[186] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 48.
[187] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 53 and Volume 2, Exhibit 2V at pp. 335 *et seq*. A minor correction was made to Exhibit 2V during Mr. Heeney's cross-examination: Certified Transcript of the Cross-Examination of James Heeney on December 1, 2015 ("**Heeney Transcript**") at p. 11 Q. 40-41; E-mail from C. Chow, dated November 30, 2015, Supplementary Responding Record, Tab 4 at p. 41.
[188] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 54. A minor correction was made to para. 54 during Mr. Heeney's cross-examination: Certified Transcript of the Cross-Examination of James Heeney on December 1, 2015 ("**Heeney Transcript**") at p. 11 Q. 40-41; E-mail from C. Chow, dated November 30, 2015, Supplementary Responding Record, Tab 4 at p. 41.

evening or was unable to stay when the Tribunal suggested extending the hearing day.[189] These facts are omitted from the Applicants' affidavit evidence.

75. In addition, the Tribunal "fully allow[ed] any adjournment" counsel thought was necessary to "prepare for…cross-examination, and/or consult with any of your impacted parties to prepare for that cross-examination" when a witness was called without an affidavit.[190] Mr Hopkins and Ms Milne not only omit this fact from their affidavits, but instead mislead this Court by stating that there was "no accommodation for adjournments",[191] and that "once [the hearing] was underway, no adjournments to the hearing schedule were granted".[192]

76. While making such bold assertions, they point to no specific instance where they did not receive an adjournment they requested, and instead cite an email from Tribunal Counsel as stating that there would be no further adjournments. Mr Hopkins and Ms Milne conveniently ignore the portion of the email where Tribunal Counsel explicitly states that the parties could bring a motion to "show cause" that an extension of time for delivering materials or an adjournment was necessary rather than just convenient.[193] The Applicants never brought a motion to "show cause", and yet now complain to this Court that the Tribunal refused to grant them adjournments or extensions of time.

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[189] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 55-56 and Volume 3, Exhibits 2W and 2X at pp. 338 and 340 *et seq*. A minor correction was made to Exhibit 2X during Mr. Heeney's cross-examination: Certified Transcript of the Cross-Examination of James Heeney on December 1, 2015 ("**Heeney Transcript**") at p. 11 Q. 40-41; E-mail from C. Chow, dated November 30, 2015, Supplementary Responding Record, Tab 4 at pp. 41-42.
[190] Excerpt from Certified Transcript of April 12, 2012 Hearing Date, Supplementary Record, Tab 14c at p. 502.
[191] Hopkins Affidavit, Application Record, Tab 5 at para. 103; Milne Affidavit, Application Record, Tab 4 at para. 93.
[192] Milne Affidavit, Application Record, Tab 4 at para. 101.
[193] E-mail from M. Zega, dated December 9, 2011, Supplementary Record, Tab 4a.

77. On May 15, 2013, the Tribunal released its 320-page decision. In the Tribunal Decision, the Tribunal provided detailed reasons for its findings and decisions on each of the individual complaints filed within the 2 group Complaints.[194] The Tribunal also sets out its findings regarding the general environment at the DSB.[195]

78. After the Tribunal Decision was released, the parties agreed to make remedy submissions in writing instead of orally.[196] Accordingly, the Tribunal adjourned the remaining hearing dates that were scheduled for remedy submissions.[197]

ix. The Tribunal's findings

79. The Tribunal found that none of the Applicants, except Dr Rose, were credible,[198] while Mr Bates and all of the 003 Complainants were generally credible.[199] The Tribunal made numerous findings of vindictive and harassing behaviour by the Applicants, other than Dr Richardson. In particular, because some of the Applicants jeopardized the jobs and career aspirations of some of the 003 Complainants through their improper abuse of processes, the Tribunal found that "Drs Bart, Taylor, Steiner and Pujari violated the trust placed in them as faculty members to protect the sanctity of the T&P [Tenure & Promotion] process…[which] are sacrosanct in a University and must not be tainted by improper motives or irrelevant personal agendas".[200]

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[194] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A.
[195] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 473, 475, and 477-478; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 73 and Volume 2, Exhibit 2LL at pp. 428 *et seq*.
[196] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 471.
[197] *Supplementary Procedural Order #11*, Tribunal Record, Volume 1, Tab 1L at pp. 101-102.
[198] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 211 and 270.
[199] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 206, 211 and 270.
[200] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 282.

80. The Tribunal carefully considered the importance of academic freedom in the University setting,[201] and "absent a power imbalance or objective vulnerability, the Tribunal was not prepared to consider harsh or critical debate and dialogue as harassment unless egregious".[202] This is directly contrary to paragraph 211 of the Applicants' factum − the Tribunal's finding was not that the Applicants were simply unable to respectfully engage in vigorous debate, but rather that they abused their tenured status, seniority, and power to negatively impact and often jeopardize the careers of the 003 Complainants, solely because of the 003 Complainants' support or perceived support of the Dean. The Tribunal was very careful to ensure that freedom to engage in vigorous debate was protected.[203]

81. In finding that the Applicants, other than Dr Richardson, had committed bullying and harassment, the Tribunal made clear that "academic freedom cannot and should not be used as a shield for inappropriate, unprofessional and/or harassing behaviour whether by individuals or groups. In a civilized society, and especially at a university which leads and upholds the virtues of freedom of expression, there can be vigorous debate and high standards without intimidation, belittling, bullying, and insults".[204]

82. Regarding the G21, the Tribunal found it "troubling that no member of the G21 who testified raised concerns about the serious allegations and disparaging remarks being communicated within the group or asked to be removed from the email list".[205] The Tribunal "observed a repeated indifference by many of the G21 witnesses (both party and non-party) concerning the impact that strategies and comments shared privately had, or

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[201] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 152-153, 165-166, 172-174, 211, 236, 252, 269-272, 275, 277, 282, 284-286, 316, 345, 353, 360, 412, 434, 450, 457, 462, and 469.
[202] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 271.
[203] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 152-153, 165-166, 172-174, 211, 236, 252, 269-272, 275, 277, 282, 284-286, 316, 345, 353, 360, 412, 434, 450, 457, 462, and 469.
[204] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 271.
[205] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 273.

might have had, on the DSB or on persons perceived to be Mr Bates' supporters",[206] and a continued reluctance to admit that the "communications and actions of the G21 had been inappropriate".[207] A snapshot of the Applicants' (other than Dr Richardson) misconduct is provided below.

(a) The "mole" hunt

83. On June 25, 2007, 2 of the Applicants, Dr Bart and Dr Taylor, vocalized their opposition to Mr Bates during a Strategic Marketing Leadership/Health Services Management ("**SML/HSM**") Area meeting in front of other Area faculty.[208] The meeting was chaired by Dr Pujari, who was to become the Area Chair for the SML/HSM Area on July 1, 2007.[209] During this meeting, Dr Bart and Dr Taylor "figuratively and effectively declared war on Mr Bates"[210] in a manner that was "unprofessional and mean spirited", leaving some faculty members feeling uncomfortable, "shaken", and "in shock and disbelief".[211]

84. Dr Terry Flynn ("**Dr Flynn**") perceived the behaviour of Drs Taylor and Bart at the meeting to be intimidating, and disclosed their comments and conduct to Mr Bates.[212] Upon discovering that someone had told Mr Bates about their conduct, Drs Taylor and Bart "engaged in harassment, intimidation and reprisal, commencing with attempts to identify the 'mole' who told Mr Bates about their comments".[213] Dr Taylor advised Ms Cossa, one of the 003 Complainants, that they "knew who did it, the person has been dealt with, and will continue to be dealt with", and suggested to her that she and the other

[206] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 273.
[207] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 273.
[208] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 274.
[209] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 274.
[210] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 242.
[211] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 371.
[212] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 274.
[213] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 274.

Contractually Limited Appointment ("**CLA**") faculty members "stay out of it".[214] Drs Taylor and Bart also went to Dr Patricia Wakefield, an untenured faculty member, in an attempt "to uncover the identity of the alleged 'mole'".[215]

85. Upon discovering that Dr Flynn was their "mole", Drs Taylor and Bart told Dr Flynn that "there was a 'mole' in their Area" and that they were "going to find out who the 'mole' was and 'deal with' that person", to intimidate Dr Flynn by making him aware they knew he had told Mr Bates.[216]

(b) The corruption of the Tenure & Promotion process

86. In June 2006, the DSB decided to appoint an inaugural Director of the Ph.D. Program which merged the positions of Ph.D. Coordinator of 2 programs.[217] Dr Steiner had been one of the Ph.D. Coordinators.[218] Mr Bates and then-Associate Dean Dr Milena Head ("**Dr Head**") wanted to advise Dr Steiner before the decision was announced, and on June 30, 2006, Dr Head conveyed Mr Bates' decision to appoint Dr Detlor as the inaugural Ph.D. Director to Dr Steiner.[219] In response, Dr Steiner "became visibly agitated"[220] and "harassed Dr Head", threatening "you shit on people and it will come back to hang you".[221]

87. Dr Steiner seized the opportunity to act on his threat when, as a member of the Faculty T&P Committee considering Dr Head's promotion to full professor, he "questioned Dr

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[214] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 274, 371-372, and 424.
[215] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 420.
[216] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 421 and 423-424.
[217] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 345.
[218] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 345.
[219] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 345.
[220] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 346.
[221] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 348.

Head for at least 90 minutes during her appearance at her Faculty T&P meeting concerning an administrative process issue that occurred during her appointment as Associate Dean"[222] 3.5 years earlier.[223] Dr Steiner conducted this interrogation under the guise that it related to her service component.[224] The Tribunal found that it was a "premeditated plan of harassment"[225] to "only question Dr Head on that information in a venue where she would feel compelled to try and answer".[226] Given Dr Steiner's experience in T&P processes, he would have been aware that, while contributions to service are one aspect considered in T&P, "those considerations focus on the level of contribution to service, not to merits of specific administrative decisions or procedures".[227] Dr Steiner's actions were "intended to embarrass Dr Head" by "ambush[ing] her", impacting "her right to be assessed for a promotion on the merits of her consideration".[228]

88. Dr Flynn's tenure-track appointment renewal consideration was similarly tainted in 2009.[229] Drs Bart, Pujari, Steiner, Rose and Ray all voted against Dr Flynn's renewal at the Area T&P level or the Faculty T&P level.[230] Drs Taylor, Bart, Pujari and Steiner created a hostile work environment for Dr Flynn, and denied him "the privilege of having his renewal untainted or considered by a faculty free of personal animosity toward him which suggested bias"[231] by failing to disclose the disparaging remarks about Dr Flynn

[222] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 279.
[223] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 350.
[224] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 351.
[225] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 354.
[226] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 354.
[227] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 354.
[228] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 355.
[229] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 278.
[230] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 419.
[231] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 419.

made by G21 members that they were privy to, including their own comments to their G21 colleagues.[232]

89. For example, Dr Taylor, who was on the Area T&P Committee but on research leave at the time, emailed Dr Pujari stating "re Flynn and Longo, I know there are no proxy votes…neither has earned the privilege of staying at Mac".[233] Upon identifying Dr Flynn as the organizer of efforts to reappoint Mr Bates, and before Dr Flynn's appointment was up for renewal, Dr Taylor wrote "Terry's probably going to orchestrate this-he's not great but he does get dirty (his old Liberal training) so prepare for more. Dr Bart utilized the 'war' analogy suggesting 'The real 'war' has now begun…are ready (sic) are we up for it?"[234]

90. On another occasion, when asked where Mr Vilks stood on the Dean's reappointment, Dr Taylor responded to the G21 that "To the best of my knowledge he is 100% behind Bates. Flynn, Bontis and Vilks are Bates' stormtroopers".[235] All of the Applicants - except Drs Richardson and Ray - were on the email distributions and not one of them ever objected to such language. To the contrary, Drs Rose, Bart, Pujari, Ray, and Steiner sat on Dr Flynn's T&P committees and voted not to renew his appointment.[236] If the recommendation not to renew had ultimately been accepted by the University's Senate Committee for Appointments, Dr Flynn's employment with McMaster would have ended.

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[232] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 433.
[233] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 279 and 424.
[234] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 276 and 424.
[235] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 276.
[236] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 428-429 and 434.

91. In finding that Drs Bart, Taylor, and Pujari breached the Policy when Dr Flynn was being considered for renewal at the Area T&P level,[237] the Tribunal considered the totality of the circumstances, including Dr Bart's and Dr Taylor's "mole" hunt, Dr Bart telling Dr Flynn that he was "on the wrong team",[238] and Dr Glen Randall's ("**Dr Randall**") testimony of how Dr Bart told Dr Randall that the reason Dr Randall "had so much trouble"[239] with his own T&P process was because "it was a fuck you vote" for supporting Mr Bates.[240]

92. Dr Chris Longo ("**Dr Longo**") was denied tenure in September 2009, and applied again in 2010.[241] Similar to Dr Flynn's and Dr Head's cases, Drs Bart, Pujari, Steiner, and Taylor adversely impacted Dr Longo's tenure application on both occasions and "failed to disclose private disparaging comments about Dr Longo made by them or other G21 participants which were known to them when they participated in the Area or Faculty T&P committee discussions".[242]

93. For example, in October 2008, Dr Chamberlain circulated an email to, among others, Drs Bart, Taylor, Pujari, Steiner, and Rose, alleging that Dr Longo, an untenured perceived supporter of Mr Bates and a complainant in the 003 Complaint, had a "secret deal" with the Dean's Office[243] that would guarantee him tenure. Dr Taylor admitted during his testimony that he "was the source of the allegation and provided the information about a secret deal between Dr Longo and Mr Bates…without any evidence of the veracity of his

[237] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 433.
[238] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 278.
[239] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 278.
[240] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 278.
[241] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 441 and 447.
[242] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 445-446 and 450.
[243] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 276 and 440.

claim".[244] A few months later, Dr Chamberlain emailed Drs Taylor, Pujari, and Bart while discussing the Dean's Selection Committee, asking "Is Chris Longo part of the unholy alliance as well?"[245]

94. Drs Taylor, Pujari, Rose, Bart and Steiner's "course of conduct and comment resulted in and/or contributed to a poisoned workplace for Dr Longo and tainted Dr Longo's tenure and promotion consideration at the Area and Faculty level".[246] Dr Steiner went one step further, alleging to the Senate Committee for Appointments that Dr Longo's dossier was "not absolutely honest".[247] Dr Steiner's continued animosity and lack of insight into his misconduct was evident in his comment during the hearing that "they all got what they asked for in T&P so why have a harassment complaint".[248]

95. In finding bullying and harassment in the T&P process, the Tribunal made clear that it was not deciding whether a particular complainant should have been awarded a renewal, tenure, or promotion, but rather whether participants in the process were harassed or otherwise treated contrary to the Policy.[249] In making these decisions, the Tribunal "required objective evidence establishing intimidation, harassment and/or reprisal given [its] concern for academic freedom".[250]

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[244] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 438-439.
[245] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 438.
[246] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 437.
[247] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 444-445.
[248] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 446.
[249] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 272.
[250] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 272.

(c) The CLAs' teaching-track appointments

96. In 2007, MUFA and the University agreed to create a "teaching-track" stream that could lead to permanence for teaching faculty.[251] Some departments used faculty members who were on fixed-term contracts (CLAs) for teaching faculty. These appointments were limited for 6 years. Based on the agreement between MUFA and the University, CLAs could either be converted to teaching-track, or would have to leave the University after 6 years.[252]

97. This new 6 year limit affected certain teaching faculty at the DSB, including Ms Stockton, Ms Cossa, and Mr Vilks, who were in the SML/HSM Area.[253] Dr Pujari, as their Area Chair, was responsible for their conversion. The SML/HSM Area consistently suffered from a lack of tenure-track faculty members. In an effort to extract more tenure-track faculty, Dr Pujari held Ms Stockton, Ms Cossa and Mr Vilks "hostage"[254] and refused to put them up for teaching-track positions.[255] Dr Pujari and Dr Bart developed this strategy together, without regard to the CLAs, who "were in a vulnerable employment position".[256]

98. While holding the CLAs "hostage", Dr Pujari made statements referring to the CLAs as "retailers of information", described their presence as an "intellectual deficit" making the DSB a "community college", and stated that he had a "drawer full of resumes".[257] The Tribunal found that Dr Pujari's "vexatious conduct or comment" and his "initial

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[251] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 370.
[252] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 370.
[253] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 370.
[254] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 404.
[255] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 371-372.
[256] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 404.
[257] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 280 and 405.

unwillingness to consider the conversion of any of the CLA's in his area, and the comments by Dr Bart about holding the CLA's hostage all breached the Policy", and were done "with full knowledge of the G21 activities".[258]

99. Dr Pujari, in addition to Drs Taylor and Bart, acted on the "power imbalance and the vulnerability of the CLA's in employment".[259] The Tribunal found that Dr Pujari "continued to engage both subtle and explicit conduct which undermined the careers and security of the CLA's",[260] including by "not disclosing the G21 emails which he had knowledge of and for which he himself participated in where persons for whom he was responsible [were] disparaged".[261]

100. In addition to engaging in misconduct that would have led to the end of the CLAs' employment at McMaster, after the CLAs filed their complaint, Dr Pujari accused them of being "racist", which the Tribunal held to be an act of reprisal.[262]

(d) The Applicants' allegations against Mr Bates

101. Having taken these and other egregious actions in their "us-against-them" campaign against Mr Bates,[263] the Applicants, other than Dr Ray, brought a complaint alleging that Mr Bates' legitimate managerial decisions constituted bullying and harassment and were taken because the Applicants opposed the Burlington Expansion and Mr Bates' second appointment as Dean.[264] Among other things, the Applicants alleged that "decisions made by Mr Bates were…designed to drive faculty from a position or…that Mr Bates removed

[258] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 404-405.
[259] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 404.
[260] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 407.
[261] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 409.
[262] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 418.
[263] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 463.
[264] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 206-208.

the 002 Complainants from positions of responsibility in order to harass and intimidate".[265]

102. Of the 19 allegations the Applicants brought against Mr Bates,[266] all of them were dismissed as "unfounded".[267] Nevertheless, the Applicants misleadingly suggest at paragraph 220 of their factum that the Tribunal made adverse findings against Mr Bates. The Tribunal found that Mr Bates "neither instigated nor exacerbated this difficult workplace environment by engaging in any harassment",[268] and that the allegations of Dr Taylor and Dr Bart in particular were "self-serving", disingenuously using harassment jurisprudence and the Policy to define their experiences.[269]

(e) Dr Ray's Counter-Complaint

103. The Tribunal found Dr Ray's "convoluted, speculative and presumptive"[270] Counter-Complaint against Dr Detlor to be "malicious, frivolous, vexatious and entirely without merit".[271] None of Dr Ray's allegations had any merit, and "the evidence confirmed that it was Dr Ray who disseminated false information and engaged in conduct and comment which breached the Policy and created a poisoned work/academic environment".[272]

104. While claiming his conduct was "<u>never</u> personal (his emphasis)",[273] Dr Ray engaged in "persistent conduct and comment which was personal, inflammatory and derogatory

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[265] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 207.
[266] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 203-204.
[267] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 207.
[268] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 206.
[269] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 463.
[270] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 333.
[271] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 332.
[272] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 333.
[273] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 333.

towards Dr Detlor".[274] When testifying, Dr Ray was "condescending and was evasive during cross-examination…routinely avoid[ing] questions and was argumentative in giving evidence", at one point "[shaking] his finger towards the Tribunal and rais[ing] his voice while stating that the complaint and hearing process [had] 'taken away his time, personal space and money'".[275]

(f) Breaches of the Tribunal's Orders

105. In addition to the Applicants withholding relevant emails between the G21 and G21+ contrary to the Tribunal's Order, the Tribunal found that Dr Taylor breached the Tribunal's Confidentiality Notice, and Dr Steiner and Dr Ray breached its Orders and tampered with evidence. The Confidentiality Notice prohibited all parties from "engaging in any negative behaviour, reprisal or retaliation against or towards any other individual who may have participated, has participated, or may participate in such proceeding".[276]

106. On January 31, 2012, Dr Steiner went to Dr Rick Hackett ("**Dr Hackett**"), a non-party witness, and asked him to consider amending his affidavit,[277] even though he knew that Dr Hackett's evidence was truthful.[278] On February 4, 2012, Dr Hackett advised Dr Steiner that he had decided not to make any amendments. In response, Dr Steiner said that he was "very disappointed" and that "this could have served as an important opening towards true reconciliation in the faculty".[279] In doing so, Dr Steiner attempted to "dissuade a witness and tamper with evidence"[280] and, after Dr Hackett refused to

[274] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 333.
[275] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 334.
[276] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 186.
[277] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 192.
[278] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 194.
[279] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 192.
[280] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 196

comply, sent an email that "amounted to a reprisal" and retaliation.[281] To date, Dr Steiner continues to believe that his actions were appropriate.[282]

107. Dr Steiner also approached Dr Martin Dooley ("**Dr Dooley**"), another non-party witness, after the hearing started and approximately 2 weeks before Dr Dooley testified, and told Dr Dooley that "they're trying to paint the G21 as a conspiracy".[283] Dr Steiner did not explain who "they" were, but when Dr Dooley asked about the G21 term, Dr Steiner replied "the group of senior business faculty opposed to the reappointment of Paul Bates".[284] The Tribunal found that, in doing so, Dr Steiner disclosed information about the evidence after the hearings began, in breach of the order excluding witnesses and the Confidentiality Notice.[285] Dr Steiner similarly breached the order excluding witnesses by approaching Dr Glen Randall ("**Dr Randall**") after the hearing began.[286]

108. In the middle of the hearing, in or around April 23, 2012, Dr Ray approached his own witness, Dr Isik Zeytinoglu ("**Dr Zeytinoglu**"), asking her to sign a revised affidavit after he "realized certain allegations in his complaint which he had earlier conveyed to Dr Zeytinoglu as a fact, would not be corroborated".[287] Dr Zeytinoglu, who was also a member of the G21, provided a new affidavit, but agreed when testifying that her original affidavit was what she remembered Dr Ray telling her.[288] The Tribunal found that Dr Ray attempted to tamper with the evidence by approaching Dr Zeytinoglu, and that the

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[281] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 196 and 198.
[282] Steiner Transcript at p. 6 Q. 6 and pp. 9-16 Q. 22-60.
[283] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 199.
[284] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 199.
[285] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 199.
[286] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 191.
[287] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 338.
[288] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 340.

information he originally conveyed to Dr Zeytinoglu contained in her first affidavit was false.[289]

109. On March 15, 2012, Dr Taylor sent an email to Mr Grant Walsh ("**Mr Walsh**"), who had written a letter supporting Mr Bates' second appointment. In his email, Dr Taylor stated that he "was disappointed, but not surprised, when [he] read [Mr Walsh's] letter to the Provost supporting Bates and deriding [Dr Taylor] (which is now part of the public record)".[290] The Tribunal found that Dr Taylor had breached its Order by sending this email, expressed insincere regret, and was not a credible witness during his testimony.[291]

110. The Tribunal took these breaches into account in addition to the Applicants' (other than Dr Richardson) "egregious" misconduct – including engaging in conduct that threatened some of the 003 Complainants' job security or otherwise negatively impacted their employment[292] – when making its decision on the appropriate remedies and sanctions.[293]

x. Remedy Decision

111. The Tribunal released its decision on remedies (the "**Remedy Decision**") on September 23, 2013.[294] The Tribunal recommended that Dr Rose be given a written reprimand, Dr Ray a suspension of one academic term, Dr Pujari a 12 month suspension, and Drs Steiner, Bart, and Taylor 3-year suspensions. The Tribunal, among other things, also recommended mandatory sensitivity, harassment, and conflict resolution training for all the Applicants, except Dr Richardson, and that they be removed from any current

[289] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 340.
[290] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 184.
[291] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 186.
[292] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 405, 407, and 409; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[293] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 474 and 476.
[294] Remedy Decision, Tribunal Record, Volume 2, Tab 2B.

positions of authority and prohibited from holding such positions for a period commensurate with the severity of their conduct.

112. A significant consideration for the Tribunal in deciding on appropriate remedies was whether Drs Pujari, Steiner, Taylor, and Bart truly accepted responsibility for their conduct.[295] The Tribunal found that the Applicants, other than Dr Richardson, refused to "acknowledge the egregious nature of the misconduct".[296] The Tribunal also found it concerning that "some 002 Complainants and certain individual 003 Respondents who were identified as breaching the Policy showed no remorse and remained intransigent throughout the hearing…",[297] and in particular Drs Bart and Taylor were "senior tenured faculty who exemplified qualities of hubris and lack of accountability".[298] The Tribunal found that the Applicants had "not come to grips with the seriousness, impact and effect of their misconduct", which did not bode well for the potential to rehabilitate their unacceptable behaviour.[299]

113. Nothing has changed. It is clear from the Applicants' affidavits and factum that they continue to refuse to accept responsibility for their actions, minimize the egregiousness of their misconduct, and blame anyone other than themselves for the Tribunal's findings.

(a) The mandatory sensitivity, harassment, and conflict resolution training

114. Drs Rose, Pujari, and Ray each attended individual mandatory training sessions. This training was conducted by Mr Trevor Hitner ("**Mr Hitner**"), a management consultant

[295] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 467-468; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 475-476 and 484.
[296] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[297] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 468.
[298] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 463.
[299] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.

specializing in matters relating to workplace human rights, workplace abuse, conflict resolution, harassment, respect, employment equity and diversity issues.[300]

115. The training consisted of 3, 2-hour sessions. In the first session, Mr Hitner focused on the seriousness of their conduct as found by the Tribunal, ensuring they were aware of the adverse impact their behaviour had on the victims, the organization, and themselves.[301] The sessions also covered, among other things, the concerns about their behaviour, the seriousness of tainting tenure and promotion processes and/or otherwise contributing to a poisoned work environment; their positions as tenured faculty members at the DSB and how that role imposed a profound obligation on them to conduct themselves in a manner that contributes to maintaining a dignified, respectful, collegial, and harassment-free work environment; the nature of power imbalances; and the responsibilities of leadership and those in senior-level positions.[302]

xi. Post-hearing motions

116. The various motions that took place after the hearing are irrelevant to the issues raised in this judicial review Application. The Applicants raise the Tribunal's decision to issue a declaration as an appropriate remedy for the University not being able to review and revise its Policy within the time stipulated in the Tribunal's Order,[303] and suggest that the University swiftly carried out the remedies ordered against the Applicants while it required an extension for the review of its Policy. However, this is unrelated and irrelevant to the pre-hearing or hearing process.

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[300] Affidavit of Trevor Hitner ("**Hitner Affidavit**"), Responding Record, Volume 2, Tab 3 at para. 1.
[301] Hitner Affidavit, Responding Record, Volume 2, Tab 3 at para. 5.
[302] Hitner Affidavit, Responding Record, Volume 2, Tab 3 at para. 6.
[303] Applicants' Factum at paras. 15 and 152-153.

117. In any event, the Applicants neglect to mention that the Tribunal, in determining that there was no further sanction required, "emphasized that the University's policies were not the cause, nor did any existing policy(s) explain or justify the inappropriate conduct [of the Applicants, other than Dr Richardson] which breached the Policy", and made clear that the Policy review was entirely different from the other remedies the Tribunal ordered "which were required to remedy the poisoned DSB work/academic environment".[304] In addition, the University sought an extension to complete the review and revision of the Policy because, in part, the University's stakeholders, including MUFA, wanted additional time to provide their input.

118. The Applicants also fail to mention that they sought a public reprimand from the Tribunal, which the Tribunal held "would serve no remedial purpose and could be misinterpreted. It is also not obvious how a public reprimand would be helpful rather than harmful to the DSB".[305] The Applicants' request for a public reprimand show their continued vindictiveness and further justify the Tribunal's recommended remedies to remove most of the Applicants for various durations to allow the DSB to heal.

PART III - THE ISSUES

119. The issues raised in this Application are as follows:

A. the Applicants waived their right to judicially review matters they either consented to or did not object to;

[304] *Implementation Order and Reasons*, Exhibit MM to the Affidavit of Elliott Saccucci ("**Saccucci Affidavit**"), Application Record, Tab 16 at para. 5.
[305] *Implementation Order and Reasons*, Saccucci Affidavit, Application Record, Exhibit 16MM at para. 18.

B. the pre-hearing investigation, which the Applicants never formally challenged before the Tribunal, is not an appropriate matter for judicial review since it did not finally dispose of any of the issues in dispute;

C. even if the pre-hearing investigation is subject to judicial review, the Applicants waived their right to raise allegations of perceived unfairness resulting from the pre-hearing investigation on judicial review;

D. Regarding the issues that are properly subject to judicial review:

(i) the appropriate standard of review for issues of procedural fairness is correctness and for all other issues is one of reasonableness;

(ii) the duty of procedural fairness and natural justice were met as:

(A) the Tribunal is not required to offer informal resolution;

(B) the parties were always granted adjournments to prepare for witnesses called without an affidavit;

(C) Dr Ray knew the case to meet;

(D) Dr Head's complaint was not time-barred;

(E) the University acted appropriately at all times;

(F) there is no evidence to support a reasonable apprehension of bias and in any event, the Applicants failed to raise this at their earliest opportunity; and

(G) the Applicants have suffered no prejudice caused by the deficiencies in the audio recording; and

(iii) the remedies ordered by the Tribunal were reasonable.

PART IV - LAW AND ARGUMENT

A. Procedures the Applicants consented to or failed to object to are not subject to judicial review

120. Even though the Applicants consented to or failed to object to the process and procedure followed by the Tribunal, they now claim that the Tribunal violated principles of procedural fairness and natural justice by, among other things, consolidating the Complaints, having the 002 Complaint proceed first, and imposing tight timelines and a tight hearing schedule. Having consented to the process and procedure, the Applicants "cannot now be heard to complain that it was deficient or that [they] were entitled to some other process".[306]

121. Parties must raise issues or objections at the earliest practical opportunity,[307] otherwise a failure to object at the hearing is an implied waiver.[308] Raising objections at the earliest practical opportunity prevents applicants from failing to make a timely objection and waiting to create "a potential ground for judicial review to be raised only if the Tribunal decision was unfavourable."[309]

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[306] *Taucar v. University of Western Ontario Faculty Assn.*, 2011 ONSC 3069 (Div. Ct.), Book of Authorities of the Respondents ("**Respondents' BOA**"),Tab 1 at para. 16.
[307] *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, aff'd 2007 FCA 199, leave to appeal ref'd [2007] S.C.C.A. No. 391 ["***Benitez***"], Respondents' BOA, Tab 2 at paras. 212-214.
[308] *Benitez*, Respondents' BOA, Tab 2 at para. 221.
[309] *Stetler v. Ontario (Agriculture, Food and Rural Affairs Appeal Tribunal)*, 2005 CarswellOnt 2877, 76 O.R. (3d) 321 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 428 ["***Stetler***"], Respondents' BOA, Tab 3 at para. 98; *Benitez*, Respondents' BOA, Tab 2 at para. 219, citing *Mohammadian v. Canada (Minister of Citizenship & Immigration)*, [2000] 3 FC 371, aff'd [2001] 4 FC 85 (FCA), leave to appeal ref'd 2002 CarswellNat 412 (SCC)

122. Because of the Applicants' consent or failure to object to the Tribunal, this Court is now deprived of the Tribunal's reasons on these procedural issues and cannot conduct a meaningful review of the Tribunal's reasons for taking jurisdiction, according the appropriate amount of deference depending on the issue under consideration.[310] The Supreme Court of Canada has made clear that Applicants "cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons".[311]

123. Having chosen to consent or not object to these procedural issues, the Applicants − as their counsel Mr Hopkins stated during the cross-examination on his affidavit − made strategic decisions in "picking [their] battles with [the] Panel".[312] Regretting tactical decisions made during the hearing is not a jurisdictional, procedural fairness, or natural justice issue subject to judicial review.

i. The Applicants consented to the deadlines, consolidation, and process

(a) Deadlines and hearing schedule

124. The Applicants consented to all timelines and the entire hearing schedule.[313] On three occasions, the parties requested timeline extensions.[314] All of these requests were made on consent of the parties.[315] The Tribunal granted every extension the parties requested

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["***Mohammadian***"], Respondents' BOA, Tab 4 at para. 25.
[310] *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255 ["***Johnson***"], Respondents' BOA, Tab 5 at paras. 42-45.
[311] *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 ["***A.T.A.***"], Respondents' BOA, Tab 6 at para. 54.
[312] Hopkins Transcript at p. 64 Q. 316.
[313] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 37, 39, 41-43, and 46-47 and Exhibits 2N, 2P, 2R, and 2S at pp. 280, 304, 310 and 313; Milne Transcript at p. 128 Q. 756; Hopkins Transcript at pp. 36-40 Q. 176-196.
[314] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 37, 39, and 41.
[315] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 37, 39, 41-43.

except for one minor extension which did not impact the timing of any substantive pleading.[316]

125. The Applicants allege that counsel's best estimate was that the hearing would take 74 days. However, the Applicants fail to mention that the parties consented to maximizing the hearing days, and most hearing days were at least 10-12 hours long.[317] In addition, the Applicants also fail to mention that this 74 day estimate was given before the Tribunal ordered evidence-in-chief to be provided by affidavit, with 60 minutes of oral examination in chief (or more, if the parties requested) to supplement the affidavit,[318] significantly reducing the amount of time needed for the hearing.[319]

126. Although neither Mr Hopkins nor Ms Milne reference in their affidavits that the initial 74 day estimate was before the Tribunal ordered examinations in chief to be provided by affidavit, Mr Hopkins now denies that 21 days was sufficient. However, once again, Mr Hopkins fails to mention that he was the one who wrote to the Tribunal requesting that it cancel the first 4 days of hearing originally scheduled for February 2012. Mr Hopkins email stated: "given the anticipated efficiency of the above [consolidated] process, and to accommodate the 002 Parties for having to now proceed before 003, the hearing will commence on March 3rd".[320]

127. While the Applicants and Mr Hopkins now allege that they were forced to withdraw witnesses or forced not to call others in order to "fit their case" into the hearing

[316] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 38 and Exhibit 2O at pp. 301-302.
[317] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 49.
[318] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 48.
[319] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 48.
[320] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at Exhibit 2L at p. 268 [emphasis in original].

schedule,[321] they fail to reference in their affidavits that, when they communicated this decision to the Tribunal, the Tribunal made clear it was "not from the direction of the Panel" that the Applicants were dropping witnesses, and if the Applicants chose to withdraw any witnesses, this decision was entirely their choice.[322] In fact, the Tribunal specifically stated that it did not want the Applicants to later state that the withdrawal of witnesses compromised their ability to put their case forward.[323]

128. Further, Mr Hopkins fails to mention in his affidavit that his co-counsel, Mark Fletcher ("**Mr Fletcher**"), followed this withdrawal of witnesses with an email advising the parties that he was withdrawing another witness on consent as long as no adverse inference would be drawn.[324] However, the Applicants now claim that they could not bring a motion seeking more time to call their witnesses because the Tribunal had previously advised that there were no additional dates. What they neglect to mention is that, although the hearing was initially scheduled to end on April 30, 2012, the Tribunal added 2 hearing dates in May.[325] In addition, after the Tribunal stated on April 5, 2012 there were no additional dates available, it provided 2 additional dates in June.[326] Finally, once again, the Applicants never brought a motion to the Tribunal requesting more dates.

129. The hearing schedule was not rushed and the Applicants suffered no prejudice. When the parties required more time for examination in chief, the Tribunal granted it.[327] When Dr

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[321] Applicants' Factum at paras. 342 and 345; Hopkins Transcript at p. 41 Q. 202.
[322] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 50-51.
[323] Partial Transcript of April 30, 2012 Hearing Date, Supplementary Responding Record, Tab 3 at p. 40; Audio Recording for April 30, 2012 Hearing Date, File No. 2, 06:13:15-06:14:00.
[324] Heeney Affidavit, Application Record, Volume 2, Exhibit 2U at p. 333.
[325] Hopkins Transcript at pp. 28-29 Q. 136-138; Milne Transcript at p. 142 Q. 845-847.
[326] Hopkins Transcript at pp. 41-42 Q. 203-208; Letter from P. Jacobsen regarding undertakings, dated January 8 2016, Supplementary Application Record, Tab 3 at pp. 4-5; Audio Recording for April 26, 2012 Hearing Date, File No. 1, 08:04:30-08:07:50; Audio Recording for April 30, 2012 Hearing Date, File No. 2, 06:11:33-06:13:10.
[327] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 53 and Volume 2, Exhibit 2V at pp. 335 *et seq.*

Bart requested an adjournment upon becoming ill immediately before his examination in chief began, the Tribunal granted it.[328] When Ms Milne protested that she was not prepared to proceed for the entire first day of hearing, the Tribunal granted an adjournment.[329] When Mr Hopkins needed more time for Dr Steiner's examination in chief, the Tribunal granted it.[330]

130. The allegation that the Tribunal imposed an unreasonable hearing schedule is not reconcilable with the collaborative efforts made by the parties to come to a mutually acceptable hearing schedule.[331] It is also not reconcilable with the fact that the Tribunal granted all additional time requests and adjournments.[332]

(b) Consolidation and hearing process

131. The Applicants agreed to consolidate the Complaints, and also agreed to the procedure the Tribunal used in proceeding with a consolidated hearing.[333]

132. The University initially brought a motion to consolidate the complaints, which was dismissed by the Tribunal.[334] In disposing of that motion in favour of the Applicants, the Tribunal ordered the 003 Complaint to be heard first and for the 002 Complaint to be held in abeyance until the hearing of all testimony for the 003 Complaint had concluded.[335]

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[328] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 54.
[329] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 55.
[330] Hopkins Transcript at p. 63-64 Q. 308-312.
[331] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 47.
[332] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 54-56.
[333] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 150 and 175; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 31-35; Milne Affidavit, Application Record, Tab 4 at paras. 64-81; Hopkins Affidavit, Application Record, Tab 5 at paras. 77-94.
[334] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 27-28.
[335] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 27-28 and Exhibit 2J at p. 228.

133. A timetable for the exchange of affidavits, as well as hearing dates, was agreed to by the parties and subsequently ordered by the Tribunal.[336] The Applicants were aware as of October 7, 2011 that all complainants had to deliver affidavits by November 22, 2011, and responding affidavits on or before January 13, 2012.[337] On October 21, 2011, the Tribunal extended the deadline for complainant affidavits to December 23, 2011 and responding affidavits to January 31, 2012, based on the parties' request on consent.[338]

134. Despite their knowledge since at least October 7, 2011 that responding affidavits were due in January 2012, on January 27, 2012, with an impending deadline for the submission of their affidavit evidence in the 003 Complaint, rather than bringing a motion to "show cause" for the reasons they needed an extension of time, the Applicants agreed to consolidate the complaints on condition that they receive an extension of time to submit their affidavit evidence, and that the 4 hearing dates that were originally scheduled for February 2012 be cancelled.[339]

135. Mr Hopkins wrote to the Tribunal to advise that the parties had agreed to a consolidated hearing process, and that given the "anticipated efficiency" of the process, the first 4 hearing dates could be cancelled.[340] Once again, Mr Hopkins misleads this Court and does not reference in his affidavit that he authored the email communication on behalf of all of the parties to the Tribunal. Based on this consent request, the Tribunal issued an order setting out the exact process and schedule proposed in Mr Hopkins' email.[341]

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[336] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 28 and Exhibit 2J at pp. 228-229.
[337] *Supplementary Procedural Order #3,* Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 225.
[338] *Supplementary Procedural Order #4*, Exhibit Q to the Heeney Affidavit, Responding Record, Volume 1.
[339] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 45.
[340] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2L at p. 268.
[341] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 33-34 and Exhibit 2M at pp. 271-274.

136. Every party had the same timelines for production.[342] The University did not get any special extensions simply because it was the University,[343] and everybody managed to serve and file their documents and affidavits on time.[344] Nonetheless, the Applicants now claim that they had to agree to consolidation as the almost 4 months' notice they had of the deadline for their responding affidavits in the 003 Complaint was too tight. Incredibly, Mr Hopkins' explanation for this was as follows:

> Q. Right. And at some point thereafter, yes, there is documents exchanged, but as I see it, your clients had to deal with the documents and gather the documents?
>
> A. No, we, that's true, but we also had to review all the documents.
>
> Q. I understand that.
>
> A. I mean, there were thousands of documents to review.
>
> Q. You were no different than any other party?
>
> A. We were the ones that had, well, we had to put our case in first. Or sorry, we had to...
>
> Q. No, you didn't.
>
> A. Sorry.
>
> Q. Right? But everyone had to review documents, you would agree with me, Mr. Hopkins?

[342] Milne Transcript at p. 126-127 Q. 748-755; Pujari Transcript at pp. 50-51 Q. 269-274; Ray Transcript at pp. 16-17 Q. 83-89; Taylor Transcript at p. 45 Q. 231-233.
[343] Milne Transcript at p. 127 Q. 751.
[344] Hopkins Transcript at p. 120 Q. 633-634; Milne Transcript at pp. 114-115 Q. 678-686 and p. 127 Q. 755.

A. That's correct.

Q. Right. And you had time, I'm going to suggest to you, in November, December, January, to interview witnesses and prepare Affidavits?

A. **No. No, I don't agree with that. We had other, we have other files, we have other matters. We hadn't, no, I don't agree with that.**[345]

137. In addition to agreeing to consolidation, the Applicants also agreed to have the 002 Complaint proceed first and for the Tribunal to consider all evidence adduced in the consolidated hearing in its decisions regarding each of the 002 and 003 Complaints.[346]

138. Contrary to paragraph 102 of the Applicants' factum, the Tribunal never "advocated" for the parties to reconsider consolidation. Counsel for the Tribunal merely suggested that the parties revisit the idea, making it clear that he was making the suggestion "with no authority other than trying to be helpful and promote an efficient and fair hearing".[347]

139. While counsel for the Tribunal's communication makes it clear he was simply suggesting that the parties consider revisiting the issue of consolidation without any authority to do so, the Applicants mislead this Court by asserting at paragraph 104 of their factum that Tribunal counsel "requested" consolidation. By doing so, they are trying to paint a false picture of the Tribunal itself trying to force the Applicants to consolidate the hearing. The Applicants had already successfully defeated a motion brought by the University to consolidate the hearing − a decision made by the Tribunal. If the Applicants did not want to consolidate the hearing, they did not have to consent to consolidation. They could have

[345] Hopkins Transcript at pp. 118-119 Q. 621-627. [emphasis added]
[346] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 150; Heeney Affidavit, Responding Record, Tab 2, Volume 1 at paras. 31 and 33-34 and Exhibit 2M at pp. 275-278.
[347] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 30 and Exhibit 2K at p. 262.

brought a motion to the Tribunal to extend the time for serving and filing their affidavits or to adjourn the impending hearing dates.[348] They simply chose not to.

140. The Applicants instead decided that the "right course of action"[349] was to agree to consolidate the Complaints and derive the benefit of an extension of time and cancellation of 4 hearing dates on consent. They now claim a breach of procedural fairness for the deal they struck willingly and derived a benefit from, arguing that they could not bring a motion to the Tribunal because it was a trier of fact and not a Master, and that Mr Aaron Rousseau, co-counsel to the 003 Complainants ("**Mr Rousseau**"), had, almost 2 months earlier, made a similar objection which the Tribunal allegedly rejected.[350] Mr Hopkins' sworn testimony was:

> Q. Right. But you don't tell the University and Mr. Heeney, "Pound salt. I'm making a motion to the Tribunal for an extension of time because I don't have enough time"?
>
> A. No, we couldn't. We couldn't because Aaron Rousseau had already made that precise objection, on November the 28th, and it would have been rejected. That precise objection had already been made. So that fact, in conjunction with Mr. Zega's e-mail, we felt we had no choice but to agree to consolidation. Consolidation was not in our clients' best interests.
>
> Q. I know you say that now, but at the time you certainly agreed to it. And the fact that

[348] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 32.
[349] Hopkins Transcript at p. 34 Q. 161.
[350] Hopkins Transcript at pp. 33-36 Q. 159-175.

> Mr. Rousseau may have brought a motion in November, Mr. Hopkins, I'm going to suggest to you, didn't mean you shouldn't have brought one at the end of January. You may have been said, the Tribunal may have said no. Right?
>
> A. I disagree. I completely disagree. I mean, this is our trier of fact that we're dealing with. We're not dealing with a Master, we're dealing with the trier of fact.
>
> Q. So you're saying just because it's a trier of fact you don't have to move for an extension of time?
>
> A. **Bringing the same motion or the same objection that had already been brought, in our view, was not the right course of action.**[351]

141. In addition, contrary to Mr Hopkins' sworn testimony and paragraph 100 of the Applicants' factum, Mr. Rousseau never brought a motion to adjourn hearing dates and the Tribunal did not reject Mr Rousseau's objection to starting the hearing on February 7, 2012. The portion of the transcript produced by the Applicants selectively excludes the Tribunal's suggestion that it did not anticipate the first day of hearing to include any examinations, only opening statements. Mr Rousseau then agreed that this was likely acceptable:

> The 10th is not -- is not the same as the 7th. And certainly not the same as the 3rd, which was originally on the list. So, if -- if we're prepared to say that we're gonna do opening

[351] Hopkins Transcript at pp. 33-34 Q. 159-161. [emphasis added]

> statements only on the 7th and that witness testimony will begin on the 10th, then I think that's -- I think that's doable.[352]

142. Mr Heeney and Mr Rousseau therefore never made a formal argument to adjourn the February 7, 2012 hearing date.[353] Instead, after Mr Rousseau conveyed the Tribunal's suggestion to Mr Heeney, they discussed whether to bring a motion and provide documentation to support hardship, but ultimately elected to be prepared to start the hearing on February 7, 2012.[354]

143. The Applicants rely on an email from counsel to the Tribunal confirming the initial Procedural Order that there would be no adjournments, indulgences, or delays to justify their failure to bring a motion,[355] ignoring the portion of the email that explicitly provides parties with the opportunity to bring a motion to "show cause" for why an extension was just and necessary rather than just convenient.[356] The Applicants never brought such a motion. Instead, they consented to consolidate and now raise their failure to bring a motion and their agreement to consolidate as a ground for judicial review.[357]

(c) The Applicants' are not entitled to have the University pay for their legal costs

144. The Applicants and Mr Hopkins argue that they considered seeking judicial review instead of consenting to consolidation but were unable to because the University would not cover legal costs incurred from judicial review[358] or external challenges to the

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[352] Partial Transcript of November 28, 2011 Pre-Hearing Date, Supplementary Responding Record, Tab 8 at p. 51; Audio Recording for November 28, 2011 Pre-Hearing Date, File No. 1, 00:07:34-00:09:56.
[353] Heeney Transcript at p. 194 Q. 918.
[354] Heeney Transcript at pp. 195-199 Q. 922-938.
[355] Hopkins Transcript at pp. 27-28 Q. 131-132, pp. 33-34 Q. 159-165, and pp. 35-36 Q. 169; Milne Transcript at pp. 102-103 Q. 605-609; E-mail from M. Zega, dated December 9, 2011, Supplementary Record, Tab 4a.
[356] E-mail from M. Zega, dated December 9, 2011, Supplementary Record, Tab 4a.
[357] *Stetler* , Respondents' BOA, Tab 3 at para. 98; *Benitez*, Respondents' BOA, Tab 2 at para. 219, citing *Mohammadian,* Respondents' BOA, Tab 4 at para. 25.
[358] Applicants' Factum at para. 105; Hopkins Transcript at pp. 35 Q. 165.

Tribunal's jurisdiction.[359] While the Applicants should have been focusing on bringing a motion to the Tribunal to extend the timelines for filing materials and seeking an adjournment of the hearing dates, they were instead focusing on whether the University would fund their legal fees for a judicial review. Further, the Applicants' perception that the University should fund all of their legal fees − whether at the Tribunal level or at the Divisional Court − underscores the absurdity of their procedural fairness claims. Although the Policy makes clear that "all parties will bear their own costs related to the proceedings",[360] the University agreed to fund everybody's legal fees at the Tribunal level to ensure that all parties were treated fairly.

(d) The Applicants could consent to consolidation under the SPPA

145. The Applicants in this judicial review state for the first time that the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 ("**SPPA**") does not permit parties to consent to consolidation where the relevant statute "requires that [the proceeding] be heard in private".[361] This is inapplicable for 2 reasons.

146. First, the Policy does not *require* proceedings to be heard in private. The Policy provides a default for proceedings to be heard *in camera*, but any party may request for the hearing or part of the hearing to be heard in public.[362] It is clear that the proceedings did not have to occur in private, evidenced during a pre-hearing conference when the parties discussed whether they were in favour of *in camera* proceedings.[363]

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[359] Applicants' Factum at para. 80.
[360] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 65(b)
[361] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ["***SPPA***"] at s. 9.1(3)(a).
[362] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 66.
[363] Excerpt from Certified Transcript of June 24, 2011 Pre-Hearing Date, Supplementary Responding Record, Tab 9 at p. 61; Excerpts from Certified Transcript of June 24, 2011 Pre-Hearing Date, Supplementary Record, Tab 14a at

147. Contrary to paragraph 247 of the Applicants' factum, *A.(J.) v B.(N.)*[364] does not stand for the principle that, where a regulation defaults to an *in camera* hearing, the Tribunal is prevented from consolidating the hearing even if it has the statutory authority to order a public hearing. In *A(J.) v B.(N.)*, the Ontario Child and Family Services Review Board held that it was prevented from consolidating the hearing because proceedings were closed under its Rules of Procedure based on "the personal information that is disclosed during the hearings".[365] Section 9(1)(b) of the SPPA therefore applied.

148. Contrary to paragraph 238 of the Applicants' factum, the Tribunal did not reject consolidation simply because it was "clearly intended under the Policy and in the interest of all concerned to hold the matters *in camera*". The Applicants again exclude the rest of the sentence, where the Tribunal recognized that

> the *in camera* nature of the proceedings refers to the public (i.e. the broader University community as a whole and beyond) and not necessarily *in camera* for the group in both matters are largely an almost common collection of Complainants and Respondents in matters 002 and 003.[366]

149. This case is therefore different from the situation in *A(J.) v B.(N.)*. However, based on the wording of the SPPA, the Tribunal determined that it did not have authority to consolidate the hearings absent consent of the Parties.[367] The Tribunal specifically noted that the matters could be consolidated if the parties provided consent.[368]

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pp. 472-484; Heeney transcript at p. 106 Q. 515 and pp. 109-110 Q. 527.
[364] *A.(J.) v B.(N.)*, 2007 CarswellOnt 4210 (Ont. Child and Family Services Review Board), Applicants' Second Supplementary Book of Authorities ("**Applicants' 2nd Supplementary BOA**"), Tab 1 at paras. 4 and 9-11.
[365] *A.(J.) v B.(N.)*, Applicants' 2nd Supplementary BOA, Tab 1 at paras 9-11.
[366] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 252.
[367] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 252.
[368] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 252.

150. Second, the SPPA specifically states that any procedural requirement of the SPPA or other statute applicable to the proceeding may be waived with the consent of the parties and the Tribunal.[369] The Applicants consented to consolidation, waiving any applicable procedural requirement for consolidation.

151. The Applicants cite *Newton v Tataryn*[370] to support their argument that they could not consent or waive their objection to consolidation because it "bestow[ed] jurisdiction" on the Tribunal.[371] However, the issue of consolidation is not a question of fundamental jurisdiction.[372] The Applicants' consent to consolidate the Complaints did not "bestow jurisdiction" on the Tribunal − the Tribunal already obtained jurisdiction when the Complaints were filed. By consenting to consolidation, the Applicants were consenting only to a procedural matter.

152. The Applicants argue that they fall under an exception to waiver because they did not know all the relevant facts.[373] It is unclear why it was unforeseeable that the 002 Complaint would proceed first, that counsel would be able to examine and cross-examine a particular witness depending on whether a complaint was impacted, and that the Tribunal would consider all evidence adduced in its decision for both complaints, when these points were all specifically set out in Mr Hopkins' email to the Tribunal dated January 27, 2012.[374]

153. It is also unclear why the global evidentiary hearing record was unforeseeable when the parties agreed to this on November 28, 2011, at which time the Tribunal made clear that a

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[369] *SPPA*, *supra* at s. 4(1).
[370] *Newton v. Tataryn*, [1990] M.J. No. 209 (MBQB) ["***Newton***"], Applicants' 2nd Supplementary BOA, Tab 3.
[371] Applicants' Factum at para. 250.
[372] *Newton*, Applicants' 2nd Supplementary BOA, Tab 3 at para. 13.
[373] Applicants' Factum at paras. 251-253.
[374] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2L at pp. 267-269.

globally produced hearing record would not preclude parties from objecting to the admissibility of a particular document to a particular hearing.[375] The Tribunal reiterated the fact that the documents in the global hearing record were not admissible as evidence at the hearing except on consent of the parties or upon being proven as evidence through witnesses during the hearing in its correspondence to the parties on February 28, 2012.[376]

154. The Applicants claim that they could not foresee consolidation permitting the University to make submission on remedies.[377] This argument has no traction. The University was a respondent in both Complaints. The University remained a respondent when the Complaints were consolidated. However the Complaints proceeded, the University would still have had the right to make submissions on remedies as a respondent, and as the entity bearing ultimate responsibility for a poisoned work environment.[378]

155. Finally, the Applicants suffered no prejudice because of consolidation. The evidence before the Tribunal would have remained the same even if the Complaints had not been heard together.[379] It was not the parties' consent to consolidation that caused the evidence of the G21 to be before the Tribunal in the 002 Complaint.[380] In the 002 Complaint, the Applicants (other than Dr Ray) complained about the actions of the Dean, arguing that the Dean's actions were a result of their opposition to him. The G21 was a group opposed to the Dean, which included the Applicants. Had the evidence of the G21 not been disclosed if the 002 Complaint had been heard separately, the Applicants, other than Dr

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[375] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para 23 and Exhibit 2G at pp. 118-119; Audio Recording for November 28, 2011 Pre-Hearing Date, File No. 3, 00:00:00-00:06:09.
[376] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2F at p. 116.
[377] Applicants' Factum at para. 253(b).
[378] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4T; DSB-0001, Tribunal Record, Volume 3 at pp. 490 *et seq*.
[379] *McNaught v. Toronto Transit Commission*, 2005 CarswellOnt 237 (ONCA), Respondents' Supplementary Book of Authorities ("**Respondents' Supplementary BOA**"), Tab 1 at paras. 39-41.
[380] Applicants' Factum at para. 253(d).

Ray, would have been withholding relevant evidence on an even larger scale than their withholding of evidence and subsequent false evidence of Dr Rose during the consolidated hearing process.[381]

ii. The Applicants consented to proceeding in the absence of a Tribunal member

156. When it became known that Dr Ibhawoh would be unavailable for a small portion of 2 of the agreed-upon hearing dates, the Tribunal provided the parties with the option of continuing with the hearing in Dr Ibhawoh's absence on the understanding that Dr Ibhawoh would review the evidence on the audio recording, rather than adjourning the hearing.[382]

157. The Applicants state at paragraph 164 of their factum that they did not object to Dr Ibhawoh's first absence. Once again, the Applicants are misleading this Court. The Applicants expressly consented to proceeding in Dr Ibhawoh's absence.[383] Before Dr Ibhawoh left on the first occasion, and in response to the Chair asking if there were "any objections to us continuing in the brief absence of Dr Ibhawoh with the concept that he will have an opportunity to review the audio tapes…",[384] Mr Hopkins stated "we have no problem with that",[385] and Ms Milne stated "that's fine".[386]

158. Despite being fully aware that they had consented to Dr Ibhawoh's absence, Ms Milne and Mr Hopkins deliberately chose not to include this fact in their affidavits. When

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[381] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 153, 263-264, and 462.
[382] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 57.
[383] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Y at p. 343. A minor correction was made to Exhibit 2Y during Mr. Heeney's cross-examination: Certified Transcript of the Cross-Examination of James Heeney on December 1, 2015 ("**Heeney Transcript**") at p. 11 Q. 40-41; E-mail from C. Chow, dated November 30, 2015, Supplementary Responding Record, Tab 4 at p. 42.
[384] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Y at p. 343.
[385] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Y at p. 343.
[386] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Y at p. 343.

confronted with this omission in cross-examination, both Ms Milne and Mr Hopkins had this remarkable answer − their consent was irrelevant.[387]

159. Ms Milne and Mr Hopkins also fail to mention that, on the second occasion Dr Ibhawoh briefly left, the Tribunal specifically "propos[ed] that [they] continue as [they] did previously" with Dr Ibhawoh reviewing the audio, and no one objected.[388]

160. After providing the incredible answer that his consenting to Dr Ibhawoh's absence was "irrelevant", and therefore that was the reason he did not include that important fact in his affidavit, Mr Hopkins claimed during his cross-examination that he could not object to Dr Ibhawoh's second absence because the Chair, after making this proposal, "seamlessly instructed Mr Fletcher to then put in his next witness".[389] Mr Hopkins fails to recognize that he could object to the Chair's proposal much as he did to, for example, lines of questioning he disagreed with. Moreover, Mr Fletcher, being the next person to speak after the Chair made her proposal, could have objected before putting forward his next witness. Neither Mr Fletcher nor Mr Hopkins made any such objections.

161. The Tribunal did not exceed its jurisdiction by proceeding in Dr Ibhawoh's absence on consent of the parties. The Applicants' consent to proceeding in Dr Ibhawoh's absence is not a jurisdictional question. The Tribunal already had jurisdiction. What the Applicants consented to was a procedural matter. The Applicants now request − once again − that this Court excuse them from having made what they now believe to be a poor tactical decision.

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[387] Hopkins Transcript at p. 9 Q. 33-35 and pp. 12-13 Q. 49-51 and 53; Milne Transcript at pp. 146-147 Q. 876-879 at p. 148 Q. 883-886.
[388] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Y at p. 344.
[389] Hopkins Transcript at p. 10-12 Q. 37-48.

162. The Applicants rely on *Doyle,*[390] where 2 of the 3 panel members were absent for various periods during the hearing *without the consent of the parties*. In addition, the relevant legislation in *Doyle* specifically set out various provisions for how the panel would obtain the evidence and information to be used in preparing its final report. In contrast, while s. 58 of the Policy provides that evidence and representations are to be heard through the procedures described in the Policy, the procedures do not speak to whether a Tribunal member may review the audio recording if absent during the proceeding. As the SPPA does not speak to this issue, the Tribunal has express authority to determine the circumstances under which a member may be absent, and establish a procedure that is guided by the principles of fairness and allow the parties an opportunity to be heard.[391] The Tribunal implemented such a procedure, but only after the Applicants consented to it.

163. The Applicants did not suffer any prejudice from Dr Ibhawoh's limited absences. The Tribunal did not prefer Dr Head's evidence over Dr Steiner's based on the 12 minutes of Mr Hopkins' cross-examination of Dr Head and 6 minutes of Mr Heeney's re-examination.[392] It preferred Dr Head's evidence over Dr Steiner's for a number of reasons, including that: "Dr Head's account of relevant events was corroborated by other credible witnesses. Her testimony was also supported by the documentary evidence where required",[393] whereas Dr Steiner's "evidence on certain matters was inconsistent and

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[390] *Doyle v. Canada (Restrictive Trade Practices Commissions)*, [1985] 1 F.C. 362 (F.C.A.), leave to appeal to S.C.C. ref'd (1985), 7 C.P.R. (3d) 235 (S.C.C.) ["***Doyle***"], Applicants' Book of Authorities ("**Applicants' BOA**"), Tab 7.
[391] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 57.
[392] Audio Notes, Supplementary Responding Record, Tab 10 at pp. 109-110.
[393] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 342.

unreliable…. In addition, Dr Steiner's allegations concerning Dr Head's own conduct were found to be vindictive and often without merit".[394]

164. In finding Dr Steiner's conduct to be vindictive and retaliatory, the Tribunal "considered the aggressive tone, inaccurate content and inflammatory nature of Dr Steiner's affidavit evidence, oral testimony and documentary evidence in our overall assessment of subsequent behaviour undertaken by Dr Steiner against some colleagues including Dr Head".[395] The Tribunal also found that many of Dr Steiner's "allegations were not supported by the evidence and in some cases were frivolous, vexatious and without merit", whereas there was evidence from both party and non-party witnesses that Dr Steiner behaved in a manner consistent with Dr Head's description.[396]

165. The Tribunal Decision clearly sets out the facts it relied upon in making its decision that Dr Steiner breached the Policy on at least 10 occasions, which encompassed at least 16 incidents,[397] including by, among other things, "negatively impact[ing] Dr Head's reasonable employment expectations during her promotion to Professor",[398] relying in part on the fact that "the next level of assessment, the Senate Committee on Appointments found Dr Steiner's questions [to be] inappropriate".[399]

166. The Applicants allege that they were denied procedural fairness and natural justice on the second occasion because Dr Ibhawoh missed a portion of Dr Pujari's cross-examination when his credibility was twice put directly at issue, and the Tribunal ultimately found Dr

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[394] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 342.
[395] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 355.
[396] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 348.
[397] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 191, 195-199, 316-318, 348, 353-355, 434-435, 440-441, 445-447, and 450.
[398] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 354.
[399] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 354.

Pujari to lack credibility. The Applicants neglect to mention that Dr Ibhawoh returned during Dr Pujari's testimony, and proceeded to ask Dr Pujari a number of questions after he completed his testimony.[400]

167. In any event, the Tribunal's findings against Dr Pujari are not based on the 2 instances when Mr Heeney put Dr Pujari's credibility directly at issue. These 2 instances were in reference to 1) whether Dr Pujari thought the use of the term "Stormtroopers" was appropriate, and 2) Dr Pujari involving a student in the faculty disputes.[401] However, the Tribunal's finding that Dr Pujari lacked credibility was based on his attempts to rationalize his behaviour[402] and his inconsistent representation of events.[403]

168. The Applicants cite *Consolidated Bathurst*[404] and *Ellis-Don*[405] to support their argument that, despite consenting to Dr Ibhawoh's brief absences, there was a violation of natural justice. Neither of these cases have any bearing on this Application. In both of these cases, the panel adjudicating the dispute discussed the cases in a meeting of all Board members, even though all Board members did not hear the evidence or arguments. In both cases, the issue before the Supreme Court of Canada was whether the discussions at the full Board meeting influenced the panel such that the other Board members effectively participated in making the final decision. The Court found no such influence. It is difficult to understand the applicability of these cases to this Application when there

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[400] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 58 and Volume 2, Exhibit 2Z at pp. 346-347.
[401] Excerpt from Certified Transcript of April 24, 2012 Hearing Date, Supplementary Responding Record, Tab 11 at pp. 177-182 and pp. 197-205.
[402] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 409.
[403] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 445.
[404] *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.,* 1990 CarswellOnt 821 (S.C.C.) ["***Consolidated Bathurst***"], Applicants' BOA, Tab 14 at paras. 33 and 43.
[405] *I.B.E.W., Local 894 v. Ellis-Don Ltd.,* 2001 CarswellOnt 99 (S.C.C.) ["***Ellis-Don***"], Applicants' BOA, Tab 8 at para. 66.

is no evidence or allegation that members of the Tribunal consulted with anyone other than themselves in making its decision.

169. Finally, the Applicants did not suffer any prejudice from Dr Ibhawoh's brief absence. The Policy does not require a unanimous decision on the merits or the remedies, only a majority decision.[406] The Tribunal was unanimous in its decision on both the merits and the appropriate remedies.

B. The pre-hearing investigation is not subject to judicial review

i. The Tribunal had jurisdiction to hear the Complaints

170. Although the Applicants agreed before the hearing began that the Tribunal had jurisdiction to hear the 002 Complaint and the 003 Complaint,[407] the Applicants now allege for the first time on judicial review that the Tribunal did not have jurisdiction to hear the Complaints due to procedural unfairness issues arising from the pre-hearing investigation and process.

171. The Supreme Court of Canada has made clear that the category of true questions of jurisdiction is very narrow,[408] and true questions of jurisdiction will be exceptional.[409] Through a series of decisions from the Supreme Court of Canada, "a true question of jurisdiction now refers to whether the tribunal had authority to make the inquiry in the first place",[410] and "modern jurisprudence cautions against labelling alleged errors as

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[406] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Exhibit 4A at s. 70(a).
[407] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 18 and Exhibit 2E at p. 114; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 154 and 176.
[408] *A.T.A.*, Respondents' BoA, Tab 6 at para. 33.
[409] *A.T.A.*, Respondents' BoA, Tab 6 at para. 39.
[410] *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 ["***Volochay***"], Respondents' Supplementary BOA, Tab 2 at para. 56; *Canada (Attorney General) v. Mowat*, 2011 SCC 53 ["***Mowat***"], Applicants'

jurisdictional to justify review on a standard of correctness".[411] As stated by the Ontario Court of Appeal ("**ONCA**") in *Volochay*, a "question of procedural fairness or natural justice is not a true question of jurisdiction".[412] The Applicants, however, erroneously argue that almost every issue in this case is a true question of jurisdiction.

172. Sections 12-20, 48, and 52 of the Policy give the Tribunal jurisdiction to hear formal complaints of harassment and discrimination brought by members of the University community under the Policy. The preliminary investigation and the results of the preliminary investigation do not deprive the Tribunal of jurisdiction. The only pre-condition to the Tribunal obtaining jurisdiction is for there to be formal proceedings. The Tribunal therefore obtained jurisdiction once the Complaints were filed, requesting that they be determined by the Tribunal under the provisions of the Policy.[413] Sections 33-36 of the Policy are not jurisdictional but rather procedural matters.

ii. The Tribunal never lost jurisdiction

173. The Tribunal's role is to determine the merits of complaints alleging breaches of the Policy.[414] Both Complaints were expressly brought under the Policy, alleging harassment and bullying by members of the University community. The issues raised in the Complaints therefore fell directly within the Tribunal's jurisdiction.[415] None of the alleged pre-hearing procedural errors deprived the Tribunal of jurisdiction to decide the Complaints.

BOA, Tab 3 at para. 18.
[411] *Re Rowan*, 2012 ONCA 208 ["***Rowan***"], Respondents' Supplementary BOA, Tab 3 at para. 71.
[412] *Volochay*, Respondents' Supplementary BOA, Tab 2 at paras. 58-60. [emphasis added]
[413] DSB-0001, Tribunal Record, Volume 3 at p. 520 (the 002 Complaint); DSB-0002, Tribunal Record, Volume 3 at p. 526 (the 003 Complaint).
[414] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 70(a).
[415] *Aylward v. McMaster University*, 1991 CarswellOnt 972 (Div. Ct.), Respondents' BOA, Tab 8 at paras. 20-21.

iii. Pre-hearing investigations are not subject to judicial review where the investigator does not make a final determination

174. Pre-hearing investigations are not subject to judicial review except where the investigator makes a final determination of a right or interest.[416] The Officer's role under the Policy was to gather information and provide a non-binding recommendation. The Officer made no final determinations that affected the Applicants' rights or interests − the Tribunal did. The pre-hearing investigation was not in the nature of the exercise of a statutory power of decision.[417]

175. The President's decision to initiate formal proceedings by way of group complaints was also not a final determination of the rights or interests of the Applicants. Regardless of the President's decision, the Applicants retained the right to bring their complaints to the Tribunal as individual complainants. The President did not make a decision regarding the merits of the complaints discovered by the investigation − the Tribunal did. The pre-hearing investigation is therefore not appropriately before the Court on judicial review.

C. The Applicants waived their right to contest any alleged unfairness arising from the pre-hearing investigation on judicial review

i. The Applicants failed to raise concerns regarding the pre-hearing investigation at the earliest practical opportunity

176. In this judicial review, the Applicants have, for the first time, claimed that the Tribunal lacked jurisdiction to hear the Complaints because of procedural issues during the pre-hearing investigation. In these circumstances, this Court should exercise its discretion and

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[416] *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, Respondents' BOA, Tab 9 at paras. 32 and 87.
[417] *Coote v. Zellers*, 2008 CarswellOnt 1231, 2008 O.J. No 809 (C.A.), Respondents' BOA, Tab 10 at para. 26; *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 36.

not consider these issues.[418] Courts have rarely exercised their discretion in favour of applicants when they could have but did not raise an issue before the Tribunal.[419]

177. The Applicants had many opportunities to raise any alleged pre-hearing procedural issues to the Tribunal. The Applicants again mislead this Court at paragraph 79 of their factum by selectively quoting Tribunal counsel as saying "there did not appear to be any ambit of jurisdiction provided to the Tribunal [regarding unfair treatment in the pre-hearing process]".[420] The Tribunal never refused jurisdiction to hear pre-hearing procedural matters. In the very next sentence of that transcript quoted by the Applicants at paragraph 79 of their factum, Tribunal Counsel states that such matters should not be brought to the Tribunal "***prior to the request being made to the University Officer***".[421]

178. The Applicants never brought their requests to the Officer or to the Tribunal. Instead, they expressly agreed that the Tribunal had jurisdiction to entertain both Complaints and proceeded to call witnesses, cross-examine witnesses, and make submissions before the Tribunal,[422] both to vigorously advance their 002 Complaint, and to respond to the 003 Complaint. In doing so, they waived their right to raise this objection on judicial review.

ii. Pre-hearing procedural issues the Applicants waived their right to raise

179. In addition to the issues of timelines, hearing schedule, consolidation, and temporary absences of Dr Ibhawoh, the Applicants have raised the following pre-hearing issues for the first time on judicial review as issues concerning the Tribunal's jurisdiction:

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[418] *A.T.A.*, Respondents' BOA, Tab 6 at para. 22.
[419] *A.T.A.*, Respondents' BOA, Tab 6 at paras. 22-23.
[420] Applicants' Factum at para. 79.
[421] Excerpt from Certified Transcript of June 24, 2011 Pre-Hearing Date, Supplementary Responding Record, Tab 9 at p. 63, lines 20-21. [emphasis added]
[422] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 154-155; *Benitez*, Respondents' BOA, Tab 2 at para. 213.

a. the President did not communicate with the Applicants before initiating formal proceedings as a complainant under s. 36 of the Policy;

b. the complaint should not have proceeded as a group complaint as at least one of the Applicants was willing to proceed with an individual complaint;

c. the pre-hearing investigation report that went to the President was flawed as the Applicants did not have an opportunity to respond to the report;

d. the Applicants were not asked if they wished to pursue informal resolution under s. 44 of the Policy;

e. the Novick Report was never produced; and

f. the contents and use of the global hearing record.

180. All of these claims should be dismissed. The Applicants made a tactical choice to consent or not object to these alleged pre-hearing deficiencies, depriving the Tribunal of the opportunity to make decisions which would have been properly before this Court on judicial review.[423]

181. The Applicants state that they complained about some of the pre-hearing processes. At paragraph 73 of their factum, the Applicants reference certain affidavits in the proceedings below in support of their claim that they objected to the pre-hearing investigation process. These affidavits all state as follows:

> I am dismayed with this entire process. I understand that an "investigation" was undertaken by Ms Sherri [sic] Novick ("Ms Novick"), which lasted weeks, if not months.

[423] *Silver Campsites Ltd. v. Pulham*, 2011 BCCA 352, Respondents' BOA, Tab 11 at para. 32; *Johnson*, Respondents' BOA, Tab 5 at paras. 47 and 52.

> I further understand that all the Complainants were interviewed by Ms Novick, and that Ms Novick produced a written investigation report to Mr Mile Komlen, Director of Human Rights and Equity Services (HRES), ("Mr Komlen"). Moreover, and notably, Ms Novick's report culminated in this Compliant [sic] against the Respondents. However, Ms Novick's report has not been produced. I am shocked, and dumbfounded that (to the best of my knowledge), neither myself, nor any of my fellow Respondents were interviewed by Ms Novick in order to obtain our responses to the allegations, before the filing of this Complaint. In fact, I had no knowledge of the allegations contained in this Complaint until after it was filed.[424]

182. While the Applicants make this complaint in 1 paragraph, they neglect to tell this Court that they never brought any motion or made any argument challenging the Tribunal's jurisdiction because of these issues. In fact, at the outset of the hearing, they consented to the Tribunal's jurisdiction.[425] The Applicants instead presented this evidence to challenge the veracity of the 003 Complaint and evidence tendered by the 003 Complainants.[426] While Dr Steiner's complaints about the pre-hearing procedure differed slightly,[427] he similarly never brought a motion or objected to the Tribunal's jurisdiction based on these procedural matters.

183. The manner in which the Applicants presented their procedural complaints is evidenced in their closing submissions to the Tribunal. While there were some references in the Applicants' submissions that they were unhappy with aspects of the pre-hearing investigation, these were passing references which, read fairly and as a whole, show that the focus was on the credibility of the 003 Complainants based on the Provost's alleged

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[424] DSB-2291, Tribunal Record, Volume 17 at para. 6 (Dr. Pujari's 003 Affidavit); DSB-2292, Tribunal Record, Volume 17 at para. 5 (Dr. Bart's 003 Affidavit); DSB-2294, Tribunal Record, Volume 17 at para. 10 (Dr. Rose's 003 Affidavit), DSB-2295, Tribunal Record, Volume 17 at para. 15 (Dr. Ray's 003 Affidavit).
[425] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 154; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 13 and 18 and Exhibit 2E at p. 114.
[426] Audio Recording for June 6, 2012 Hearing Date, File No. 1, 00:42:16-00:48:00; Partial Transcript of June 6, 2012 Hearing Date, Supplementary Responding Record, Tab 12 at p. 209.
[427] DSB -2293, Tribunal Record, Volume 17 at paras. 98-102 (Dr. Steiner's 003 Affidavit).

bias.[428] As the Tribunal Decision states, the Applicants' complaints were that the "HRES investigation was tainted by the Provost's alleged favourable bias towards the 003 Complainants and Mr Bates".[429]

184. Equally as important, to the degree there were procedural flaws in the pre-hearing investigation process, the Tribunal found that "a flawed process impacted all parties equally".[430]

185. Having rejected the Applicants' characterization of their "procedural fairness objections",[431] there was no reason for the Tribunal to grant remedies regarding the alleged procedural fairness objections.[432]

iii. If these issues are subject to judicial review, there was still no procedural unfairness, breach of natural justice, or over-reach of the Tribunal's jurisdiction

(a) Communication with the Applicants before initiating formal proceedings

186. The Applicants cite the decision in *Kupeyan* to support their argument that, because the President did not communicate with them before referring the matters to the Tribunal, the hearing should be found to be "nugatory". However, the decision in *Kupeyan* had nothing to do with whether the applicant had notice. [433] In fact, the court in *Kupeyan* specifically stated that notice was not an issue, as the applicant in that case had full notice of the

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[428] *Koscik v. Ontario (Labour Relations Board)*, 2015 ONSC 1652 (Div. Ct.), Respondents' Supplementary BOA, Tab 4 at para. 9; Audio Recording for June 6, 2012 Hearing Date, File No. 1, 00:42:16-00:48:00.
[429] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 467.
[430] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 467.
[431] Applicants' Factum at para. 76.
[432] Applicants' Factum at para. 76.
[433] *Kupeyan v. Royal College of Dental Surgeons Ontario*, 1982 CarswellOnt 938 (Ont. Sup. Ct.) ["***Kupeyan***"], Applicants' 2nd Supplementary BOA, Tab 4 at para. 39.

allegations and could not argue that he was taken by surprise or not afforded a reasonable opportunity to answer.[434]

187. In *Kupeyan*, the tribunal in question could only hear proceedings for specific, pre-defined allegations considered and referred to it by the Executive Committee or Complaints Committee. However, the Executive Committee only referred a general allegation that the applicant's conduct be reviewed, requiring the tribunal to review any and all of the individual's potential misconduct.[435] The court held that, because there were no specific allegations when the referral was made, the complaint was not properly before the tribunal.

188. In the present case, there was no procedural flaw in the University as Complainant process. Not only is there no requirement under the Policy that there be specific, pre-defined allegations, but the President had before him the Milne and Novick Reports which set out specific complaints. Moreover, the Applicants and 003 Complainants then chose to file formal written group complaints of bullying and harassment, which gave the Tribunal jurisdiction to hear the complaints.

189. The Applicants also cite the Divisional Court decision in *Volochay* to support their argument that, because they were not interviewed before the President referred the matters to the Tribunal, there was a breach of procedural fairness and natural justice. In *Volochay*, the College of Massage Therapists of Ontario (the "**College**") received a complaint about Volochay and investigated the complaint, ultimately deciding to refer the matter to the Executive Committee to consider a full investigation of Volochay's practice.

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[434] *Kupeyan*, Applicants' 2nd Supplementary BOA, Tab 4 at para. 39.
[435] *Kupeyan*, Applicants' 2nd Supplementary BOA, Tab 4 at para. 31.

In making this decision, the College never told Volochay the substance of the allegations or gave him a chance to refute the allegations. However, the ONCA overturned the Divisional Court's decision, finding that the applicants' request was premature because they had an "adequate alternative remedy".

190. The Applicants claim that, unlike in *Volochay*, they have no other prospect of appeal. However, the Applicants' lack of alternative remedy at this stage (that is, to take these concerns to the Tribunal) is a direct result of their own failure to object to the pre-hearing procedures before the Tribunal. Applicants "must pursue these [adequate alternative] remedies before seeking relief from the court".[436]

191. Moreover, s. 36 of the Policy "is not a provision that goes to the [Tribunal's] jurisdiction" to hear the complaint.[437] Similar to the ONCA's decision in *Volochay*, ss. 33-36 of the Policy are not pre-conditions to the Tribunal's jurisdiction, but rather "statutory codification of an affected party's right to procedural fairness and natural justice".[438] In this case, even if there was a breach of procedural fairness because the President did not communicate with the Applicants as respondents before referring the matters to the Tribunal, the Applicants should have raised this with the Tribunal before the hearing began, not for the first time on judicial review.

192. In any event, the Applicants suffered no prejudice. They fully prosecuted the case against the University and Mr Bates and fully defended the case brought by the 003 Complainants. The Applicants are asking this Court to nullify the Tribunal Decision on the most technical of grounds.

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[436] *Volochay*, Respondents' Supplementary BOA, Tab 2 at para. 68.
[437] *Volochay*, Respondents' Supplementary BOA, Tab 2 at para. 59
[438] *Volochay*, Respondents' Supplementary BOA, Tab 2 at para. 59.

(b) The 002 Complaint proceeded appropriately as a group complaint

193. Ms Milne, counsel to the complainants in the 002 Complaint, recommended that the complaints against Mr Bates and the University proceed by way of a group complaint,[439] stating that there was "sufficient overlap" in the allegations that they were best treated as a group complaint.[440] The Applicants (other than Dr Ray) expressly identified common elements in their 002 Complaint. In the 002 Complaint, they asked the Tribunal to hear their group complaint, consenting to the Tribunal's jurisdiction.[441] They then vigorously prosecuted the 002 Complaint against the Dean of the DSB and the University.

194. The fact that the Tribunal dismissed all but one of the Applicants' complaints does not alter the existence of common elements in their complaints.[442] Indeed, it seems obvious that the Applicants' complaints were much more than "tangentially related"[443] when all of the Applicants, other than Dr Ray, brought complaints against Mr Bates and the University based on their opposition to Mr Bates as Dean of the DSB.

195. In addition, while it is opportunistic for the Applicants to now complain about the President's lack of communication before initiating formal procedures, less than a week after the President initiated formal proceedings, the Applicants (other than Dr Ray) contacted Mr Komlen, unprompted, eagerly asking about how the cases would proceed.[444] On February 24, 2011, Dr Steiner wrote to Mr Komlen asking:

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[439] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 37 and Volume 3, Exhibit 4T at p. 618, para. 6.
[440] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 37 and Volume 3, Exhibit 4T at p. 618; Milne Transcript at pp. 23-25 Q. 112-122.
[441] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 13 and 17-18; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 154 and 176.
[442] Milne Transcript at pp. 26-30 Q. 128-152.
[443] Applicants' Factum at para. 307.
[444] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 53-55.

> Following the president's announcement last week, we would like to meet with you in order to find out more information about how the case(s) will proceed: What will be the format, rules, who will be the complainant (McMaster?), etc. We were wondering whether you could meet with us next week. We have the following suggested times when at least five of us could be available….[445]

196. A week later, on March 1, 2011, Dr Steiner again wrote to Mr Komlen, copying Drs Bart, Taylor, Pujari, Rose, and Richardson, to state:

> Hi All,
>
> This is just to let you know that I've received no reply from Mile so far. Thus, it is unlikely that a meeting is on today (or tomorrow)?[446]

197. Ms Milne, who was retained to represent the Applicants, then proceeded to draft the 002 Complaint. All of the Applicants, other than Dr Ray, chose to participate in proceeding with the 002 Complaint, while certain potential complainants identified in the Novick Report chose not to continue.

198. The Applicants also claim that the 002 Complaint should not have proceeded as a group complaint because Dr Taylor advised Mr Komlen that he was willing to proceed on his own.[447] In paragraph 57 of his affidavit, Dr Taylor states that "Mr Komlen did not respond" to his expression of willingness to proceed on his own.[448] Dr Taylor misleads this Court. He failed to disclose an important email that he sent to Mr Komlen the very next day, where he stated that, having received legal advice,[449] he was "quite willing to proceed as a group".[450]

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[445] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4EE at p. 741.
[446] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4EE at pp. 740-741.
[447] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 47 and Volume 3, Exhibit 4Y at p. 710.
[448] Taylor Affidavit, Application Record, Tab 14 at para. 57.
[449] Taylor Transcript at p. 32 Q. 159-161.
[450] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 47 and Volume 3, Exhibit 4Z at p. 714; Taylor

199. The Applicants' claim that they were unwilling to participate in the hearing is absurd. Some individuals refused to participate in the 003 Complaint. Dr Steiner withdrew from being an Applicant in the 002 Complaint. The Policy specifies that any party can withdraw their complaint. Further, Mr Komlen made clear to the Applicants that "anyone may bring an individual complaint to the Tribunal at any time".[451] He simply advised the Applicants, other than Dr Ray at the time, that the benefit of proceeding as a group would be that the University would retain counsel on their behalf and fund their legal fees.[452] The Applicants were well aware that they could bring individual complaints or withdraw from the process at any time. The simple fact is that the Applicants wanted to prosecute their complaints and terminate Mr Bates' employment with the University or otherwise to see him disciplined,[453] but did not want to pay for their own legal costs by proceeding individually.

(c) The 003 Complaint proceeded appropriately as a group complaint

200. The 003 Complaint similarly had common themes and properly proceeded as a group complaint. Each of the Applicants as respondents to the 003 Complaint faced multiple allegations from various complainants. Although Dr Detlor and Ms Colwell's complaints were not included in the Novick Report, there were included in the written 003 Complaint that the relevant Applicants had a full opportunity to respond to. The

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Transcript at p. 32 Q. 159-161.
[451] Komlen Affidavit, Responding Record, Volume 4, Exhibit 4X at p. 670.
[452] Komlen Affidavit, Responding Record, Volume 4, Exhibit 4X at p. 670.
[453] E-mail from W. Taylor to C. Milne, dated December 16, 2010, Supplementary Responding Record, Tab 7 at p. 50.

Applicants then chose not to bring a motion to sever these complaints,[454] despite now claiming this was a breach of procedural fairness.

201. The Applicants seem to claim that, because the 003 Complainants filed a written complaint which included their own names and appeared before the Tribunal as complainants, they were "willing" to proceed.[455] If this is the case, then the same argument should apply to the Applicants. Again, the Applicants simultaneously argue that they − all tenured professors − were "strong-armed" to proceed with their own complaints,[456] yet at the same time "willingly" filed a written complaint with their own names and appeared before the Tribunal as Complainants.[457]

202. The fact that the 003 Complainants were named and appeared as complainants before the Tribunal is not evidence of their willingness to proceed and appear as complainants individually. It is only evidence of their willingness to proceed as a group, much as the Applicants were.

(d) The Applicants were not deprived of their right to respond

203. Mr Komlen made it clear to the Applicants that the Milne and Novick Reports were not formal complaints.[458] The investigations leading to the Milne and Novick Reports were completed for the primary purpose of determining whether the various complaints could be resolved informally, or whether HRES should recommend that formal proceedings be

[454] Hopkins Transcript p. 109 Q. 575.
[455] Applicants' Factum at para. 309(d).
[456] Applicants' Factum at para. 66.
[457] Applicants' Factum at para. 62.
[458] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 45 and 51-52 and Volume 3, Exhibits CC and DD at pp. 726 and 730.

initiated with the University as Complainant.[459] The investigations were not conducted for the purpose of making a decision on the merits of the various complaints.

204. As the reports moved towards formal complaints during the investigations by Ms Milne and Ms Novick, it became inappropriate to interview the respondents.[460] Mr Komlen believed that interviews or examinations are an improper abuse of process if their purpose is to prematurely inquire into the other party's defences, particularly when they take place before pleadings or formal complaints are submitted.[461]

205. The Applicants cite *Tessier*[462] in arguing that, because the Applicants were not interviewed by Ms Novick as respondents, there was a breach of procedural fairness sufficient to invalidate the investigation. In *Tessier*, the investigator failed to interview the 2 named respondents. The Nova Scotia Human Rights Commissioner then reviewed the investigative reports and the complainant's response, and accepted the investigator's recommendation to dismiss the complaint. There was no hearing process. The court held that this was a breach of procedural fairness.

206. Unlike *Tessier*, however, any recommendations or decisions made by the Officer or the President were accompanied by a full hearing before the Tribunal. Even if the President had decided not to initiate formal proceedings with the University as Complainant, the Applicants and 003 Complainants could still bring individual complaints if they wished to proceed. The only effects of the President's decision were that complainants could

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[459] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 22, 24, 45, and 49 and Volume 3, Exhibit 4X at pp. 670-671.
[460] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 32.
[461] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 33; *Ontario Psychological Association v. Mardonet*, 2015 ONSC 3063, Respondents' BOA, Tab 12 at paras. 23-24; *Abou-Elmaati v. Canada (Attorney General)*, 2013 ONSC 3176, Respondents' BOA, Tab 13 at para. 64.
[462] *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65 (N.S.S.C.), Applicants' BOA, Tab 27.

come forward as a group if they were reluctant to proceed individually, and the University would serve as an umbrella complainant and therefore cover the group's legal fees.[463]

207. Although the President decided to initiate formal proceedings, the Applicants could always withdraw from the process and not proceed with their complaints under the umbrella of the University as Complainant, or at all. Instead, the Applicants chose to fully prosecute their case against Mr Bates and the University, and had the opportunity to fully respond to and defend against the case brought by the 003 Complainants[464] – an option they would have had regardless of the President's decision. *Tessier* is therefore entirely inapplicable.

(e) Informal resolution is not mandatory under the Policy

208. Contrary to paragraph 300 of the Applicants' factum, the plain language of s. 44 of the Policy does not make it "mandatory" for the Officer to determine whether the complainant wished to proceed by way of informal resolution.[465] Section 44 states that the Officer, "where appropriate, shall determine whether the complainant wishes first to proceed by way of the 'informal resolution with a written complaint' procedure or whether the complainant wishes directly to proceed with the 'formal resolution'

[463] E-mail from M. Komlen to G. Steiner, dated June 22, 2011, Supplementary Responding Record, Tab 6 at p. 47.
[464] *King v. University of Saskatchewan*, 1969 CarswellSask 38, [1969] S.C.R. 678, Respondents' BOA, Tab 14 at para. 32.
[465] Milne Transcript at pp. 83-84 Q. 481-484.

procedure".[466] The Officer in this case determined that it was appropriate to recommend that formal proceedings be initiated with the University as Complainant.[467]

209. At paragraph 302 of the Applicants' factum, they state that Mr Komlen "had always contemplated formal complaints". This is misleading. Formal complaints are always an option under the Policy, and therefore always reasonably contemplated. It is clear from Mr Komlen's and Ms Novick's affidavits that Mr Komlen wanted to avoid Tribunal proceedings if possible, and hoped that, through the investigative process, various complaints could be resolved informally.[468]

210. In addition, the Applicants had the opportunity to seek informal resolution which was readily available through the onsite Ombuds and independent mediator service, but chose not to do so.[469] When 2 of the Applicants, Drs Pujari and Ray, were approached by Mr Komlen to attempt informal resolution of some of the complaints that were ultimately brought against them in the 003 Complaint, they disingenuously agreed to the appropriateness of mediation, only to proceed to filibuster the process.[470]

211. There was therefore no breach of the Policy by the Officer, and, in any event, failing to conduct a mediation is not a reason to nullify the Tribunal Decision.

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[466] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at s. 44 [emphasis added].
[467] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 32 and 37.
[468] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 32; Novick Affidavit, Supplementary Responding Record, Tab 1 at para. 10.
[469] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 12.
[470] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 15-17 and 21 and Exhibits 4H and 4J at pp. 550 *et seq* and 566 *et seq*.

(f) The Applicants never pursued a motion for disclosure of the Novick Report

212. The Applicants made a strategic decision not to pursue a motion for disclosure of the Novick Report. On June 23, 2011, the day before the first pre-hearing conference, Mr Fletcher wrote to the Tribunal to advise that he and Mr Hopkins would be seeking motion dates to, among other things, seek disclosure of the Novick Report.[471] Mr Fletcher did not copy HRES on his email even though HRES commissioned the Novick Report.

213. Upon learning of Mr Fletcher's intent, HRES counsel, Mr Andrew Pinto ("**Mr Pinto**"), wrote to the parties and the Tribunal to advise that he would attend at the pre-hearing conference to make submissions as the motion for production engaged HRES' mandate under the Policy.[472] Mr Pinto attended the pre-hearing conference on June 24, 2011, where the Tribunal advised that nothing would be decided that day involving HRES, and that the parties or the Tribunal would advise HRES if any issues arose concerning HRES going forward.[473]

214. 5 months later, on Friday, November 25, 2011, Mr Fletcher decided to serve his motion materials seeking production of the Novick Report, for the motion to be heard the following Monday, November 28, 2011.[474] Mr Fletcher again failed to serve Mr Pinto,[475] despite HRES' obvious interest and right to participate in the proceedings on this motion.

215. Upon learning of this, Mr Pinto immediately wrote to all counsel on November 26, 2011, reminding them of his June 23, 2011 email and the Tribunal's instructions regarding giving notice to HRES, and advising that HRES would strongly oppose any motion for

[471] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 71.
[472] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 71 and Volume 3, Exhibit 4JJ at pp. 795-796.
[473] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 72.
[474] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 73
[475] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 73.

production of the Novick Report.[476] Mr Pinto requested that Mr Fletcher either withdraw his motion and discuss the matter with HRES and the other parties, or provide sufficient notice to HRES to seek a mutually convenient time for the motion to be argued.[477] Given Mr Fletcher's continued failure to serve HRES, Mr Pinto reminded Mr Fletcher that HRES was an interested party and should be served with Mr Fletcher's motion materials.[478] The motion therefore did not proceed on November 28, 2011.

216. On December 6, 2011, counsel to the Tribunal advised Mr Pinto that the motion for production of the Novick Report would be heard on January 13, 2012.[479] Mr Pinto advised all parties that he was not available until February 2012.[480] The Applicants did not further pursue their motion for production of the Novick report.[481]

217. While Mr Hopkins now states that the Applicants could not pursue their motion for the Novick Report because of Mr Pinto's availability,[482] his own email to the Tribunal makes clear that outstanding motions would take place in February 2012 − a time when Mr Pinto was, in fact, available.[483]

218. Ultimately, the Applicants chose not to pursue a motion for production of the Novick Report after Mr Heeney advised Mr Hopkins and Mr Fletcher that, if they elected to bring

[476] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 74 and Volume 3, Exhibit 4KK at p. 798.
[477] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 74 and Volume 3, Exhibit 4KK at pp. 798-799.
[478] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 74 and Volume 3, Exhibit 4KK at pp. 798-799.
[479] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 76.
[480] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 76 and Volume 3, Exhibit 4LL at pp. 805-806.
[481] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 77; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 15.
[482] Hopkins Transcript at p. 83 Q. 433.
[483] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2L at pp. 267-269.

their motion, he would seek production of the Milne Report to ensure fairness.[484] Having made this tactical decision, the Applicants now raise this as a ground for judicial review.

219. In any event, the Applicants were not prejudiced by their failure to pursue a motion for disclosure of the Novick Report. First, Ms Milne had the draft Novick Report in her possession as of December 2010.[485] Second, the Applicants claim that the Novick Report contained information from potential witnesses who the Applicants were not aware were involved, specifically, Dr Nick Bontis ("**Dr Bontis**").[486] However, the final Novick Report provided to the President did not refer to Dr Bontis[487] as he had decided not to pursue his complaint.

220. Mr Hopkins claims that Dr Bontis "would have been a relevant witness from whom [Mr Hopkins] would have sought evidence", as Dr Bontis had "initially complained about Dr Bart".[488] While the initial draft of the Novick Report included Dr Bontis,[489] the final Novick Report did not.[490] To have disclosed Dr Bontis' complaint when he had decided to withdraw from the process would have been a breach of confidentiality contrary to the Policy, and would have had the effect of compelling Dr Bontis to bring his complaint.

221. Further, the Applicants were well aware that Dr Bontis had some involvement in the events leading up to the 003 Complaint. The Applicants' knowledge is made clear in Mr Fletcher's closing submissions when he expressly cites evidence provided by Dr Randall, one of the 003 Complainants' witnesses, regarding Dr Bontis' involvement in organizing a

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[484] Heeney Transcript at p. 136 Q. 653.
[485] Milne Transcript at pp. 74-75 Q. 413-421.
[486] Hopkins Affidavit, Application Record, Tab 5 at para. 39.
[487] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4W at p. 649.
[488] Hopkins Affidavit, Application Record, Tab 5 at para. 39.
[489] Novick Affidavit, Supplementary Responding Record, Exhibit 1A at p. 20-21.
[490] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4W at p. 649.

meeting to discuss inter-faculty disputes.[491] Having learned of this evidence during the 003 Complainants' presentation of their case, the Applicants could have summonsed Dr Bontis to testify. Their failure to do so is not an issue of procedural fairness, but is instead another strategic decision made by the Applicants which they now regret.

(g) The global hearing record did not prejudice the Applicants

222. The Applicants were not prejudiced by the use of a global hearing record. Again, Ms Milne and Mr Hopkins fail to mention that they consented to the contents being entered as exhibits at the hearing.[492] The parties had the right to object to any document at the appropriate time, but chose not to do so.[493] The documents in the global hearing record were not admissible as evidence at the hearing except on consent of the parties or upon being proven as evidence through witnesses at the hearing.[494] The parties agreed that the Tribunal could consider all evidence adduced in its decision,[495] as is clearly set out in Mr Hopkins' email to the Tribunal.[496]

223. Moreover, the documents relating to the activities of the G21 and G21+ − including those that the Applicants withheld in breach of a Tribunal Order until their deception was discovered by a witness for the 003 Complainants − were extremely relevant to both the 002 and 003 Complaints. These documents supported the Tribunal's findings that most of

[491] Audio Recording for June 6, 2012 Hearing Date, File No. 1, 00:42:16-00:48:00; Partial Transcript of June 6, 2012 Hearing Date, Supplementary Responding Record, Tab 12 at p. 209.
[492] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 23 and Exhibit 2E at p. 114.
[493] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 23 and Exhibits 2E and 2G at pp. 114 and 118 *et seq*; Milne Transcript at p. 108 Q. 639.
[494] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 63.
[495] *Supplementary Procedural Order #8*, Exhibit M to the Heeney Affidavit, Responding Record, Volume 1, Tab 2 at pp. 277-278.
[496] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2L at pp. 267-269.

the Applicants were involved in a concerted effort to sabotage the careers of many of the 003 Complainants.

224. It is incomprehensible that the Applicants believe the documents related to the G21 were not relevant to the 002 Complaint. In the 002 Complaint, the Applicants (other than Dr Ray) complained about the actions of the Dean. The G21 was a group opposed to the Dean, which included the Applicants. Failing to disclose this evidence if the 002 Complaint had been heard separately would have amounted to the withholding of relevant evidence, deception on an even greater scale than their withholding of evidence during the consolidated hearing process.[497]

225. In any event, the Tribunal did not discredit the Applicants simply because of the global hearing record evidencing their membership in the G21/G21+.[498] The Tribunal provided many reasons why the Applicants lacked credibility, including that:

a. "Dr Taylor was not a credible witness having observed his demeanour during his testimony in the 002 Complaint and especially with respect to his testimony in the 003 Complaint".[499] He was "exceptionally evasive under questioning and determined to present a self-serving representation of the facts".[500] In addition, his "credibility was not determinative in dismissing his 002 Complaint. The evidence

[497] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 153, 263-264, and 462.
[498] Applicants' Factum at para. 253(d). Footnote 357 of the Applicants' Factum is misleading. Most of the citations are not related to the particular Applicant's credibility, but rather what that Applicant did or what his motivations were at the time of the incidents, other evidence the Tribunal relied upon in making their findings of fact, or summaries of counsel's submissions.
[499] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 186.
[500] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 229.

did not support any findings of harassment as alleged by Dr Taylor in the 002 Complaint";[501]

b. "Dr Steiner was, in many instances, not a credible witness"[502] "due to his demeanour and furthermore Dr Steiner's evidence on certain matters was inconsistent and unreliable".[503] In addition, the "Tribunal found Dr Steiner lacked credibility, having observed the evasive nature of his replies to questions and inconsistencies in his testimony",[504] and his "testimony could be described as aggressive in response to questions concerning Ms Stockton, Mr Vilks and Dr Hackett";[505]

c. "Dr Bart was not a credible witness. In reaching this conclusion, the Tribunal considered all of the evidence including Dr Bart's testimony and having observed his demeanour as a witness…. Specific examples of the lack of internal consistency in Dr Bart's testimony include his lack of perception of his own aggressive demeanor in situations in which other reliable witnesses have corroborated reports of aggressive behaviour. At one point during his testimony Dr Bart was refuting that he could have leaned across a table aggressively during a meeting and at the same point was observed by the Tribunal to be exhibiting the exact same behaviour";[506]

d. there were "credibility issues with both Dr Ray and Dr Zeytinoglu after observing each individual's demeanour when providing testimony, inconsistencies in their

[501] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 231.
[502] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 196.
[503] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 342.
[504] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 348.
[505] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 358.
[506] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 218.

evidence and their general reluctance to be forthcoming when responding to questions";[507] and

e. there were "serious credibility problems for Dr Pujari when he attempted to rationalize his behaviour and in the Tribunal's view did not establish reasonable cause or excuse".[508] The Tribunal also "observed some inconsistencies in the representation of events by Dr Pujari that negatively affected credibility".[509]

226. At best, the Applicants' membership in the G21/G21+ and lack of candour regarding their membership only added to the Tribunal's finding that they lacked credibility. Finally, despite the Applicants' lack of credibility, the Tribunal made clear that, in dismissing the 002 Complaint in its entirety, "credibility findings were not necessary for most of the allegations to reach this conclusion".[510]

D. Issues appropriately raised on this judicial review Application

i. The standard of review

227. While the standard of review for issues related to procedural fairness is correctness,[511] the correctness of procedural decisions should "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures".[512]

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[507] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 338.
[508] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 409.
[509] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 445.
[510] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 176.
[511] *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 ["***Khosa***"], Applicants' BOA, Tab 4 at para. 43; *Khela v. Mission Institution*, 2014 SCC 24 ["***Khela***"], Respondents' BOA, Tab 15 at para. 79
[512] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817 ["***Baker***"], Respondents' BOA, Tab 16, para. 27; *SPPA*, *supra* at ss. 2, 25.1(1) and 28.

228. When interpreting a tribunal's own statute or Policy, "the standard of reasonableness will generally apply and the Tribunal will be entitled to deference".[513] Only issues that rise "to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized areas of expertise" are reviewed on a standard of correctness,[514] and "modern jurisprudence cautions against labelling alleged errors as jurisdictional to justify review on a standard of correctness".[515]

229. If there is a breach of the relevant statute or Policy, the reviewing court must determine whether that error or technicality rendered the decision procedurally unfair.[516] Relief should be withheld if "the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice".[517]

230. The standard of review on the remedies recommended by the Tribunal is reasonableness.[518]

ii. The duty of procedural fairness and natural justice were met

231. The exact scope of the duty of procedural fairness must be determined for the Court to decide whether the duty was met. The scope of procedural fairness depends on the specific context of each case,[519] and requires the assessment of a number of relevant factors including:

a) The nature of the decision made and the process followed in making it;

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[513] *Mowat*, Applicants' BOA, Tab 3 at para. 24.
[514] *Mowat*, Applicants' BOA, Tab 3 at para. 23.
[515] *Rowan*, Respondents' Supplementary BOA, Tab 3 at para. 71.
[516] *Khela*, Respondents' BOA, Tab 15 at para. 90.
[517] *Khosa*, Applicants' BOA, Tab 4 at para. 43.
[518] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 ["***Dunsmuir***"], Respondents' BOA, Tab 17 at para. 47.
[519] *Dunsmuir*, Respondents' BOA, Tab 17 at para. 79; *Khela*, Respondents' BOA, Tab 15 at para. 83.

b) The nature of the statutory scheme;

c) The importance of the decision to the individuals affected;

d) The legitimate expectations of the person challenging the decision; and

e) The agency's choice of procedure.[520]

232. Courts should "attribute a large measure of autonomy of decision to a tribunal",[521] particularly in the university context where Courts have been reluctant to interfere in university affairs absent "manifest unfairness" in the adopted procedures.[522] A tribunal can determine its own procedures, within reason, and must observe the requirements of natural justice within the context and circumstances of the particular inquiry.[523] A high standard of justice applies when one's employment or profession is at stake.[524]

233. The Tribunal met its duty of procedural fairness in this case. It heard evidence from about 65 witnesses, with a full right of cross-examination. Of these witnesses, over 35 were called by the Applicants as Complainants in the 002 Complaint and Respondents in the 003 Complaint. The University called less than 10 witnesses in responding to the 002 Complaint and 003 Complaint. The Complainants in the 003 Complaint called about 17 witnesses in support of their case.[525]

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[520] *Baker*, Respondents' BOA, Tab 16 at paras. 23-28.
[521] *Kane v. University of British Columbia*, 1980 CarswellBC 1, [1980] 1 S.C.R. 1105 ["***Kane***"], Respondents' BOA, Tab 18 at para. 29
[522] *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.) leave to appeal ref'd (1982) 42 N.R. 270 (SCC), Applicants' BOA, Tab 20 at p 5.
[523] *Kane*, Respondents' BOA, Tab 18 at para. 30, citing *Russell v. Norfolk (Duke)*, [1949] 1 All E.R. 109, Respondents' BOA, Tab 19 at 118
[524] *Kane*, Respondents' BOA, Tab 18 at para. 31.
[525] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 50.

(a) The Tribunal is not required to offer informal resolution

234. The Policy does not contemplate that the Tribunal offer informal resolution. Section 39 of the Policy contemplates the potential for informal resolution before matters proceed to the Tribunal, but does not preclude complainants from bypassing informal procedures and moving directly to formal resolution. There was therefore no breach of the Policy by the Tribunal.

235. In addition, the Applicants never brought a motion to the Tribunal seeking further attempts at mediation before or during the hearing.[526] Instead, during the most significant mediation discussion, the Applicants took the position that a mediated settlement of the Complaints would be impossible and that a formal resolution was required.[527] Mr Hopkins, Mr Fletcher, and Ms Milne at various times expressed their view that a resolution of this matter without a formal hearing would never occur.[528]

236. The Applicants always had the option to seek informal resolution or withdraw their complaints.[529] The Milne Report did not bind the Applicants, all of whom chose willingly, and without prompting, to pursue their allegations through the formal complaint procedure almost immediately after the President's announcement that he was referring the complaint files to the Tribunal.[530] Having waited for the outcome of the hearing of their complaints, the Applicants now attempt to blame HRES for the decision that each of them made to pursue their ultimately meritless allegations.

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[526] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 24.
[527] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 24.
[528] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 24.
[529] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 47(b); Pujari Transcript at p. 24 Q. 120; Rose Transcript at p. 28 Q. 126-127.
[530] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at paras. 52-55 and Volume 3, Ex. 4EE at pp. 733-756; Steiner Transcript at pp. 45-52 Q. 210-247.

(b) Permitting evidence to be led without an affidavit was not procedurally unfair

237. The Policy does not require evidence to be led by affidavit. As Mr Hopkins noted in his email to the Tribunal dated January 27, 2012, the Tribunal has the right to control its own process.[531] The Tribunal ordered evidence to be led by affidavit to reduce the number of hearing days needed. The parties were then given 60 minutes for the examination in chief of each witness who submitted an affidavit, and additional time if requested, as occurred in the case of Dr Steiner.[532] The Tribunal never issued an order preventing a party from adducing evidence unless it was accompanied by an affidavit.

238. During the hearing, when a witness was examined without an affidavit, the Tribunal "fully allow[ed] any adjournment" that counsel thought was necessary "to be able to prepare for that cross-examination, and/or consult with any of [their] impacted parties to prepare for that cross-examination".[533] The Applicants, of course, do not mention this anywhere in their materials.

239. Even if the Applicants were not present when evidence was presented by a witness who did not provide an affidavit, they suffered no prejudice because they chose not to be at the hearing during that time. Judicial review should not be granted to parties who make the strategic decision to attend only certain days of a hearing. "If a party voluntarily chooses to be absent from the proceedings he or she cannot be heard to complain about what was or was not done in his or her absence".[534] In any event, the Applicants' counsel

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[531] Heeney Affidavit, Responding Record, Volume 1, Exhibit 2L at p. 268.
[532] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 53 and Exhibits 2J and 2V at pp. 230 and 336.
[533] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 60 and Volume 2, Exhibit 2AA at p. 349; Excerpt from Certified Transcript of April 12, 2012 Hearing Date, Supplementary Record, Tab 14c at p. 502.
[534] *Cameron v. Nanaimo (Regional District)*, 2009 BCSC 1206, aff'd 2010 BCCA 73, Respondents' Supplementary BOA, Tab 5 at para. 25.

was present during this testimony and the Tribunal granted counsel time to, among other things, consult with their clients before starting their cross-examinations.

240. The Applicants cite 3 witnesses whose testimonies they were not prepared for, including one witness who was the Applicants' own witness and gave adverse evidence during cross-examination.

Dr Connelly's testimony

241. The Applicants chose to call Dr Connelly, but allege that they were "ambushed" by the evidence she gave during Mr. Heeney's cross-examination. The Applicants' failure to discover all ambits of Dr Connelly's potential evidence before deciding to call her as their witness is not a breach of procedural fairness.

242. Despite Mr Hopkins' belief to the contrary,[535] there is no limit on the scope of a cross-examination at trial except for relevance or if otherwise prohibited by the rules of evidence.[536] There is no rule of evidence that prohibits cross-examination on issues that opposing counsel failed to anticipate or prepare for. Re-examination provides opposing counsel with the opportunity to examine their witness on issues raised in cross-examination that they did not cover during examination in chief. A witness "cannot avoid cross-examination on relevant issues by leaving it out of [his/her] affidavit, nor should [a witness] be able to avoid this by putting forth a straw witness".[537]

243. In addition, Procedural Order #8, which the Applicants consented to, allowed Mr Heeney to cross-examine the Applicants' witnesses to the extent the 003 Complaint was

[535] Hopkins Transcript at p. 54 Q. 258-259.
[536] *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, leave to appeal ref'd 2011 ONSC 3685 (Div. Ct.), Respondents' Supplementary BOA, Tab 6 at paras. 109-110.
[537] *Hinke v. Thermal Energy International*, 2011 ONSC 1018 (Ont. Master), Respondents' BOA, Tab 20 at para. 37.

impacted.[538] The Applicants made a strategic decision to call Dr Connelly but now complain that their failure to adequately prepare for her testimony means the Tribunal made a "jurisdictional error" by allowing her testimony. This claim is untenable. The "right of cross-examination must…be jealously protected and broadly construed"[539] and "as long as counsel has a good faith basis for asking an otherwise impressible question in cross-examination, the question should be allowed".[540]

244. During examination in chief, Ms Milne specifically asked Dr Connelly about the T&P process, and whether Dr Rose ever spoke to her about tenure, bringing her specifically to the allegation that Drs Pujari and Rose interfered with the T&P process.[541] Ms Milne also asked Dr Connelly about the MUFAgab posts authored by Dr Rose, including whether Dr Connelly saw it as particularly controversial, intimidating, or threatening, or an attempt to manipulate CLAs or junior faculty members.[542] These issues of the poisoned work environment and Dr Rose's MUFAgab posts are also reflected in Dr Connelly's affidavit submitted in the hearing.[543]

245. The issues raised by Dr Connelly in her affidavit and evidence in chief were all issues raised in the 003 Complaint, and went directly to the issue of a poisoned work environment, thereby triggering Mr Heeney's right to cross-examine.[544] While Dr

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[538] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 33-34 and Exhibit 2M at pp. 272.
[539] *R v. Lyttle*, 2004 SCC 5 ["***Lyttle***"], Respondents' BOA, Tab 21 at para. 44.
[540] *Lyttle*, Respondents' BOA, Tab 21 at para. 66.
[541] Excerpt from Certified Transcript of March 3, 2012 Hearing Date, Supplementary Responding Record, Tab 13 at pp. 232-235.
[542] Excerpt from Certified Transcript of March 3, 2012 Hearing Date, Supplementary Responding Record, Tab 13 at p. 218, lines 12-16.
[543] DSB-2120, Tribunal Record, Volume 16 at paras 10-14 (Dr. Connelly's 002 Affidavit).
[544] Hopkins Affidavit, Application Record, Tab 5 at para. 76; Audio Notes, Supplementary Responding Record, Tab 10 at p. 71.

Connelly's testimony was given substantial weight based on her credibility, the Tribunal's findings against the Applicants did not rely solely on her testimony.[545]

246. The Applicants could have but chose not to seek an adjournment to prepare for re-examination on the evidence they failed to anticipate.[546] Having failed to ask for an adjournment, the Tribunal cannot be faulted for not granting one.[547]

Dr Head and Ms Cossa

247. The Applicants allege that the Tribunal exceeded its jurisdiction by allowing counsel to the University and Mr Bates to examine Dr Head and Ms Cossa – in chief – without providing affidavits. This issue is not a question of jurisdiction.[548]

248. There was nothing prohibiting counsel from calling witnesses without an affidavit. In fact, both parties had the opportunity to and did request for the Tribunal to compel witnesses to give evidence under the Tribunal's power to issue summons.[549] Compelled witnesses did not submit affidavits.[550] For example, the Applicants called Dr John Miltenburg as a witness without an affidavit, and yet complain about other witnesses testifying without affidavit evidence.

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[545] In support of Dr Detlor's complaint against Drs Steiner and Ray: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 302, 316, and 318. In dismissing Dr Ray's counter-complaint and finding it was retaliatory: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 323 and 329-330. In support of Dr Head's complaint against Dr Steiner: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 348 and 355. In support of the CLA's complaints against Drs Pujari, Ray, Taylor, and Bart: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 369.
[546] Hopkins Transcript at p. 56 Q. 267-268.
[547] *Obsessions Dress Designs Ltd. v. Tully*, 2004 CarswellOnt 868 (ONCA), Respondents' Supplementary BOA, Tab 7 at para. 2.
[548] *Mowat*, Applicants' BOA, Tab 3 at para. 24.
[549] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 155; Hopkins Transcript at pp. 50-54 Q. 243-256.
[550] Dr Chamberlain was a compelled witness, and he never provided an affidavit. There were no objections.

249. In the cases of Dr Head and Ms Cossa, Mr Heeney, counsel for the 003 Complainants, denied University counsel's request for Dr Head and Ms Cossa to provide affidavits on the testimony they would give on behalf of the University.[551] Based on the Applicants' theory, however, they should be allowed to have Dr Miltenburg testify without an affidavit, but Dr Head and Ms Cossa could not testify without an affidavit. This is untenable and absurd, and again underscores the Applicants' lack of credibility

250. In any event, there was no breach of procedural fairness by having Dr Head and Ms Cossa testify without an affidavit. Opposing counsel did not cross-examine Ms Cossa until April 19, 2012 − 7 days after her examination in chief.[552] Ms Milne did not cross-examine Dr Head until April 22, 2012 − 9 days after her examination in chief.[553] Although Mr Hopkins cross-examined Dr Head the next day, he could have sought an adjournment[554] but chose not to do so. Of course, Mr Hopkins, Ms Milne, and the Applicants omit to advise the Court that the Tribunal granted them sufficient time to prepare for their cross-examinations of these witnesses. They also fail to mention that any witness could have been recalled at any point to give additional evidence,[555] but that the Applicants chose not to do so.

(c) Dr Ray knew the case to meet

251. The Tribunal did not exceed its jurisdiction by "failing to give" Dr Ray notice that it was considering ruling on whether his Counter-Complaint was fraudulent, malicious,

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[551] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 59.
[552] Audio Notes, Supplementary Responding Record, Tab 10 at p. 120; Audio Recording for April 19, 2012 Hearing Date, File No. 3, 02:24:38-03:49:30.
[553] Audio Notes, Supplementary Responding Record, Tab 10 at pp. 121-123;; Audio Recording for April 22, 2012 Hearing Date, File No. 1, 00:55:30-03:53:30.
[554] Excerpt from Certified Transcript of April 12, 2012 Hearing Date, Supplementary Application Record, Tab 14c at p. 502.
[555] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 60.

frivolous, or vexatious. The Tribunal complied with the Policy and Dr Ray had full notice of the potential finding of reprisal. Contrary to paragraph 335 of the Applicants' factum, this is not a "true question of jurisdiction".[556]

252. The Tribunal communicated its intent when, after hearing the evidence, including Dr Ray's admission that certain of his allegations did not, in fact, occur, the Tribunal asked whether Dr Ray wished to alter anything in his Counter-Complaint.[557] Neither Dr Ray nor his counsel sought clarification on this question despite their claim before this Court that the Tribunal's question was "cryptic".[558]

253. Even if the Tribunal's question was "cryptic", Dr Ray was not prejudiced as he had full knowledge that Mr Heeney would be making this argument.[559] Mr Heeney consented to the late filing of Dr Ray's Counter-Complaint on the specific condition that he would be arguing that the Counter-Complaint was retaliation under the Policy.[560] Dr Ray did not object to Mr Heeney's position at this time.[561] During his opening statement, Mr Heeney reaffirmed that he would be asking the Tribunal to sanction Dr Ray for his retaliatory conduct,[562] and repeated this in his closing submissions.[563] Despite these various opportunities, Dr Ray never objected to Mr Heeney's position at any time.[564]

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[556] *Mowat*, Applicants' BOA, Tab 3 at para. 24.
[557] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 69 and Volume 2, Exhibit 2GG at pp. 413-415; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 472-473.
[558] Applicants' Factum at paras. 331-333.
[559] Hopkins Transcript at pp. 14-15 Q. 57-67; Ray Transcript at pp. 40-43 Q. 232-249.
[560] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 67 and Volume 2, Exhibit 2CC at p. 401; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 472.
[561] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 68.
[562] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 68 and Volume 2, Exhibit 2DD at p. 405.
[563] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 69 and Volume 2, Exhibit 2FF at pp. 410 *et seq.*
[564] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 67-69 and Volume 2, Exhibit 2EE at pp. 408.; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 472-473.

254. Instead, Dr Ray's counsel chose, in his closing submissions and contrary to paragraph 331 of the Applicants' factum, to expressly deny that Dr Ray's Counter-Complaint was an act of reprisal.[565] Despite the Tribunal's alleged "failure to give Dr Ray notice" and "failure to invite his submissions before making its adverse finding against him",[566] Dr Ray made submissions on this very issue.

255. At its highest, this alleged procedural error "is purely technical and occasions no substantial wrong or miscarriage of justice".[567] Dr Ray was afforded and took the opportunity to make full answer and defence on multiple occasions, and had ample notice that Dr Detlor was asking the Tribunal to make a retaliation finding.[568] Similar to the case in *Kupeyan*, notice was not an issue, as Dr Ray had full notice of the allegations and should not be permitted to argue that he was taken by surprise or not afforded a reasonable opportunity to answer.[569]

256. It is opportunistic for Dr Ray to now state that he would have withdrawn his Counter-Complaint had the Tribunal told him it was considering making a retaliation finding and invited submissions, and disingenuous for Dr Ray and his then-counsel to now say that they were unaware the Tribunal was considering making this finding. Dr Ray made an informed decision that backfired and now seeks to blame the Tribunal for his strategy.

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[565] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at paras. 67-69.
[566] Applicants' Factum at para. 334.
[567] *Khosa*, Applicants' BOA, Tab 4 at para. 43; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 472-473.
[568] Applicants' Factum at para. 332-333; Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 472-473.
[569] *Kupeyan*, Applicants' 2nd Supplementary BOA, Tab 4 at para. 39.

(d) Dr Head's complaint was not time-barred

257. Motions were brought by Mr Bates and Dr Steiner seeking to have the Tribunal dismiss complaints and aspects of complaints for being time-barred.[570] The Tribunal dismissed both motions.[571] While Dr Steiner was pursuing a motion to dismiss Dr Head's complaint for being time-barred, at the very same time, he was opposing Mr Bates' motion for the same relief based on the same grounds.[572]

258. In deciding that neither Dr Head's complaint against Dr Steiner nor the Applicants' complaint, including Dr Steiner's, against Mr Bates, should be dismissed for being time-barred, the Tribunal, adopting Ms Milne and Mr Heeney's argument,[573] held that Mr Komlen's preliminary audit started the complaint process, and therefore any allegations that occurred within the 12 month period before the preliminary audit were not out of time,[574] and that all of the complaints before the Tribunal emanated from the Komlen Report.[575] The Tribunal further held that the preliminary audit likely precluded any complaints from being brought before HRES completed its audit.[576]

259. Dr Head raised her allegations with HRES during the preliminary audit, within 2 months of the incident, and her formal complaint emanated from the Komlen Report.[577] Her claim

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[570] Supplementary Tribunal Record, Volume 1, Tab 7; Supplementary Tribunal Record, Volume 2, Tabs 8 and 19-20.
[571] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at pp. 226-227 and 237-246.
[572] Supplementary Tribunal Record, Volume 2, Tab 19 at pp. 487-488.
[573] Milne Transcript at pp. 120-121 Q714-721.
[574] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 241.
[575] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 241.
[576] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 241.
[577] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 241.

was therefore brought in time as she proceeded through the steps towards a formal hearing with the University as Complainant under the Policy.[578]

260. Further, paragraph 321 of the Applicants' factum misinterprets the Tribunal's reasoning when it refers to the "willingness of all parties (and in certain cases respondents) whose complaints arose during this period to participate in the process"[579] in allowing Dr Head's complaint to proceed. The Tribunal's reference to general willingness refers to complainants, as is clear from the words "and in certain cases respondents". In this case, Dr Head was a willing participant in the process, as were the Applicants. It would be absurd to bar a complainant from bringing a complaint because the respondent does not want to participate. Dr Head's complaint, as well as the Applicants' complaint, were allowed to proceed not because Dr Steiner participated in the pre-hearing process, but rather because of Dr Head's and the Applicants' involvement within the 12 month period before the HRES audit began.

261. Contrary to paragraph 318 of the Applicants' factum, Mr Komlen's response to Dr Steiner's question in December 2009 regarding whether there were any complaints brought against him was not a "false representation". Until the filing of the Complaints on March 31, 2011, there were no formal complaints brought against anyone. Having been involved in preparing and drafting the Milne Report, the Applicants, other than Dr Ray, were well aware of this.[580] Had the Officer advised Dr Steiner of Dr Head's

[578] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 243.
[579] *Supplementary Procedural Order #3*, Heeney Affidavit, Responding Record, Volume 1, Exhibit 2J at p. 241.
[580] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4X, pp. 670-671.

allegations at that time, when Dr Head had yet to file a formal complaint, he would have breached the confidentiality provisions of the Policy.[581]

(e) The University acted appropriately at all times

262. Nothing in the Policy precludes the University from making submissions on remedy. In fact, the Policy states that the closing arguments of the parties "should address both the substance of the complaint and the appropriate penalty if a complaint is found to be valid by the tribunal".[582] This provision does not limit submissions on remedy to complainants. In addition, in certain circumstances,[583] such as when the University is the Complainant, the University has the right and obligation to pursue any and all remedies under section 71 of the Policy. This right and obligation is not impacted by consolidation.

263. The Applicants state that the Tribunal's procedural order for the Complainants to serve their proposed remedies did not invite the University to make remedy submissions, while also alleging that the University did not comply with the Tribunal's procedural order for the Complainants to serve their proposed remedies. Based on this, they conclude that allowing the University to make remedy submissions was a breach of procedural fairness.[584] If the procedural order did not require the University to serve remedy submissions, it seems clear that the University could not have failed to comply with the Tribunal's order.

264. The Tribunal did not breach procedural fairness, natural justice, or display a reasonable apprehension of bias by permitting a respondent to make submissions on remedy. As

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[581] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at ss. 8, 24(a) and (b), 32(a), and 37(a).
[582] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at 67(g).
[583] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A, at ss. 33-36.
[584] Applicants' Factum at paras. 346 and 350-351.

noted in the Milne Report, the University, as an employer, has ultimate responsibility for preventing a poisoned work environment.[585] As Ms Milne herself stated, failing to maintain and foster a positive and safe work environment puts the University "at risk for being found to be liable under provincial human rights and safety legislation [the Ontario *Human Rights Code*[586] and the *Occupational Health and Safety Act*[587]] as well as through the common law doctrine of vicarious liability".[588] By making remedy submissions in furtherance of its responsibilities, the University was attempting to address a hostile and poisoned work environment and comply with the law.

265. When the remedy submissions were made, the Tribunal had already determined that the Applicants, other than Dr Richardson, bore "primary responsibility for the poisoned work/academic environment", were "unconcerned about the collateral damage to others", and that their "ends justifies the means" mentality was "poisonous and unbecoming of senior tenured faculty who have the academic freedom and knowledge of established processes to raise concerns constructively".[589] This engaged the University's responsibilities under the various statutes and the doctrine of vicarious liability, as noted in the Milne Report.[590] In fulfillment of these responsibilities, the University made submissions on the remedies necessary to foster and maintain a safe and positive work environment and remediate what the Tribunal found to be a poisoned work environment.

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[585] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4T at pp. 620-622; Hopkins Transcript at pp. 16-17 Q. 72-78. Despite Mr Hopkins' belief to the contrary, simply because the words "poisoned work environment" do not appear in the statute does not mean that the employer is not responsible for preventing such an environment in its statutory obligation to maintain and foster a positive and safe work environment.
[586] *Human Rights Code*, R.S.O. 1990, c. H.19 at ss. 5(1) and (2), and 46.3(1).
[587] *OHSA* at ss. 25(2), 32.0.1(1), 32.0.6(1) and (2), and 32.0.7.
[588] Komlen Affidavit, Responding Record, Volume 2, Tab 4 at para. 38 and Volume 3, Exhibit 4T at p. 617-618, paras. 2 and 8.
[589] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 152-153.
[590] Komlen Affidavit, Responding Record, Volume 3, Exhibit 4T at pp. 620-622

266. In addition, during the University's closing submissions in the 003 Complaint, the University expressly stated that, if the Tribunal found that any faculty members interfered with the job prospects of other faculty members, McMaster would be requesting that the Tribunal recommend the termination of employment of the offending faculty member.[591]

267. The fact that the University made remedy submissions to the Tribunal, who then recommended an appropriate remedy for the President to impose, does not demonstrate a reasonable apprehension of bias. In fact, the Tribunal did not accept *any* of the University's submissions on the appropriate discipline to be imposed on the Applicants, instead recommending much lighter sanctions. The President then accepted the Tribunal's recommendation.

(f) Appointment of a Tribunal member to the University Administration

268. Dr Ibhawoh was appointed to the position of Associate Dean, Graduate Research Studies in the Faculty of Humanities on July 1, 2012.[592] To be appointed to this position, Dr Ibhawoh had to be recommended by the Selection Committee, and approved by the University Senate and the Board of Governors.[593] Although one candidate was nominated from each department, only 2 candidates accepted the nomination and applied and interviewed for the position.[594]

269. Dr Steiner was a member of the University Senate when Dr Ibhawoh was recommended, and when the University Senate approved his appointment on June 6, 2012.[595] All

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[591] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para 71 and Volume 2, Exhibit 2II at p. 419.
[592] Affidavit of Helen Ayre ("**Ayre Affidavit**"), Responding Record, Volume 1, Tab 1 at para. 18 and Exhibit 1G at p. 41.
[593] Ayre Affidavit, Responding Record, Volume 1, Tab 1 at para. 15.
[594] Response to Undertakings of Helen Ayre, Supplementary Record, Tab 10b at p. 381.
[595] Ayre Affidavit, Responding Record, Volume 1, Tab 1 at paras. 15-16.

members of the University Senate, including Dr Steiner, were sent the materials regarding Dr Ibhawoh's nomination to the position on or about May 30, 2012.[596] Dr Steiner's decision not to review the materials or attend the June 6, 2012 meeting is not evidence that Dr Ibhawoh's appointment was "stealthy".[597]

270. All of the Applicants and their counsel knew Dr Ibhawoh had been appointed to the position by the summer of 2012.[598] However, the Applicants chose not to object to Dr Ibhawoh's appointment in the year between the end of the hearing and the release of the Tribunal Decision, or before remedy submissions were made, instead "attempting to create and reserve a ground for review if the [Tribunal] decision was unfavourable".[599]

271. Allegations of bias must be made in a timely fashion,[600] otherwise "parties perceiving bias could lie in the weeds and long after the trial judge rules against them, have the entire proceeding invalidated *ab initio*".[601] That the Applicants, including Dr Steiner, claim they only learned of Dr Ibhawoh's appointment a few months after the oral portion of the hearing was completed is irrelevant. What is clear is that they became aware of Dr Ibhawoh's appointment long *before* the Tribunal issued any decision on the merits. The Applicants should have raised their objection as soon as they discovered Dr Ibhawoh's appointment, but they waited until this judicial review to do so.[602]

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[596] Ayre Affidavit, Responding Record, Volume 1, Tab 1 at para. 16; Letter to Members of the McMaster University Senate, dated May 30, 2012, Supplementary Record, Tab 10c at p. 384.
[597] Applicants' Factum at para. 204.
[598] Applicants' Factum at para. 203; Hopkins Transcript at pp. 7-8 Q. 24-26; Milne Transcript at pp. 143-145 Q. 854-865.
[599] *KAP Holdings Inc. v. London (City)*, 2008 CarswellOnt 9696 (Div. Ct.), Respondents' Supplementary BOA, Tab 8 at para. 52.
[600] *R v. Curragh Inc.*, 1997 CarswellNS 88 (S.C.C.) ["***Curragh***"], Respondents' Supplementary BOA, Tab 9 at paras. 11 and 106
[601] *Curragh*, Respondents' Supplementary BOA, Tab 9 at para. 106.
[602] *Dickson v. Canadore College*, 2007 CarswellOnt 6910 (Div. Ct.) ["***Dickson***"], Respondents' Supplementary BOA, Tab 10 at para. 23.

272. Contrary to Ms Milne and Mr Hopkins' belief, simply because the Applicants were expecting the Tribunal Decision in the fall of 2012 does not relieve the Applicants from their obligation to raise allegations of bias in a timely fashion.[603] An administrative tribunal is not *functus officio* until it has reached its decision.[604] By failing to raise this with the Tribunal, the Applicants impliedly waived any objection to Dr Ibhawoh's participation in the Tribunal Decision and Remedy Decision.[605]

273. In any event, Dr Ibhawoh's appointment to the Administration did not result in bias or a breach of natural justice. Duplication in roles in the university setting is perfectly proper and "the mere duplication of roles in university affairs does not necessarily result in bias or a breach of natural justice".[606] In fact, between 2008-2010, during the consideration of Mr Bates' reappointment and the G21's uprising, Dr Ibhawoh was a member of the MUFA Executive that agreed to conduct the faculty vote regarding support or opposition to Mr Bates' reappointment as requested by various members of the G21, including most of the Applicants.

274. The threshold for finding a reasonable apprehension of bias is extremely high, and there is a strong presumption in favour of impartiality by the decision-maker.[607] Similar to *Rao*,[608] which is cited by the Applicants, it is difficult to comprehend how it can be said that Dr Ibhawoh had a significant or sufficient material interest in the outcome of the

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[603] Hopkins Transcript p. 8 Q. 27-29; Milne Transcript pp. 145-146 Q. 867-871.
[604] *Chandler v. Assn. of Architects (Alberta)*, 1989 CarswellAlta 160 (S.C.C.), Respondents' Supplementary BOA, Tab 11 at paras. 12-15 and 75-79.
[605] *Dickson*, Respondents' Supplementary BOA, Tab 10 at para. 23
[606] *University of Waterloo and University of Waterloo Faculty Assn. (Pan)*, 2007 CarswellOnt 10486 (Ont. Arb.), Respondents' BOA, Tab 22 at para. 29.
[607] *Clayson-Martin v Martin*, 2015 ONCA 596 ["***Clayson-Martin***"], Respondents' BOA, Tab 23 at para. 71.
[608] *Rao v. McMaster University*, 2010 HRTO 1051 ["***Rao***"], Applicants' BOA, Tab 23.

Complaints merely because he was first a member of the MUFA Executive, was then appointed to the Tribunal[609] and then later, to his administrative role.

275. A reasonable and informed person, viewing the matter realistically and practically and having thought it through,[610] would not conclude that Dr Ibhawoh was biased solely because he was appointed to an Associate Dean position in the Faculty of Humanities. The standard stipend and teaching relief granted for the additional responsibilities of an Associate Dean are not reasons to apprehend bias. The Applicants have provided no reasons demonstrating why anyone appointed to a position with the Administration, regardless of Faculty or position, should automatically raise a reasonable apprehension of bias. The Applicants have pointed to no evidence from the hearing, the Tribunal Decision, or the Remedy Decision, to support a finding of bias, other than the fact that the Tribunal did not find in their favour.

(g) The Applicants have suffered no prejudice from any deficiencies in the audio recording

276. Where the statute or Policy creates a right to a recording of the hearing, an applicant "must show a 'serious possibility' of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review".[611] Otherwise, defects or gaps in the recording will not violate the rules of natural justice.[612] The audio recording, while flawed, does not raise a serious possibility of an error that deprives the Applicants of a ground for judicial review. Further, the Applicants had several counsel at

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[609] *Rao,* Applicants' BOA, Tab 23 at para. 29.
[610] *Clayson-Martin,* Respondents' BOA, Tab 23 at para. 68.
[611] *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels),* 1997 CarswellQue 82, [1997] 1 S.C.R. 793 ["***City of Montreal***"], Respondents' BOA, Tab 24 at para. 77.
[612] *City of Montreal,* Respondents' BOA, Tab 24 at para. 81.

the hearing, and while Mr Hopkins and Ms Milne provide affidavits, neither one of them attach their hearing notes so the Court can review the Applicants' purported claims of prejudice.

277. The Applicants allege that there are 4 instances that raise a serious possibility they are deprived of a ground of review:

March 3, 2012 audio

278. The Applicants allege that they suffer prejudice as this audio contains the testimony of Dr Connelly, whose evidence the Tribunal relied on based on her credibility and neutrality, because the Tribunal allowed various lines of questioning by Mr Heeney that were contested and the Applicants cannot hear the Tribunal's reasons for allowing the lines of questioning.

279. Mr Hopkins has submitted an affidavit where he advises that his objections were overruled as Mr Heeney's line of questions "fit broadly under the heading of 'poisoned work environment'".[613] If Mr Hopkins is able to recall the Tribunal's reason for overruling his objections, then clearly the Applicants have not suffered any prejudice based on their inability to hear the Tribunal's reasons for allowing the lines of questioning in the audio.

280. Even if Mr Hopkins wanted to supplement his affidavit with the Tribunal's ruling, as counsel who made the objection, he should have hearing notes − which were not attached to his affidavit − reflecting that his objection was based on his allegation that Mr Heeney's questioning of Dr Connelly was on issues related to the 003 Complaint when

[613] Hopkins Affidavit, Application Record, Tab 5 at para. 76.

her examination in chief raised only issues in the 002 Complaint.[614] The Tribunal allowed Mr Heeney's line of questioning because it was relevant to the poisoned work environment,[615] and based on Procedural Order #8, which was predicated on an email from Mr Hopkins submitted on consent of the parties, and expressly permitted Mr Heeney to cross-examine overlapping witnesses to the extent the 003 Complaint was impacted.[616] In addition, the audio notes set out the Tribunal's reasons for permitting the lines of questioning.[617]

March 23, 2012 audio

281. On March 23, 2012, parts of the testimonies of Dr Taylor, Mr Weiner, and Dr Swirsky are missing. However, the Tribunal's decision to dismiss Dr Taylor's complaints against Mr Bates was based on the totality of the record, principles of management rights, and Mr Bates' credible testimony,[618] which was corroborated by documentary or other evidence.[619] The Tribunal Decision sets out the evidence it relied upon in making its decision in the 003 Complaint against Dr Taylor,[620] and did not make any findings in the absence of evidence. Instead, the Tribunal found that Dr Taylor (and indeed all of the Applicants, other than Dr Rose) lacked credibility as a witness.[621]

282. In any event, as Dr Taylor was represented by Ms Milne in the 002 Complaint, Ms Milne should have hearing notes of her client's and his witnesses' evidence. Although the notes

[614] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 61 and Exhibit 2M at p. 272.
[615] Hopkins Affidavit, Application Record, Tab 5 at para. 76.
[616] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 61 and Exhibit 2M at p. 272.
[617] Audio Notes, Supplementary Responding Record, Tab 10 at p. 71.
[618] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 206-208, 229, 231, and 235-238.
[619] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 231-238.
[620] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 404-407, 423-424, 432-433, 445-446, and 450.
[621] See, for example: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 186, 196, 218, 229, 237, 270, 326, 3742, 348, 354, 367, and 405-406.

have not been produced in her affidavit, any potential ground of review should be recorded in those notes. Similarly, as Dr Taylor was represented by Mr Derek Collins ("**Mr Collins**") as a 003 respondent, Mr Collins should have hearing notes on this point. Once again, these notes have not been attached to any affidavit.

283. Mr Weiner and Dr Swirsky provided evidence in support of Dr Bart's allegations against Mr Bates and the University. The Tribunal makes clear in its decision that their evidence was considered,[622] and there is no serious possibility that the lack of recording deprived the Applicants of a potential ground of review.

April 19, 2012 audio

284. On April 19, 2012, a portion of Dr Maureen Hupfer's ("**Dr Hupfer**") testimony cannot be heard on the audio. The Applicants allege that, because of this, they are unable to "scrutinize the Tribunal's treatment" of Dr Hupfer's testimony, which was relied upon in its findings.[623] The Tribunal's treatment of a witness' testimony, or the weight it gives to the evidence, are not appropriate issues on judicial review. The Applicants have provided no reasons why the Tribunal's treatment of Dr Hupfer's testimony should be questioned, or why the Tribunal's reasons setting out which aspects of Dr Hupfer's evidence it relied upon were inadequate.[624] The Tribunal did not make any findings in the absence of evidence.[625]

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[622] For the Tribunal's references to Mr. Weiner's evidence: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 218, 419, and 436. For the Tribunal's references to Mr. Swirsky's evidence: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 218 and 223.
[623] Applicants' Factum at para. 272.
[624] *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 ["***NLNU***"], Respondents' Supplementary BOA, Tab 12 at paras. 11-22.
[625] In the complaints of the CLAs against Drs Pujari, Ray, Taylor and Bart: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 369. In Dr Flynn's complaint against Drs Taylor, Bart, Pujari, Ray, Steiner, and Rose: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 419, 431-432, 434-435. In Dr Longo's complaint

May 8, 2012 audio

285. The Applicants allege that the May 8, 2012 audio is missing the testimony of Dr Naresh Agarwal ("**Dr Agarwal**") and Dr Clarence Kwan ("**Dr Kwan**"), who testified on behalf of some of the Applicants in responding to the 003 Complaint. However, the Tribunal makes clear that it considered both Dr Agarwal's and Dr Kwan's evidence, referring to both throughout the Tribunal Decision.[626]

286. The Applicants also allege that the May 8, 2012 audio is missing testimony from witnesses regarding the allegedly improved atmosphere at the DSB after Mr Bates resigned. However, Drs Steiner, Taylor, Ray, Pujari, and Yufei Yuan and Narat Charupat, the Applicants' own witnesses, all indicated in their evidence that the environment remained deeply divided and toxic during the hearing process, which was after Mr Bates had resigned.[627] Dr Flynn, Dr Detlor, Ms Cossa, and Ms Stockton also all testified that the atmosphere at the DSB continued to be negative, toxic, poisoned, and confrontational after Mr Bates resigned.[628] In addition, "all parties conceded that the evidence confirmed a poisoned work/academic environment contrary to the Policy".[629]

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against Drs Bart, Taylor, Steiner, Rose, and Pujari: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 437. In Dr Ray's counter-complaint against Dr Detlor: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 330.

[626] For the Tribunal's references to Dr. Kwan's evidence: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 434, 437, and 455. For the Tribunal's references to Dr. Agarwal's evidence: Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 290, 297, 302, 304-305, 318, 322-323. In addition, the Tribunal's findings regarding the issues Drs Agarwal and Kwan were asked to testify about were supported by a significant amount of other evidence: For Dr Detlor, see Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 316-318 and 323-341; For Dr Flynn, see Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 434-435; For Dr Longo, see Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 438, 440, 445-446, and 448-449; For Dr. Head, see Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 348-355; For Ms. Colwell, see Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 291-293 and 297-301.

[627] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 73 and Volume 2, Exhibit 2LL at pp. 432-435; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 194.

[628] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 73 and Volume 2, Exhibit 2LL at pp. 428-431.

[629] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 281.

287. A tribunal's reasons do not have to include all the arguments and details a reviewing judge would have preferred - they merely have to allow the reviewing court to understand why the Tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes.[630] The Remedy Decision shows that the Tribunal considered evidence of the then-current environment at the DSB in determining that temporarily removing some of the Applicants from the workplace was necessary in order for the DSB to heal.[631] The Applicants have provided no reasons to question the Tribunal's treatment of the evidence regarding the environment at the DSB.[632]

288. Moreover, as discussed in more detail below, the Tribunal determined that its proposed remedies were warranted because, among other reasons, the Applicants lacked self-awareness about their behaviour and failed to acknowledge the egregious nature of their conduct.[633]

iii. The remedies recommended by the Tribunal were reasonable

289. The Tribunal, as a panel of the Applicants' peers, had special expertise regarding the community and environment of a University.[634] It was therefore in a unique position to balance the "longstanding values of academic freedom…in universities"[635] with the power

[630] *N.L.N.U.*, Respondents' Supplementary BOA, Tab 12 at para. 16.
[631] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.
[632] *Byrnes v. Law Society of Upper Canada*, 2015 ONSC 2939 (Div. Ct.), Respondents' Supplementary BOA, Tab 13 at para. 58.
[633] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[634] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 173, 224, and 434-435.
[635] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 172.

imbalance in the University context when deciding what remedies were "necessary to guarantee that the behaviour is not repeated".[636]

290. Having determined that the Applicants, other than Dr Richardson, bore primary responsibility for the poisoned work/academic environment,[637] the Tribunal gave detailed reasons for recommending suspensions of various lengths based on each Applicant's level of culpability. The Tribunal recommended, among other things:

a. 3 year suspension for each of Drs Taylor, Bart, and Steiner;

b. 12 month suspension for Dr Pujari;

c. 1 academic term suspension for Dr Ray; and

d. formal written reprimand for Dr Rose.

291. The Tribunal's main reasons for recommending suspensions were:

a. The Applicants, other than Dr Richardson, "abused the fundamental privileges and responsibilities enjoyed by and entrusted to them";[638]

b. Drs Bart, Taylor, Steiner, and Pujari committed the most "egregious misconduct" by unlawfully interfering with tenure and promotion and teaching-track conversion processes, and thereby jeopardizing the jobs and career aspirations of many of the 003 Complainants;[639]

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[636] *Anti-Discrimination Policy*, Komlen Affidavit, Responding Record, Volume 2, Exhibit 4A at s. 73.
[637] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 152-153.
[638] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[639] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.

c. The Applicants, other than Dr Richardson and Dr Ray, "engaged in conduct which corrupted, tainted, interfered with, and compromised the integrity of tenure/permanence and promotion and teaching-track conversion process";[640]

d. The tenured faculty members who abused the fundamental privileges and responsibilities enjoyed by and entrusted to them corrupted established processes vital to the University, which had significant negative impacts upon the DSB and the University;[641]

e. Drs Bart, Steiner, Taylor, and Pujari's conduct, could not "be characterized as a momentary flare-up. Although not always premeditated, their conduct was often deliberate and willful. The totality of the evidence and the traditional mitigating factors considered in the jurisprudence…do not…weigh in Dr Taylor, Dr Steiner, and Dr Bart's favour";[642]

f. Dr Taylor, Dr Steiner, and Dr Ray breached the Tribunal's Orders and Confidentiality Notice, and/or tampered with evidence;[643]

g. The "remedy submissions on behalf of the individual 003 Respondents continued to rationalize the misconduct and/or attempt to, without merit, minimize the gravity of the Tribunal's findings";[644]

h. There was little in the evidence or remedy submissions to suggest that the Applicants had "attained the level of self-awareness about their behaviour which

[640] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 475.
[641] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[642] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[643] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[644] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.

was necessary to satisfy the Tribunal that significant sanctions are not required or that their behaviour has been corrected and will not be repeated";[645]

i. "In the face of overwhelming evidence, the individual 003 Respondents not only vigorously denied any misconduct (as they were entitled) but also continued to blame the victims";[646]

j. The failure of the Applicants, except Dr Richardson, to truly accept responsibility for their conduct and failure to "come to grips with the seriousness, impact and effect of their misconduct" did not "bode well for the potential to rehabilitate their unacceptable behaviour";[647]

k. The presence of the Applicants, except Drs Richardson and Rose, in the workplace would "jeopardize true reconciliation at the DSB and preclude the development of an environment where all faculty and staff" could reasonably function in the workplace;[648] and

l. That the remedies were required to "protect the integrity of the University's policies and procedures and to deter conduct which has breached and tainted the integrity of fundamental processes treasured by faculty".[649]

292. In recommending shorter suspensions for Drs Pujari and Ray, the Tribunal recognized that Dr Pujari was a "conflicted and reluctant participant whose behaviour is easier to correct and we have less concern that he will be an obstacle to returning the DSB to an

[645] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[646] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476
[647] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 475.
[648] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[649] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.

appropriate work environment",[650] and Dr Ray was "likely unduly and negatively influenced by the senior tenured professors with whom he increasingly became aligned".[651] In ordering a formal written reprimand to remain in Dr Rose's record for 5 years, the Tribunal recognized that its findings against Dr Rose were "comparatively few and less concerning".[652]

293. The Tribunal determined that the Applicants' conduct, other than Drs Rose, Ray and Richardson, met the threshold of "gross misconduct" to justify dismissal of a tenured academic.[653] The conduct of Drs Bart, Taylor, Steiner, and Pujari as a whole showed that the University could "no longer be expected to accord [them] the degree of trust that it must be able to place in faculty members if they are to have the freedom from minute supervision that has long been considered essential to the effective performance of their academic functions".[654]

294. It also concluded that misconduct "affecting tenure and promotion are a grave assault on the basic foundation of academic freedom at McMaster University, in the Tribunal's view".[655] However, since the Tribunal also raised a concern about a decision made by the Provost at the time, as well as with delays on the part of HRES in processing complaints, it decided against recommending removal proceedings.[656]

295. A suspension is not "worse" than termination from employment under the University's policies. Although removal of a tenured faculty member generally requires a hearing

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[650] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.
[651] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.
[652] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[653] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[654] *W.U.F.A. v. University of Windsor (Taboun)*, 2002 CarswellOnt 8792, [2002] O.L.A.A. No. 1020 (Ont. Arb.), Respondents' BOA, Tab 25 at para. 78.
[655] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 272.
[656] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 477.

before a Hearing Committee,[657] in the circumstances of this case, any such hearing subsequent to the Tribunal's findings would be an abuse of process that impeaches the integrity of the judicial system.[658] In addition to *res judicata* applying in a case before the Hearing Committee, the doctrine of abuse of process would also apply. The Supreme Court of Canada in *Toronto (City) v CUPE, Local 79* makes clear that the Applicants would not be entitled to relitigate the merits of their case before any subsequent Hearing Committee.[659]

296. Termination of employment of tenured faculty is not unprecedented. The Tribunal has broad remedial authority to do what is necessary to ensure compliance with the Policy, and there is no "barrier or obstacle to this remedy in law".[660] The Tribunal supported its recommendation after reviewing both aggravating and mitigating factors, and emphasized the remedial nature of its recommendation to guarantee the behaviour would not be repeated.[661] While the Tribunal noted that the Applicants "attempted to express remorse",[662] it found that this "remorse" was conditional and the Applicants generally continued to appear "either incapable of, or unwilling to, own up to the fact" that the Tribunal found them to be primarily responsible for the poisoned academic/work environment at the DSB.[663] "Not recognizing one's misconduct is an important factor that weighs in the decision to substitute a penalty lesser than discharge".[664]

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[657] *McMaster University Revised Policy and Regulations with Respect to Academic Appointment, Tenure and Promotion (2007)* ["***Yellow Document***"] at Section VI, Tribunal Record, Volume 8 at pp. 4766-4770.
[658] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ["***CUPE***"], Respondents' BOA, Tab 27 at paras. 51-52.
[659] *CUPE*, Respondents' BOA, Tab 27 at paras. 50-52.
[660] *Fair v. Hamilton-Wentworth District School Board*, 2014 ONSC 2411 (Div. Ct.), Respondents' BOA, Tab 26 at para. 42.
[661] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at pp. 473-477.
[662] Applicants' Factum at para. 220(vii); Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[663] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[664] *University of Ottawa and Association of Professors of the University of Ottawa (APUO) (Rancourt)*, unreported award of Arbitrator Foisy, dated January 27, 2014, Respondents' BOA, Tab 28 at para. 101.

297. This case has many similarities with *Saskatoon (City) v. CUPE Local 47*,[665] where the employee in question regularly made derogatory comments, swore, shouted, made physical gestures and threatening comments, and generally mistreated his co-workers. In this case, the Applicants similarly engaged in persistent and egregious conduct that was bullying and harassment[666] and, among other things, are unable or unwilling to see how their behaviour affected the 003 Complainants and the DSB,[667] continue to deny that they were the problem,[668] and continue to blame Mr Bates[669] and the 003 Complainants.[670] The Tribunal did not believe that the Applicants truly accepted responsibility for their misconduct.[671]

298. Even worse than the employee in *Saskatoon (City)*, the Applicants, other than Dr Richardson, used their power and vindictiveness to negatively impact vulnerable employees' job security and career advancement. Based on the Applicants' testimony during the hearing, their remedies submissions, their affidavits and testimony in this Application, and their submissions in this Application, it is clear that the Applicants, other than Dr Richardson, had to be removed from the workplace for a period so that the DSB could heal.

299. The cases cited by the Applicants can be readily differentiated. The Applicants continue to minimize the egregiousness of their conduct by citing cases where less severe remedies were ordered for less serious conduct. None of the cases cited by the Applicants

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[665] *Saskatoon (City) v. CUPE Local 47*, 2012 CarswellOnt 3306 (Ont. Arb.) ["***Saskatoon***"], Respondents' Supplementary BOA, Tab 14.
[666] *Saskatoon*, Respondents' Supplementary BOA, Tab 14 at paras. 301 and 326.
[667] *Saskatoon*, Respondents' Supplementary BOA, Tab 14 at para. 307.
[668] *Saskatoon*, Respondents' Supplementary BOA, Tab 14 at para. 328.
[669] Applicants' Factum at paras. 20, 220, 231, and 264.
[670] *Saskatoon*, Respondents' Supplementary BOA, Tab 14 at para. 334.
[671] *Saskatoon*, Respondents' Supplementary BOA, Tab 14 at para. 342.

considers a situation where senior-level tenured faculty members engage in a premeditated course of conduct using their senior positions to adversely impact the employment and career aspirations of vulnerable faculty members, and then showing a complete lack of remorse for their gross misconduct. A chart differentiating the Applicants' cases is attached as Appendix "3".

300. The Applicants argue that the Tribunal failed to consider evidence of the atmosphere at the DSB after Mr Bates resigned. As noted earlier, there was evidence during the hearing, including from Dr Taylor and Dr Steiner, that the atmosphere at the DSB remained toxic and dysfunctional.[672] The Applicants have provided no reasons why the Tribunal's reasons for its decision were inadequate.[673] By raising this, the Applicants once again display their refusal to acknowledge their gross misconduct, attempting to lay the blame for the environment at the feet of Mr Bates,[674] contrary to the Tribunal's findings.

301. In any event, the Tribunal's Remedy Decision made clear that the Applicants' lack of "self-awareness about their behaviour" did not "satisfy the Tribunal that significant sanctions [were] not required or that their behaviour [was] corrected and [would] not be repeated".[675]

302. The Applicants have provided fresh evidence in various affidavits regarding the effect of the recommended remedies on the Applicants.[676] Evidence that was not before the

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[672] Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 73; Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 194; Steiner Transcript at pp. 25-28 Q. 108-122.
[673] *N.L.N.U,* Respondents' Supplementary BOA, Tab 12.
[674] Applicants' Factum at paras. 20, 220, 231, and 264.
[675] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[676] Bart Affidavit, Application Record, Tab 8 at paras. 83-105; Pujari Affidavit, Application Record, Tab 9 at paras. 6 and 73-104; Rose Affidavit, Application Record, Tab 11 at paras. 9 and 63-69; Ray Affidavit, Application Record, Tab 12 at paras. 6, 96-119; Steiner Affidavit, Application Record, Tab 13 at paras. 8 and 102-124; Taylor Affidavit, Application Record, Tab 14 at paras. 12 and 81-98.

adjudicator is not admissible on judicial review.[677] The role of this Court on judicial review is to determine whether, in light of the evidence before the Tribunal, its Remedy Decision was reasonable. It is not to re-assess what the remedy should be.[678] Similarly, fresh evidence regarding the Applicants' ability to work without harassing and bullying anyone between the end of the hearing and release of the Remedy Decision is irrelevant (and should have been raised in the Applicants' remedies submissions). In any event, while economic hardship may be a mitigating factor in appropriate cases, it is improper to interfere with the Tribunal's recommendation "merely on the basis of a generalized sympathy for the position which the [Applicants] will find [them]selves in".[679]

303. If this Court decides to consider the Applicants' fresh evidence on economic hardship and other after-the-fact evidence, it should also consider how the Applicants' affidavits and submissions in this judicial review continue to highlight the lack of remorse for their misconduct because they dispute the Tribunal's findings and minimize the gravity of their misconduct. It should also consider the misleading evidence proffered by the Applicants, as well as their refusal to acknowledge any wrongdoing.[680] In addition, Drs Rose, Pujari,

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[677] *Assn. of Universities and Colleges Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, Respondent's BOA, Tab 29 at para. 19; *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, 2011 ONSC 4086 (Div. Ct.), Respondents' BOA, Tab 30 at para. 13; *Delios v. Canada (Attorney General)* 2015 FCA 117, Respondents' BOA, Tab 31 at para. 42.

[678] *Shaw v. Phipps*, 2012 ONCA 155, Book of Authorities of the Board-Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy ("**Tribunal BOA**"), Tab 28 at para. 10; *Canada (Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, Tribunal BOA, Tab 29 at paras. 30-31; *Peel Law Association v. Pieters*, 2013 ONCA 396, Tribunal BOA, Tab 30 at para. 132.

[679] *Dupont Canada Inc., Kingston Works v. Kingston Independent Nylon Workers Union*, 1983 CarswellOnt 2409 (Ont. Arb.), Respondents' BOA, Tab 31 at para. 20.

[680] For example: Bart Affidavit, Application Record, Tab 8 at paras. 62-63 as compared to Bart Transcript at pp. 40-41 Q. 198-205; Pujari Affidavit, Application Record, Tab 9 at paras. 51-52 as compared to Pujari Transcript at pp. 22-25 Q. 107-124; Richardson Affidavit, Application Record, Tab 10 at paras. 23-26 as compared to Certified Transcript of the Cross-Examination of Dr. William Richardson on November 12, 2015 ("**Richardson Transcript**") at pp. 10-19 Q. 41-92; Rose Affidavit, Tab 11 at para. 63 as compared to Rose Transcript pp. 5-10 Q. 9-32; Ray Affidavit, Application Record, Tab 12 at paras. 69-70 as compared to Ray Transcript at pp. 40-43 Q. 232-249; Steiner Affidavit, Application Record, Tab 13 at para. 73 as compared to Steiner Transcript at p. 6 Q. 6 and pp. 9-16 Q. 22-60; Taylor Affidavit, Application Record, Tab 14 at para. 56 as compared to Taylor Transcript at pp. 30-32

and Ray, after apparently feigning remorse during their sensitivity, harassment and conflict resolution training sessions, now insinuate that Mr Hitner's comments and instruction were improper.[681]

304. The Applicants reference in their factum that their "very livelihoods hung in the balance"[682] while the Tribunal made its decision, and state that the remedies had "career ending stakes",[683] caused "permanent damage to their reputation and career"[684] and "devastating and enduring professional and personal harm",[685] leaving them with "virtually no prospects for career advancement".[686] Because of these effects, the Applicants claim that the remedies are "draconian".[687] Yet somehow, the Applicants cannot seem to recognize that their behaviour, which preyed on vulnerable faculty members, impacted faculty members' legitimate career advancement opportunities, and corrupted the T&P process[688] − the very process that can jeopardize an academic's career − was significantly worse than a "general inability…to respectfully engage in vigorous debate, accept different visions and outcomes and to act collegially".[689] The Applicants' continued minimizing of their behaviour in this Application, and especially highlighted at paragraph 211 of their factum, itself justifies the remedies recommended by the Tribunal.

Q. 150-163.
[681] Pujari Affidavit, Application Record, Tab 9 at paras. 95-101; Rose Affidavit, Application Record, Tab 11 at paras. 66-67; Ray Affidavit, Application Record, Tab 12 at paras. 96-107.
[682] Applicants' Factum at para. 160.
[683] Applicants' Factum at para. 273.
[684] Applicants' Factum at para. 317.
[685] Applicants' Factum at para. 15.
[686] Applicants' Factum at para. 134.
[687] Applicants' Factum at paras. 5, 11, 211, and 363.
[688] Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 273, 286, 354, 367, 369-370, 404-405, 407-408, 419-420, 433-435, 437, 445-446, 450, and 462.
[689] Applicants' Factum at para. 211.

305. The Tribunal's remedy recommendations were reasonable, and were, in fact, less severe than those the Applicants, other than Dr Ray, sought as a remedy against Mr Bates.[690] Even though Mr Bates resigned as the Dean of the DSB before the Tribunal hearing started, the Applicants, other than Dr Ray, wanted the Tribunal to recommend to the President that Mr Bates' employment be terminated "for alleged conduct which was relatively less serious than the breaches of Policy committed by Dr Pujari, Dr Steiner, Dr Bart and Dr Taylor",[691] despite the "overwhelming evidence"[692] at the hearing that it was the Applicants (other than Dr Richardson) and not Mr Bates who had engaged in harassment.

306. Even if this Court finds that the remedies recommended by the Tribunal should be reduced, based on the Applicants' continued refusal to accept responsibility for the situation they created,[693] their continued sense of entitlement,[694] their lack of honesty,[695] and their continued minimizing of the extent of their misconduct,[696] there is no reasonable expectation that a viable employment relationship between the University and the Applicants can be re-established.[697] None of the Applicants should be reinstated to their previous positions or be granted any compensation. In the cases of Drs Steiner, Taylor, and Bart, they chose to retire from their employment, and this Court cannot rescind those decisions as they were not decisions made by the Tribunal.

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[690] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474.
[691] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 474; Heeney Affidavit, Responding Record, Volume 1, Tab 2 at para. 72 and Volume 2, Exhibits 2JJ and 2KK and pp. 421 and 423.
[692] Remedy Decision, Tribunal Record, Volume 2, Tab 2B at p. 476.
[693] *Re Children's Hospital of Eastern Ontario and OPSEU*, 2015 CarswellOnt 13987 (Ont. Arb.) ["***Children's Hospital***"], Respondents' Supplementary BOA, Tab 15 at para. 131.
[694] *Children's Hospital*, Respondents' Supplementary BOA, Tab 15 at para. 134.
[695] *Children's Hospital*, Respondents' Supplementary BOA, Tab 15 at para. 135.
[696] *Children's Hospital*, Respondents' Supplementary BOA, Tab 15 at para. 137.
[697] *Children's Hospital*, Respondents' Supplementary BOA, Tab 15 at para. 140.

307. Finally, contrary to paragraph 220(iv) of the Applicants' factum, the University did not single out 6 faculty members for sanctions. 8 faculty members came forward and brought complaints. These complaints led to findings of bullying and harassment by the Applicants, other than Dr Richardson. The University cannot compel anyone to bring a complaint, and therefore only the particular allegations of the 8 faculty members, which were limited to allegations against 6 faculty members, were pursued. There was no discrimination in the University's application of the Policy. Their bullying and harassment tactics having backfired in their effort to "take back the school", the Applicants now ask this Court to quash the Tribunal's decisions, continuing to blame everyone other than themselves for the outcome.

PART V - ORDER SOUGHT

308. The Respondents request that the Application for judicial review be dismissed, with costs awarded to the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2016.

per:

George Avraam, Baker & McKenzie LLP
Lawyers for the Respondents,
McMaster University, "Senior Administrator at McMaster University", and "Certain Unnamed Individuals at McMaster University"

Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

DR. CHRIS BART, DR. DEVASHISH PUJARI, DR. WILLIAM RICHARDSON, DR. JOE ROSE, DR. SOURAV RAY, DR. GEORGE STEINER, AND DR. WAYNE TAYLOR

Applicants

- and -

MCMASTER UNIVERSITY, THE BOARD SENATE HEARING PANEL FOR SEXUAL HARASSMENT/ANTI-DISCRIMINATION UNDER THE MCMASTER UNIVERSITY POLICY**, THE SENIOR ADMINISTRATOR AT MCMASTER UNIVERSITY, AND CERTAIN UNNAMED INDIVIDUALS AT MCMASTER UNIVERSITY**

Respondents

CERTIFICATE

I estimate that 1.5 days will be needed for my oral argument in response to the application. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 29th day of March, 2016.

per:

George Avraam

APPENDIX "1"

Summary of the Tribunal's Findings Against the Applicants (other than Dr. Richardson)

	Complainant	Allegation	Finding
Dr. Bart			
1.	Ms. Stockton	Dr. Bart breached the policy by sending an e-mail to the G21 regarding Ms. Stockton's posts on MUFAgab.	Breach of the Policy
2.	CLAs (Mr. Vilks, Ms. Stockton and Ms. Cossa)	Dr. Bart engaged in unwelcome conduct and comment towards the CLAs, including by commenting that they were all held hostage.	Breach of the Policy
3.	Dr. Flynn	Dr. Bart harassed Dr. Flynn or otherwise breached the Policy during and following the June 25, 2007 Area Meeting, including by receiving or participating in G21 emails that disparaging information and baseless allegations about Dr. Flynn and searching for a "mole".	Breach of the Policy
4.	Dr. Flynn	Dr. Bart interfered with Dr. Flynn's three year review for renewal during Dr. Flynn's Area T&P Committee Reconsideration Meeting in September 2009, by tainting the process and failing to identify his bias.	Harassment and Breach of the Policy
5.	Dr. Longo	Dr. Bart harassed Dr. Longo by receiving or participating in G21 e-mails that distributed disparaging information and baseless allegations about Dr. Longo.	Breach of the Policy
6.	Dr. Longo	Dr. Bart harassed Dr. Longo during Dr. Longo's first and second T&P consideration, by tainting the process	Breach of the Policy

		in both 2009 and 2010.	
Dr. Pujari			
1.	Ms. Colwell	Dr. Pujari intentionally delayed, refused or failed to complete certain tasks connected to Ms. Colwell's work.	Breach of the Policy
2.	Ms. Stockton	Dr. Pujari used events involving Dr. Hongjin Zhu to harass Ms. Stockton.	Harassment and Breach of the Policy
3.	Ms. Stockton	Dr. Pujari took retaliatory steps against Ms. Stockton, which affected her ability to do her job.	Breach of the Policy
4.	CLAs (Mr. Vilks, Ms. Stockton and Ms. Cossa)	Dr. Pujari engaged in unwelcome conduct and comment towards the CLAs, including by unreasonably threatening their job security, describing the presence of CLAs as an "intellectual deficit" during a March 2008 Area Meeting, calling CLAs "retailers of information", referring to a "drawer full of resumes", being unreasonably dismissive of Mr. Vilks' concerns regarding Dr. Taylor's posters, and undermining the Fall 2010 reappointment process by refusing to disclose his potential bias and recuse himself.	Harassment (reappointment process) and Breach of the Policy
5.	CLAs	Dr. Pujari refused to address a variety of Ms. Cossa's concerns and ignored her deferred exam marks.	Harassment and Breach of the Policy – Reprisal
6.	CLAs	Dr. Pujari made racism allegations against the CLAs as reprisal for their filing the 003 Complaint.	Breach of the Policy – Reprisal
7.	Dr. Flynn	Dr. Pujari interfered with Dr. Flynn's three year review for renewal during Dr. Flynn's Area T&P Committee Reconsideration Meeting in	Harassment and Breach of the Policy

		September 2009, by tainting the process and failing to identify his bias.	
8.	Dr. Longo	Dr. Pujari harassed Dr. Longo by receiving or participating in G21 e-mails that distributed disparaging information and baseless allegations about Dr. Longo.	Breach of the Policy
9.	Dr. Longo	Dr. Pujari harassed Dr. Longo during Dr. Longo's first and second T&P consideration, by tainting the process in both 2009 and 2010.	Breach of the Policy
Dr. Ray			
1.	Ms. Colwell	Dr. Ray engaged in harassing conduct and communication towards Ms. Colwell, including a telephone call on January 28, 2010 and his response to the Newton Fact-Finding Report from August 2010 onwards.	Harassment (post-Newton Report) and Breach of the Policy
2.	Ms. Colwell	Dr. Ray intentionally delayed, refused or failed to complete certain tasks connected to Ms. Colwell's work.	Harassment and Breach of the Policy
3.	Dr. Detlor	Dr. Ray filed and pursued a Counter-Complaint that was malicious, frivolous, vexatious, and entirely without merit, including by attempting to tamper with Dr. Zeytinoglu's evidence.	Breach of the Policy – Reprisal
Dr. Rose			
1.	Dr. Flynn	Dr. Rose interfered with Dr. Flynn's three year review for renewal during Dr. Flynn's Faculty T&P Committee Meeting in October 2009, by tainting the process and failing to identify his bias.	Breach of the Policy

2.	Dr. Longo	Dr. Rose harassed Dr. Longo by receiving or participating in G21 e-mails that distributed disparaging information and baseless allegations about Dr. Longo.	Breach of the Policy
3.	Dr. Longo	Dr. Rose harassed Dr. Longo during Dr. Longo's first T&P consideration, by tainting the process in 2009.	Breach of the Policy
Dr. Steiner			
1.	N/A – Procedural	Dr. Steiner's second conversation with Dr. Randall breached the order excluding witnesses.	Breach of the Policy
2.	N/A – Procedural	Dr. Steiner breached the Tribunal's Confidentiality Notice in his conduct towards Dr. Hackett.	Breach of the Policy and Reprisal
3.	N/A – Procedural	Dr. Steiner discussion with Dr. Dooley breached the order excluding witnesses and the Confidentiality Notice.	Breach of the Policy.
4.	Dr. Detlor	Dr. Steiner engaged in repetitive and vexatious conduct from the March 7, 2006 meeting onwards.	Breach of the Policy
5.	Dr. Head	Dr. Steiner retaliated against Dr. Head as a result of her perceived association and collaboration with Mr. Bates, and for not being named as Ph.D. Director.	Harassment and Breach of the Policy
6.	Dr. Head	Dr. Steiner harassed Dr. Head regarding her T&P Consideration in 2009, and, in particular, during the Faculty T&P Committee Meeting in December 2009.	Harassment and Breach of the Policy
7.	Dr. Flynn	Dr. Steiner interfered with Dr. Flynn's three year review for renewal during	Breach of the Policy

		Dr. Flynn's Faculty T&P Committee Meeting in October 2009, by tainting the process and failing to identify his bias.	
8.	Dr. Longo	Dr. Steiner harassed Dr. Longo by receiving or participating in G21 e-mails that distributed disparaging information and baseless allegations about Dr. Longo.	Breach of the Policy
9.	Dr. Longo	Dr. Steiner harassed Dr. Longo during Dr. Longo's first and second T&P consideration, by tainting the process in both 2009 and 2010.	Breach of the Policy
Dr. Taylor			
1.	N/A – Procedural	Dr. Taylor breached the Confidentiality Notice in his conduct towards Mr. Walsh.	Breach of the Policy and Reprisal
2.	CLAs (Mr. Vilks, Ms. Stockton and Ms. Cossa)	Dr. Taylor engaged in unwelcome conduct and comment towards the CLAs, including by posting particular posters, and sending an e-mail referring to the CLAs as "stormtroopers".	Harassment (stormtroopers e-mail) and Breach of the Policy
3.	Dr. Flynn	Dr. Taylor harassed Dr. Flynn or otherwise breached the Policy during and following the June 25, 2007 Area Meeting, including by receiving or participating in G21 emails that disparaging information and baseless allegations about Dr. Flynn and searching for a "mole".	Breach of the Policy
4.	Dr. Flynn	Dr. Taylor interfered with Dr. Flynn's three year review for renewal during Dr. Flynn's Area T&P Committee Reconsideration Meeting in September 2009, by tainting the process and failing to identify his bias.	Harassment and Breach of the Policy

5.	Dr. Longo	Dr. Taylor harassed Dr. Longo by receiving or participating in G21 e-mails that distributed disparaging information and baseless allegations about Dr. Longo.	Breach of the Policy
6.	Dr. Longo	Dr. Taylor harassed Dr. Longo during Dr. Longo's first and second T&P consideration, by tainting the process in both 2009 and 2010.	Breach of the Policy

APPENDIX "2"

Summary of Tribunal's Findings Dismissing the Applicants' Complaints against Paul Bates

	Complainant	Allegation	Summary of Main Findings
1.	Dr. Joe Rose	Mr. Bates' outburst at a Faculty Council meeting in November 2009 regarding a pending Teaching Assistants' strike was harassment and a reprisal.	Harassment by Mr. Bates was not established. It was a single event that was demeaning and unwelcome but was followed shortly after by an equally public apology on the part of Mr. Bates. The isolated conduct was not sufficiently egregious or the type of communication intended to be prohibited under the Policy. There was no objective evidence that Dr. Rose was vulnerable to or a victim of a reprisal, on the evidence provided and accepted by the Tribunal. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 211.*
2.	Dr. Joe Rose	Mr. Bates knew about the Facebook page "The Root of DeGroote" and did not remedy it.	Mr. Bates was not responsible for the students' conduct and there was no evidence to suggest otherwise. Mr. Bates was not responsible for Dr. Rose's name appearing on the Facebook page as Mr. Bates was not involved in any aspect of authorship, maintenance or administration of the postings. No harassment or breach of the Policy has been established by the Complainant. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 212.*
3.	Dr. Bill Richardson	Mr. Bates engaged in a pattern of harassing behaviour that culminated in his refusing to appoint Dr. Richardson as a sessional lecturer in 2010.	The decision maker (Dr. Medcof) did not provide evidence and the 002 Complainants bore the onus of establishing that Mr. Bates breached the Policy. Sessional lecture appointments are not

			guaranteed and management can consider prior actions in the decision-making process. The evidence did not establish a breach of the settlement or release and there was no evidence that Dr. Medcof's decision was tainted or influenced by his discussion with Mr. Bates. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 216.*
4.	Dr. Bill Richardson	Mr. Bates breached an undertaking/term of settlement in 2007 by discussing information regarding Dr. Richardson's 2006 grievance.	There was no evidence that Mr. Bates breached any undertaking or term of the settlement. The evidence did not establish that Mr. Bates harassed Dr. Richardson or engaged in a reprisal under the Policy. Even if there had been a breach of the settlement or release, Mr. Bates' conduct did not constitute harassment or a breach of the Policy. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 217.*
5.	Dr. Chris Bart	Mr. Bates harassed Dr. Bart by removing him as Principal of the Directors College/reducing his responsibilities and moving the Directors College to Ottawa.	Dr. Bart's role in governance decision was diminished or discontinued, but the alleged conduct did not constitute harassment or breach of the Policy. Such changes fell within the purview of the University and Mr. Bates. No harassment or reprisal was established concerning the Director's College issues and how they were handled or addressed. Managing the joint venture by addressing the Conference Board of Canada's concerns and placing Dr. Bart's personal interests second to the interests of the Director's College did not constitute harassment. The conduct resulted rom and contributed to the poisoned work/academic environment at the DSB but did not constitute a breach of the Policy on the part of Mr. Bates. Mr. Bates' decision not to discuss some issues with Dr. Bart did not constitute harassment or reprisal contrary to the

			Policy. The operational and business considerations undertaken by Mr. Bates and the environment under which he had to make them satisfied the Tribunal that his conduct did not constitute harassment of Dr. Bart. The poor communication, issue avoidance and seeking of comfort and support from like-minded colleagues resulted in lost opportunities for open, clear and timely communication, but were not evidence of individual harassment or a breach of the Policy. Mr. Bates' conduct "resulted from" and "contributed to" the poisoned work/academic environment but did not rise to the level where Mr. Bates breached the Policy. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 221-224.*
6.	Dr. Chris Bart	Mr. Bates engaged in reprisal against Dr. Bart by failing to support him regarding allegations made by Anne Golden in November 2007 and January 2008, as reprisal for Dr. Bart's criticism of Mr. Bates during an Area Chair meeting in the summer of 2007.	There were no grounds for individual harassment or reprisal on the part of Mr. Bates with respect to the handling of Anne Golden's complaints. Mr. Bates' explanations were reasonable and his investigation of Ms. Golden's concerns was proper. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 225.*
7.	Dr. Chris Bart	Mr. Bates engaged in reprisal against Dr. Bart by manipulating Dr. Bart's CP/M scores in 2008, 2009, 2010, and 2011.	None of Mr. Bates' actions related to Dr. Bart's CP/M scores or the process involved in awarding those scores constituted individual harassment on the part of Mr. Bates. Consulting work at the Directors' College would not be eligible for consideration under the service component of the CP/M scheme. *Tribunal Decision, Tribunal Record,*

			Volume 2, Tab 2A at p. 226.
8.	Dr. Chris Bart	Mr. Bates alienated Dr. Bart and withheld important information regarding the Directors College in January 2010 and February 2011, including an impending program review.	None of Mr. Bates' actions with respect to the planning and implementation of the review of the Director's College were inappropriate. These actions did not constitute individual harassment on the part of Mr. Bates. These decisions could have been communicated in a more open and timely manner, but did not cross the line to constitute harassment. This was one example of how the poisoned work/academic environment adversely influenced the judgment exercised by some faculty at the DSB, including the Dean. However, individual harassment and reprisal under the Policy were not established by Dr. Bart. Mr. Bates' conduct did not rise to the level associated with a breach of the Policy. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 228.*
9.	Dr. Wayne Taylor	Mr. Bates engaged in a "campaign of harassment" and reprisal against Dr. Taylor, commencing in 2006, including: removing Dr. Taylor from his Health Leadership Institute (HLI) role, closing a Fall 2007 Faculty meeting after Dr. Taylor spoke, delaying attempts to remediate a mould problem in Dr. Taylor's office, interfering with Dr. Taylor's CP/M ranking, interfering with Dr. Taylor's appointment to the Dean Selection Committee, and subjecting Dr. Taylor to differential treatment for being part of the complaint process (i.e., favouritism towards Dr. Randall).	The evidence did not established that Mr. Bates launched a campaign of harassment commencing in 2006 or engaged in any reprisal against Dr. Taylor. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 231.*
10.	Dr. Wayne Taylor	Mr. Bates harassed Dr. Taylor by removing Dr. Taylor from the HLI, suspending the Disney Program, raising issues regarding the involvement of Dr. Taylor's wife with the HLI, and rebuking Dr. Taylor for remarks made at an Area Chair	None of Mr. Bates' action, including the review of Dr. Taylor's conduct, constituted harassment on the part of Mr. Bates, whether viewed as an individual incident or as a course of conduct. Mr. Bates had *bona fide* reasons to

		handover meeting in the summer of 2007.	address concerns with Dr. Taylor. Mr. Bates' actions related to Dr. Taylor's removal from the HLI were not harassing in nature. There was financial justification for the actions of the Dean with respect to the HLI. There was no harassment or breach of the Policy with respect to Dr. Taylor's allegations regarding the Disney Program; the issues concerning Dr. Taylor's wife; or his concerns about mould. These allegations were without merit and the decisions were under the purview of management. The mould issue was an example of the frivolous and trite nature of some of the complaints. The evidence did not establish that harassment or reprisal tainted those decisions. The HLI decisions could have been communicated and conducted in a more transparent, timely and collegial manner but, while Mr. Bates' conduct resulted from and contributed to the poisoned work/academic environment, it did not breach the Policy. There was no reprisal by Mr. Bates arising from the Area handover meeting. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 235-236.*
11.	Dr. Wayne Taylor	Mr. Bates engaged in harassment and reprisal by refusing to renew Dr. Taylor's role as Director of at the Health Services Management Program (HSM).	The decision not to renew Dr. Taylor's role at the HSM was an administrative decision for which the evidence did not establish either reprisal or harassment. The lack of communication was likely a by-product of the poisoned DSB culture. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 237.*
12.	Dr. Wayne Taylor	Mr. Bates communicated about Dr. Taylor's removal from the HSM in a manner that was callous, which amounted to harassment and reprisal.	There were no grounds for finding individual harassment on the part of Mr. Bates with respect to the handling of Dr. Taylor's removal from the HSM. This was

			Dr. Medcof's decision. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 237.*
13.	Dr. Wayne Taylor	Mr. Bates engaged in reprisal against Dr. Taylor by manipulating Dr. Taylor's CP/M scores for 2008 and 2009.	The CP/M score awarded to Dr. Taylor did not constitute harassment or a reprisal contrary to the Policy. The appropriate avenue for any CP/M dispute was a Review Committee and Dr. Taylor did not initiate an appeal. Mr. Bates did not have exclusive decision-making authority over CP/M scores. Dr. Taylor voluntarily disengaged himself from most of his duties and roles in the DSB in response to his removal from the HLI, but was still identified as meeting expectations. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 238.*
14.	Dr. Devashish Pujari	Mr. Bates harassed and intimidated Dr. Pujari around the time of the Burlington vote, including by: promising additional faculty at a Faculty Council meeting on September 26, 2007; sending an e-mail on October 22, 2007; rebuking Dr. Pujari for sending an e-mail in late October 2007 regarding the Area Chairs' concerns about the Burlington expansion vote; arriving at Dr. Pujari's door in December 18, 2007; and appearing in the Student Centre on December 19, 2007.	The evidence did not establish individual harassment by Mr. Bates. There was nothing harassing about Mr. Bates' e-mail dated October 22, 2007, in which he declined to meet with the five Area Chairs. Mr. Bates was entitled to decline to meet with the five Area Chairs and insist on the presence of all participants with respect to the Burlington expansion issue. Lobbying was going on by both sides regarding the Burlington expansion. There was no objective evidence that Dr. Pujari's vote was subject to intimidation or harassment. Dr. Pujari's suspicions or allegations regarding Mr. Bates' motivations were without merit. Dr. Pujari attributed unfounded motivations to decision by or discussions he had with Mr. Bates. Viewed objectively, harassment was not established on the evidence, recognizing

			the context and DSB environment which exacerbated Dr. Pujari's suspicions and likely contributed to how he felt. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 242-245.*
15.	Dr. Devashish Pujari	Mr. Bates used Dr. Kleinschmidt to harass and bully Dr. Pujari.	Mr. Bates encouraged Dr. Kleinschmidt to speak to Dr. Pujari, but this request, in and of itself, did not constitute individual harassment by Mr. Bates. Nothing that Dr. Kleinschmidt said to Dr. Pujari privately or otherwise as alleged constituted harassment or intimidation. Dr. Pujari failed to establish on a balance of probabilities that Mr. Bates harassment him on any of the grounds identified in his complaint. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 247.*
16.	Dr. Devashish Pujari	Mr. Bates participated in the University's failure to properly investigate Dr. Pujari's complaint of harassment and intimidation by Dr. Kleinschmidt.	The pressures and distress that Dr. Pujari experienced were not established by the evidence to be exclusively attributable to the alleged conduct by Mr. Bates and the Provost. The conduct confirmed by the evidence does not constitute harassment breaching the Policy. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 250-251.*
17.	Dr. Devashish Pujari	Mr. Bates participated in the University's improper discipline against the Area Chairs regarding their opposition to the Burlington expansion, which had a chilling effect and intimidated Dr. Pujari.	There was no evidence that this discipline was conducted or engineered in any way by Mr. Bates and, as such, was not an act of individual harassment on his part. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at pp. 252-253.*
18.	Dr. Devashish Pujari	Mr. Bates interfered with the resource and CLA allocation in the Strategic Marketing Leadership/Health Services Management Area, as reprisal for Dr.	Mr. Bates did not withhold or redirect resources away from the SML/HSM Area in an act of individual harassment or reprisal against Dr. Pujari. The resource allocation decisions followed full

		Pujari's opposition to Mr. Bates.	participation of representation from all Areas and was a justifiable management decision. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 255.*
19.	Dr. Devashish Pujari	Mr. Bates engaged in reprisal against Dr. Pujari by manipulating Dr. Pujari's CP/M scores for 2009 and 2010.	The evidence did not support Dr. Pujari's allegation that Mr. Bates manipulated or harassed him in the initial assignment, review or final rewarding of his CP/M. There was no objective or reliable evidence regarding Dr. Pujari's allegations concerning Mr. Bates raising CP/M scores for his perceived supporters. *Tribunal Decision, Tribunal Record, Volume 2, Tab 2A at p. 256.*

APPENDIX "3"

Analysis of the Applicants' Authorities on Remedies

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
The University of Windsor and University of Windsor Faculty Association (Manley), unreported award of Arbitrator Swan, dated June 28, 2000	Paragraph 167(a): Labour arbitration cases with similar conduct in the University context have resulted in unpaid suspensions of less than three months, and include the following: (a) An arbitration involving a grieving academic with 26 years of service who engaged in a course of conduct extending more than two years, which was antagonistic of, and openly undermined, the legitimate administrative obligations of his department head and of the University administration. The arbitrator found that following extended disagreements about class size with the department head and the University administration the grievor engaged in conduct including: (i) inciting students to protest and refusing to carry-out his teaching duties; (ii) requesting the procurement and assistance of teaching assistants and then refusing to work with them; (iii) insulting and acting in a manner that was demeaning towards students; (iv) denigrating assigned teaching materials; (v) meeting with a secret "group" and drafting a lengthy memorandum to the University administration which was openly critical of his department head, and which also made unsubstantiated allegations to sexual harassment and impropriety, as well as complaints about resource allocation and funding; and (vi) repeated instances insubordination [*sic*]. In finding that the grievor's discipline would be reduced to, in effect, a one month unpaid suspension, the arbitrator noted that a three month unpaid suspension was unusual in the University context, that "removal from a teaching assignment, particularly in so public a way as occurred here, is a heavy penalty all by itself …" and	**Outcome:** A loss of one month's salary and any overload stipend paid for the academic year 1993-1994. **Additional Relevant Findings and Factors:** • The arbitrator noted that there could be no criticism of the grievor for the positions he took in relation to departmental management, allocation of departmental resources, and the "equity" issue of class sizes for courses for which he was responsible. The arbitrator further noted that there was nothing wrong with seeking student support for a political issue that properly involves students. • The grievor was ultimately sanctioned for failing to foster and maintain a learning environment that was productive to scholarly learning, failing to attend scheduled tutorials, failing to deliver a scheduled diagnostic test, and failing to properly supervise his teaching assistants. • The grievor ultimately confirmed most of what was alleged against him, although he attempted to assign the blame for the incidents to others.

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
	that it "strikes at the very heart of a Professor's reputation, and will not soon be forgotten by students involved, many of whom will be at the University for some years thereafter."	• The grievor had never been disciplined before and the conflict between the grievor and the head of his department did not escalate "beyond rather extravagant language" (page 26). As such, the grievor was treated as a "first offender". • The grievor was only an average contributor to the University service component and had not been a major participant in scholarly research and publication. • The grievor did not constitute a safety or security risk, so there was no need to completely remove him from the University for a lengthy period.
University College of the North v. Manitoba (Thompson Grievance), [2011] M.G.A.D. No. 33 (Man. Arb.)	Paragraph 167(b): Labour administration cases dealing with similar conduct in the University context have resulted in unpaid suspension of less than three months, and include the following: … (b) An arbitration involving a tenure-track professor, who after two years of service was terminated as a result of his conduct in chairing a search committee. In terminating the professor, the University alleged that by chairing a search committee involving his wife, the Dean, he engaged in a breach of trust, and that e-mails complaining about the conduct of the Interim-President in rejecting the search committee's recommendation, as well as writing to the candidate and disclosing the Interim-President's rejection, each amounted to insubordination. In overturning the termination and substituting a two month unpaid suspension, the arbitrator noted that "[t]his is a significant penalty which should send a message that behaviour	**Outcome:** A two-month unpaid suspension. **Additional Relevant Findings and Factors:** • The arbitrator found that there had been no breach of trust. • The arbitrator found that the grievor's complaints regarding the Interim President were limited to a single spur-of-the-moment e-mail, which could have been dealt with through a verbal or written reprimand. • The University had not attempted progressive discipline for the grievor, who had an otherwise unblemished record.

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
	such as occurred here will not be tolerated."	
The University of Calgary Faculty Association (Prof. Polzer et al.) v. The University of Calgary, unreported award of the board of arbitration chaired by Arbitrator Sims, dated September 21, 1999	Paragraph 167(c): Labour administration cases dealing with similar conduct in the University context have resulted in unpaid suspension of less than three months, and include the following: … (c) An arbitration involving a two-week hearing in which five senior academics alleged that their Dean engaged in conduct over the course of more than three years that harassed them and infringed their academic freedom. The grievance included a history of vigorous debate about resource allocation, the structuring of programs and courses, the evaluation of research, and allegations that the Dean's methods and tactics of governance were non-consultative, harassing and demeaning, all of which resulted in a poisoned and dysfunctional work environment. The hearing Board concluded that the Dean had indeed engaged in some conduct aimed at "getting at" the grievors, but no sanction was issued.	**Outcome:** The University was directed to compensate the grievors for monies lost as a result of their spring/summer courses being cancelled. **Additional Relevant Findings and Factors:** • The board of arbitration dismissed all but one of the grievors' allegations of harassment and determined that the specific issues regarding academic freedom were a "grey area" that could be determined within the institution itself. • The board of arbitration accepted that the Dean had exceeded the bounds of his authority and acted in a harassing manner regarding one decision - canceling the spring and summer program that the grievors had taught for many years. The harassment arose because the Dean's decision was an attempt to penalize and "get at" the grievors for failing to go along with the Dean's views on evaluation methods offered during the regular academic year. • The board of arbitration specifically noted that the pattern of events leading up to the Dean's decision assisted them in categorizing the Dean's motive, but that they did not find the Dean's conduct in general to constitute

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
		harassment.
St. Lawrence College v. Ontario Public Service Employees Union (Young Grievance), [1998] O.L.A.A. No. 746 (OLRB)	Paragraph 169(a): By contrast, examples of the kind of egregious cases that give rise to unpaid suspension exceeding three months, but still short of termination, include: (a) An arbitration involving allegations of repeated physical and verbal sexual harassment, and gender discrimination perpetrated by a college professor against multiple female students, in a class designed specifically to teach mechanical automotive skills to female students. The majority of the Board found that although the College had failed to make out its case for sexual harassment of one student, it had proven that the professor had created a poisoned teaching environment through gender discrimination, favouritism toward certain students, the use and condonation of inappropriate, sexist, or sexual language in the class-room, and that as a result had placed the comfort of the students, his effectiveness as a teacher, and the very existence of the program in jeopardy. The majority of the Board found that grounds for termination were not made out, but instead ordered a five-month unpaid suspension.	**Outcome:** A five-month unpaid suspension. **Additional Relevant Findings and Factors:** • The majority of the board of arbitration found that the grievor "was a direct contributor to all of these problems and while not the primary cause of much of the commotion in the class he was culpable to some degree in his conduct" (paragraph 48). • The grievor had not acted in a manner that warranted discharge without first engaging in corrective discipline and behavioural training, since his misconduct could be described as failing to control others, doing little to stop harassment, and inadvertently engaging in discrimination. • The majority of the board of arbitration noted that the grievor's conduct "was not overt and direct but secondary and lacking in clarity of understanding and foresight that a well prepared and trained teacher ought to have" and that "[t]he severity of what has been proved is of consequence but not to the degree of gravity imposed by the College" (paragraph 56).
Okanagan	Paragraph 169(b): By contrast, examples of	**Outcome:** A one-year suspension.

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
University College and Okanagan University College Faculty Assn. (Craig Grievance), [1997] B.C.C.A.A.A. No. 313 (BC Arb.)	the kind of egregious cases that give rise to unpaid suspension exceeding three months, but still short of termination, include: … (b) An arbitration involving a professor found to have abused his position of authority and having engaged in an abuse of trust by carrying on a series of sexual relationships with multiple of his students, which the arbitrator found to constitute sexual harassment in the circumstances. In overturning the professor's dismissal and substituting a two-semester suspension, the arbitrator found that dismissal was excessive because it permanently curtailed the professor's future academic opportunities, and had impacted his health, finances and his ability to continue his academic work.	**Additional Relevant Findings and Factors:** • The case against the grievor involved two consensual sexual relationships, involving female students aged 19 and 27. The grievor was 32 at the time of these relationships. • The arbitrator concluded that the grievor's conduct did not fall within the concept of sexual harassment, as defined in the University's policy • The arbitrator found that there was a breach of trust but noted that such a breach would only constitute harassment in situations where the consent was not *bona fide*. The arbitrator did not find that the students' consent was not *bona fide*. • The arbitrator noted that a one-year suspension was a serious penalty. • The grievor had an otherwise unblemished record and had an exceptionally good reputation as a teacher and artist. • No other faculty member had been disciplined for consensual sexual relations with students. Faculty and students were not aware of the College's policy on the matter. • The grievor had suffered greatly as a result of the discipline and educated himself about sexual harassment. As a result, he

Case	Description by Applicants	Outcome and Additional Relevant Findings and Factors
		understood the seriousness of the situation and that any repeat offences would end his career.
The Mount Saint Vincent University Faculty Association and Mount Saint Vincent University (Stebbins), unreported decision of Arbitrator Outhouse, dated February 20, 1995	Paragraph 169(c): By contrast, examples of the kind of egregious cases that give rise to unpaid suspension exceeding three months, but still short of termination, include: … (c) An arbitration involving a professor grieving his termination and ban from campus by the University after having been convicted of defrauding a loan program orchestrated by the Provincial government. In terminating the professor, the University – which had only learned of the conviction after inquiries were made by the local media – argued that there was a clear and troubling nexus between the professor's field of study, financial transactions, and his conviction for committing financial fraud. In overturning the termination of the grievor, the arbitrator weighed the competing issues of the damage to the University's reputation, as well as the wilfully dishonest conduct of the grievor, against the grievor's relatively long-service of ten years, his previous good record, and the fact that the termination would all but assuredly end the grievor's career, and instead issued a one-year unpaid suspension.	**Outcome:** A one-year unpaid suspension. **Additional Relevant Findings and Factors:** • There was no suggestion that the grievor had ever taught unethical practices to students or risked doing so in the future. • The arbitrator was skeptical of the University's argument that professors have an implied responsibility to be role models, which was part of the basis for the University's decision to terminate the grievor. • The grievor had engaged in frank discussions with the University regarding his offence and conviction.

SCHEDULE "A" – List of Authorities

1. *Taucar v. University of Western Ontario Faculty Assn.*, 2011 ONSC 3069 (Div. Ct.)

2. *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, aff'd 2007 FCA 199, leave to appeal ref'd [2007] S.C.C.A. No. 391

3. *Stetler v. Ontario (Agriculture, Food and Rural Affairs Appeal Tribunal)*, 2005 CarswellOnt 2877, 76 O.R. (3d) 321 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 428

4. *Mohammadian v. Canada (Minister of Citizenship & Immigration)*, [2000] 3 FC 371, aff'd [2001] 4 FC 85 (FCA), leave to appeal ref'd 2002 CarswellNat 412 (SCC)

5. *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255

6. *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61

7. *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541

8. *Aylward v. McMaster University*, 1991 CarswellOnt 972 (Div. Ct.)

9. *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181

10. *Coote v. Zellers*, 2008 CarswellOnt 1231, 2008 O.J. No. 809 (C.A.)

11. *Silver Campsites Ltd. v. Pulham*, 2011 BCCA 352

12. *Ontario Psychological Association v. Mardonet*, 2015 ONSC 3063

13. *Abou-Elmaati v. Canada (Attorney General)*, 2013 ONSC 3176

14. *King v. University of Saskatchewan*, 1969 CarswellSask 38, [1969] S.C.R. 678

15. *Khela v. Mission Institution*, 2014 SCC 24

16. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

17. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

18. *Kane v. University of British Columbia*, 1980 CarswellBC 1, [1980] 1 S.C.R. 1105

19. *Russell v. Duke of Norfolk and others*, [1949] 1 All E.R. 109

20. *Hinke v. Thermal Energy International Inc.*, 2011 ONSC 1018 (Ont. Master)

21. *R v. Lyttle*, 2004 SCC 5

22. *University of Waterloo and University of Waterloo Faculty Assn. (Pan)*, 2007 CarswellOnt 10486 (Ont. Arb.)

23. *Clayson-Martin v. Martin*, 2015 ONCA 596

24. *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, 1997 CarswellQue 82, [1997] 1 S.C.R. 793

25. *W.U.F.A. v. University of Windsor (Taboun)*, 2002 CarswellOnt 8792, [2002] O.L.A.A. No. 1020 (Ont. Arb.)

26. *Fair v. Hamilton-Wentworth District School Board*, 2014 ONSC 2411 (Div. Ct.)

27. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63

28. *University of Ottawa and Association of Professors of the University of Ottawa (APUO) (Rancourt)*, unreported award of Arbitrator Foisy, dated January 27, 2014

29. *Assn. of Universities and Colleges Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22

30. *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, 2011 ONSC 4086 (Div. Ct.)

31. *Delios v. Canada (Attorney General)*, 2015 FCA 117

32. *Dupont Canada Inc., Kingston Works v. Kingston Independent Nylon Workers Union*, 1983 CarswellOnt 2409 (Ont. Arb.)

33. *Canada (Attorney General) v. Mowat*, [2011] 3 S.C.R. 471

34. *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65 (N.S.S.C.)

35. *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.)

36. *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.) leave to appeal ref'd (1982) 42 N.R. 270 (SCC).

37. *Rao v. McMaster University*, 2010 HRTO 1051

38. *McNaught v. Toronto Transit Commission*, 2005 CarswellOnt 237 (ONCA)

39. *Re Rowan,* 2012 ONCA 208

40. *Koscik v. Ontario (Labour Relations Board),* 2015 ONSC 1652 (Div. Ct.)

41. *Cameron v. Nanaimo (Regional District),* 2009 BCSC 1206, aff'd 2010 BCCA 73

42. *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, leave to appeal ref'd 2011 ONSC 3685 (Div. Ct.)

43. *Obsessions Dress Designs Ltd v. Tully*, 2004 CarswellOnt 868 (ONCA)

44. *KAP Holdings Inc. v. London (City),* 2008 CarswellOnt 9696 (Div. Ct.)

45. *R v. Curragh Inc.*, 1997 CarswellNS 88 (S.C.C.)

46. *Dickson v. Canadore College*, 2007 CarswellOnt 6910 (Div. Ct.)

47. *Chandler v. Assn. of Architects (Alberta),* 1989 CarswellAlta 160 (S.C.C.)

48. *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board),* 2011 SCC 62

49. *Byrnes v. Law Society of Upper Canada*, 2015 ONSC 2939 (Div. Ct.)

50. *Saskatoon (City) v. CUPE Local 47,* 2012 CarswellOnt 3306 (Ont. Arb.)

51. *Re Children's Hospital of Eastern Ontario and OPSEU,* 2015 CarswellOnt 13987 (Ont. Arb.)

52. *Shaw v. Phipps*, 2012 ONCA 155

53. *Canada (Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53

54. *Peel Law Association v. Pieters*, 2013 ONCA 396

55. *A.(J.) v B.(N.),* 2007 CarswellOnt 4210 (Ont. Child and Family Services Review Board)

56. *Newton v. Tataryn*, [1990] M.J. No. 209 (MBQB)

57. *Doyle v. Canada (Restrictive Trade Practices Commissions),* [1985] 1 F.C. 362 (F.C.A.), leave to appeal to S.C.C. ref'd (1985), 7 C.P.R. (3d) 235 (S.C.C.)

58. *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1990 CarswellOnt 821 (S.C.C.)

59. *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 CarswellOnt 99 (S.C.C.)

60. *Kupeyan v. Royal College of Dental Surgeons Ontario*, 1982 CarswellOnt 938 (Ont. Sup. Ct.)

SCHEDULE "B" – Statutes and Legislation

1. *Anti-Discrimination* Policy at sections 8, 24(a), 24(b), 32(a), 36-37, 44, 46-47, 63, 65(a), 65(b), 66, 70(a), and 73
2. *Courts of Justice Act*, R.S.O. 1990, c. C.43 at sections 20(1), 21(1), and 131
3. *Human Rights Code*, R.S.O. 1990, c. H.19 at sections 5(1) and (2), and 46.3(1)
4. *McMaster University Revised Policy and Regulations with Respect to Academic Appointment, Tenure and Promotion (2007)* at Section VI
5. *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 at sections 25(2), 32.0.1, 32.0.6, and 32.0.7
6. *Rules of Civil Procedure*, R.S.O. 1990, c. Reg. 194 at sections 1.04, 38, 39, 57.01, and 68
7. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, sections 2, 4(1), 9.1(3)(a)**,** 25.1(1), and 28

BART et al.
Applicants

-and-

MCMASTER UNIVERSITY et al.
Respondents
Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
Proceeding commenced at Toronto, Ontario

FRESH AS AMENDED FACTUM OF THE RESPONDENTS, MCMASTER UNIVERSITY, "SENIOR ADMINISTRATOR AT MCMASTER UNIVERSITY", AND "CERTAIN UNNAMED INDIVIDUALS AT MCMASTER UNIVERSITY"

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