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/Antidiscrimination under the McMaster University Antidiscrimination Policy, the Senior Administrator at McMaster University and Certain Unnamed Individuals at McMaster University

Respondents

FRESH AS AMENDED FACTUM OF THE APPLICANTS

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TABLE OF CONTENTS

PAGE

PART I - INTRODUCTION

1. The Applicants, who are all current or former distinguished tenured professors at the DeGroote School of Business at McMaster University bring this Application for Judicial Review of the decisions of the University's "Human Rights" Tribunal, which imposed punitive rather than remedial sanctions that had the disproportionate and disastrous effect of terminating the careers of three of the Applicants and seriously prejudicing the careers of all of the Applicants.

2. The imposed sanctions significantly exceeded the reasonable range of penalties that could have been justified based on the Tribunal's findings of fact.

3. The unfairness of the penalties meted out to the Applicants is compounded by the significant procedural unfairness which permeated the entire history of the proceedings.

4. The Tribunal found that the McMaster Office of Human Rights and Equity Services' ("HRES") handling of the pre-hearing investigation, including the length of time it took the Officer to act, the lack of transparency, and the grouping of the complaints "were ineffective" and all served to create "barriers to resolution" in the DSB.[1]

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[1] The Confidential Decision, pages, 313, 317-318, at Tab 2, page 340, and 344-345, of the Application Record, Vol. 1

5. McMaster's discipline process provided no internal mechanism to allow the Applicants to review the Tribunal's decisions or processes, which resulted in these draconian sanctions.

6. Accordingly, the Applicants bring this Application for Judicial Review in the nature of *certiorari*, seeking to quash the Confidential Decision dated May 15, 2013 (the "Confidential Decision") and the Confidential Remedies Decision dated September 23, 2013 (the "Remedies Decision") of the Board Senate Hearing Panel for Sexual Harassment/Anti-Discrimination (the "Tribunal") (collectively the "Tribunal Decisions" or the "Decisions") and the related heavily redacted public version of the Tribunal Decisions, also dated September 23, 2013 (the "Public Report").

7. At the centre of the Tribunal hearing were disputes about allegations and counter-allegations of harassment arising out of a "state of dysfunction" over the future direction, daily management and leadership of the DeGroote School of Business ("DSB") at McMaster University (the "University"). The disputes involved numerous individuals within the DSB and the University administration, including the former DSB Dean and the Provost. However, only a handful of individuals were singled out by the Tribunal for punishment.

8. As a result of the Tribunal Decisions, six out of seven of the Applicants, all distinguished current or former tenured professors at the DSB without any history of discipline,[2] were punished as follows:[3]

- three of the Applicants (Dr. Chris Bart, Dr. George Steiner and Dr. Wayne Taylor) were forced into early retirement due to a three year suspension without pay, benefits, privileges or access to the University premises; [4]

- two of the Applicants (Dr. Devashish Pujari and Dr. Sourav Ray) received suspensions of varying length without pay, benefits, privileges or access to the University premises and one Applicant (Dr. Joseph Rose) received a formal reprimand to be maintained on his record for five years;[5] and

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[2] None of the sanctioned professors had any history of discipline. See: the Affidavit of Dr. Chris Bart, sworn February 2, 2015, Tab 8, page 65 of the Application Record, Vol. 2, para. 99 ("Bart Affidavit"); the Affidavit of Dr. Devashish Pujari, sworn February 2, 2015, Tab 9, page 673 of the Application Record, Vol. 2, para. 6 ("Pujari Affidavit"); the Affidavit of Dr. Joseph B. Rose, sworn February 2, 2015, Tab 11, page 745 of the Application Record, Vol. 3, para. 9 ("Rose Affidavit"); the Affidavit of Dr. Sourav Ray, sworn February 2, 2015, Tab 12, page 765 of the Application Record, Vol. 3, para. 6 ("Ray Affidavit"); the Affidavit of Dr. George Steiner, sworn February 2, 2015, Tab 13, page 881 of the Application Record, Vol. 3, para. 8 ("Steiner Affidavit"); the Affidavit of Dr. Wayne Taylor, sworn February 2, 2015, Tab 14, page 973 of the Application Record, Vol. 3, para. 12 ("Taylor Affidavit"). Dr. Pujari, as Area Chair, did receive a reprimand letter for a letter he submitted and shared with his area outlining his disagreement with Mr. Bates over the proposal to open a DSB campus in Burlington (the "Burlington expansion plan"); however this disciplinary action was grieved and the reprimand letter subsequently removed from his record. See Pujari Affidavit, Tab 9, pages 676-677 of the Application Record, Vol. 2, at paras. 19-22.

[3] Dr. Richardson did not receive any penalty as he was not a respondent to the group complaint brought against the other six Applicants that resulted in the penalties levied against them (Complaint "B" or "003 Proceeding"). However, Dr. Richardson is a party to this Judicial Review Application as he was a party to the other group complaint (Complaint "A" or "002 Proceeding") brought by the Applicants against the former Dean and the University which was dismissed by the Tribunal. Both Complaint A and Complaint B were heard together and all seven Applicants seek *certiorari* on the basis of procedural unfairness and denial of natural justice. However, in this factum, when discussing the "Applicants" in the context of any discussion involving the penalties or findings giving rise thereto, the factum will refer to the "sanctioned Applicants" which refers to all the Applicants except Dr. Richardson.

[4] Dr. Bart, Dr. Steiner and Dr. Taylor each received three year suspensions. The suspensions are without pay, privileges or benefits. See Bart Affidavit, Tab 8, page 651 of the Application Record, Vol. 2, paras. 82, 84 and Exhibit "C" thereto and the Remedies Decision, pages 10-11, at Tab 3, pages 357-358 of the Application Record, Vol. 1; Steiner Affidavit, Tab 13, page 906 of the Application Record, Vol. 3, paras. 102, 104 and Exhibit "N" thereto and the Remedies Decision, page 12, at Tab 3, page 359 of the Application Record, Vol. 1; and Taylor Affidavit, Tab 14, page 991 of the Application Record, Vol. 3, paras. 87-88 and Exhibit "E" thereto, and the Remedies Decision, page 11, at Tab 3, page 358 of the Application Record, Vol. 1.

[5] Dr. Pujari received a one year suspension; Dr. Ray received a one academic term suspension; Dr. Rose received a formal reprimand to be maintained on his record for five years. These Applicants have since returned to the University after serving out their respective punishments and have undergone mandatory sensitivity, harassment and conflict resolution training. See Pujari Affidavit, Tab 9, pages 689-691 and 695-696 of the Application Record, Vol. 2, paras. 73, 78, 95-101 and Exhibit "C" thereto, and the Remedies Decision, page 10, at Tab 3, page 357 of the Application Record, Vol. 1; Ray Affidavit, Tab 12, pages 786-788 of the Application Record, Vol. 3, paras. 97-107 and Exhibit "I" thereto, and the Remedies Decision, page 12, at Tab 3, page 358 of the Application Record, Vol. 1; and Rose Affidavit, Tab 11, pages 757-758, of the Application Record, Vol. 3, paras. 62, 66-67, and the Remedies Decision, page 13, at Tab 3, page 360 of the Application Record, Vol. 1.

- all six sanctioned Applicants were stripped of positions of academic authority and barred from holding any positions of authority indefinitely.[6]

9. It is critical to note that given the structure of the University's policies, any recommendation by the Tribunal for suspension is effectively *worse* than termination—the latter provides for an internal right of review before a separate Senate Sub-Committee, which is designed to address allegations of procedural unfairness. In contrast, a suspension can be carried out unilaterally by the President, without oversight, and there is no right of procedural review regardless of its duration.[7]

10. The Tribunal process was seriously flawed from the very outset. The Tribunal contravened the principles of procedural fairness and natural justice in multiple respects, and in particular:

(a) The Tribunal process was fatally flawed as a result of an opaque investigation process, which was followed by a hearing framework that forced 15 individualized harassment complaints into two group complaints, pitting two sides against each other in a single hearing;

(b) One of the Tribunal members who participated in and signed the Decisions was absent from the hearing on two separate occasions, missing testimony from key witnesses whose credibility assessment informed fundamental findings in the Decisions;

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[6] All of the six sanctioned Applicants were stripped from positions of authority and prohibited from holding any positions of authority for a minimum of five years after his return to the University. However, any future positions of authority are still subject to approval by the President.

[7] See for instance DSB-0802, Tab 18, page 1492 of the Application Record, Vol. 5 (the "Yellow Document"), and specifically sections V and VI, at pages 1522 and 1523-1527, respectively, of the Application Record, Vol. 5, and Appendix "B" hereto, at s. 74.

(c) The same Tribunal member was promoted by the University to a senior administrative position just weeks after the conclusion of the Tribunal hearing and well in advance of receiving remedy submissions and the release of the two Tribunal Decisions in which he participated;

(d) Compounding the unfairness was the extremely unreasonable and prejudicial schedule imposed by the Tribunal (counsel's best estimate was that they required 74 hearing days to make their case but were only granted 21) [8] and the Tribunal permitting the receipt of evidence damaging to the Applicants when the Applicants were not given proper notice, thus denying the Applicants the right to make full answer and defence;

(e) The Tribunal failed to maintain an adequate record and as a result filed a seriously deficient audio recording of the proceedings, prejudicing the Applicants' right to properly scrutinize the proceedings for the purpose of preparing a Judicial Review[9]; and

(f) There is no internal avenue for reviewing the Tribunal Decisions.

11. The severe penalties imposed by the Tribunal were grossly disproportionate to the actions for which they were punished. It is undisputed that, not unlike other academic settings, there was a history of serious debate regarding leadership and administrative issues leading to internal conflict. Nevertheless, the sanctioned Applicants received excessively harsh, discriminatory and draconian sanctions, in

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[8] Counsel provided an estimate of 74 days, which did not include an estimate of Mr. Avraam's time required to respond to the 003 Complaint on behalf of the University. This occurred days before the Tribunal's order that evidence in chief should be predominantly entered by affidavit, and also its order for consolidation. The evidence of the Applicants counsel remains that notwithstanding these two changes in procedure, 21 days was still insufficient to complete the hearing.
However, the evidence of Applicants' counsel is that this 21 days was still insufficient. See excerpt of the cross-examination of Jeff Hopkins dated November 11, 2015, Tab 5(B), pages 56-58 of the Supplementary Application Record, Vol. 1,.

[9] In the University Respondents' answers to undertakings, the Respondents' affiant Mr. Heeney admits that the audio quality of the Tribunal proceedings made it impossible to provide definitive answers to the cross-examination questions; see answers-to-undertakings for questions 1025, 1035, 1059 of Mr. James Heeney, Tab 8(I), pages 317-318 of the Supplementary Application Record, Vol. 1.

response to harassment allegations brought under the McMaster University Anti-Discrimination Policy.

12. Despite the University having urged the Tribunal to recommend that the University immediately remove and/or suspend the sanctioned Applicants,[10] and despite the urgent pace of the HRES directed investigations, and the Tribunal's conduct of the subsequent hearing, the Tribunal took nearly a year from the last day of the hearing (June 6, 2012) to release the Confidential Decision on liability (May 15, 2013), and even longer to release the Remedies Decision (September 23, 2013). During this time, the sanctioned Applicants continued to work within the DSB without incident or complaint and in some cases, received additional responsibilities and accolades.[11]

13. In order to justify the harsh sanctions against the Applicants, the Tribunal stated that the sanctions against each of the Applicants were necessary in order to remedy the poisoned atmosphere at the DSB.[12]

14. The Tribunal made this ruling despite the fact that the Tribunal received evidence from at least seven witnesses all of whom testified that the atmosphere at the DSB

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[10] Affidavit of Catherine Milne, sworn December 23, 2014, Tab 4, page 398 of the Application Record, Vol. 2, para. 108, and Exhibit "B" thereto (University's Submissions on Remedy in U/SHAD 003), page 448 of the Application Record, Vol. 2, at para. 2(a). ("Milne Affidavit").

[11] Bart Affidavit, Tab 8, page 650 of the Application Record, Vol. 2, para. 77; Pujari Affidavit, Tab 9, pages 688-689 of the Application Record, Vol. 2, paras. 70-72; Rose Affidavit, Tab 11, page 756 of the Application Record, Vol. 3, para. 61; Ray Affidavit, Tab 12, pages 781-782 of the Application Record, Vol. 3, paras. 72-80; Steiner Affidavit, Tab 13, page 906 of the Application Record, Vol. 3, para. 101; Taylor Affidavit, Tab 14, page 989 of the Application Record, Vol. 3, para. 80. As detailed in paragraphs 70-72, and 72-80 of their respective affidavits, both Drs. Pujari and Ray received additional responsibilities and/or accolades in the intervening time between the end of the hearing and their subsequent suspension. See also Milne Affidavit, Exhibit "A" thereto, Tab 4, page 411, of the Application Record, Vol. 2, para. 36.

[12] The Remedies Decision, page 7, which is at Tab 3, at page 354 of the Application Record, Vol. 1.

was already much improved under its new Dean.[13] None of this testimony about the improved environment is referred to in the Tribunal Decisions.

15. In its Decisions, the Tribunal concluded that the University respondent was also liable for contributing to a "poisoned" work environment.[14] As a result, the Tribunal ordered the University to review and revise the Anti-Discrimination Policy by September 23, 2014. The University failed to do so in time, in breach of the Tribunal's order.[15] In contrast, the harsh penalties levied against the Applicants were swiftly carried out by the University, causing immediate, devastating and enduring professional and personal harm.[16] For the individual Applicants who have since returned to the University after completing their suspensions (Dr. Ray, Dr. Pujari and Dr. Rose), they continue to suffer the prejudicial effects of the Decisions on their career prospects and/or re-integration in the school.

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[13] Steiner Affidavit, Tab 13, pages 904-906 of the Application Record, Vol. 3, paras. 91-100, and Exhibits I, J, K, L, and M thereto.
[14] The Confidential Decision, page 312, at Tab 2, page 339 of the Application Record, Vol. 1.
[15] Affidavit of Elliot P. Saccucci, sworn February 19, 2015, Tab 16, page 1040 of the Application Record, Vol. 4, para. 51 ("Saccucci Affidavit"), and Exhibit "MM" thereto, at pages 1277-1278 of the Application Record, Vol. 4. The University was declared to be in breach by the Tribunal's Order from the Remedies Decision; however, the Tribunal declined to sanction the University and granted an extension to complete the review.
[16] Bart Affidavit, Tab 8, pages 651-652 and 654-656 of the Application Record, Vol. 2, paras. 83, 86-89, 95-96, 98, 100-105; Pujari Affidavit, Tab 9, pages 689, 691-697 of the Application Record, Vol. 2, paras. 73, 79-104; Rose Affidavit, Tab 11, pages 757-759 of the Application Record, Vol. 3, paras. 62-69; Ray Affidavit, Tab 12, pages 786-790 of the Application Record, Vol. 3, paras. 97, 104-106, 108-119; Steiner Affidavit, Tab 13, pages 906-911 of the Application Record, Vol. 3, paras. 102-104, 107-108, 113-123; and Taylor Affidavit, Tab 14, pages 991-993 of the Application Record, Vol. 3, paras. 87-98.

PART II - THE FACTS

16. The relevant factual context can be narrowed into the following chronological sub-categories, which illustrate the overarching issues of procedural fairness and natural justice:

1. the HRES-directed investigation and the establishment of the flawed Tribunal process;
2. the composition and conduct of the Tribunal panel;
3. the procedural framework of the Tribunal hearing;
4. the nature of the penalties sought by the University and ultimately recommended by the Tribunal; and
5. the conduct of the Tribunal after the release of the Tribunal Decisions.

A chronology of the key events is attached as Appendix "A".

i. The HRES-Directed Investigation and Formulation of the Complaints and Tribunal Process

17. At the centre of the proceedings below was the Tribunal's inquiry into two "group complaints" brought under the Anti-Discrimination Policy for harassment, known as the 002 Complaint (wherein the majority of the Applicants were the complainants against former Dean Bates and the University) and the 003 Complaint (wherein the majority of the Applicants were respondents to complaints brought by other faculty and staff against these Applicants and the University).

18. Many of the complaints heard by the Tribunal arose from, and included, incidents that occurred many years prior to the Tribunal's proceedings. For instance, the 003 Complaint included events dating as far back as April 2005[17], but were not investigated until the summer of 2009.

19. However, the Tribunal was not convened by the President until March 31, 2011 and did not become involved until the start of its pre-hearings in the spring of 2011, and the subsequent consolidated hearing in March to June of 2012. The Sanctioned Applicants were then suspended in the fall of 2013.

20. Starting in 2006, there were serious divisions within the DSB stemming from (i) the appointment of Paul Bates as Dean[18] and (ii) a debate about the expansion of the DSB to a campus in Burlington, Ontario. The "Burlington expansion plan" was advocated by Mr. Bates and his administration, including the Provost Dr. Ilene Busch-Vishniac.[19] Also mixed with these divisive issues was a policy dispute within the DSB over the hiring of Contractually-Limited Appointments ("CLAs") as teaching staff rather than additional tenure-track research professors and the Tenure and Promotion Process in general.[20]

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[17] Affidavit of Dr. Milena Head, DSB 2106, Tribunal's Record, Vol. 16, page 11242, at para. 17.
[18] Paul Bates was first appointed Dean in 2004 and re-appointed in 2009.
[19] Preliminary Audit on Allegations of Discrimination at the School of Business, McMaster University, page 7, at Tab 19, page 1541 of the Application Record, Vol. 5 (the "Komlen Report"). President's Advisory Committee on the DeGroote School of Business, Report to the President, at page 15, at Tab 20, page 1570 of the Application Record, Vol. 5 (the "PACDSB Report"); Pujari Affidavit, Tab 9, page 675 of the Application Record, Vol. 2, para. 13; Steiner Affidavit, Tab 13, page 882 of the Application Record, Vol. 3, para. 13; and Taylor Affidavit, Tab 14, page 976 of the Application Record, Vol. 3, para. 26.
[20] Rose Affidavit, Tab 11, pages 746-747 of the Application Record, Vol. 3, paras. 14, 22; Steiner Affidavit, Tab 13, page 882 of the Application Record, Vol. 3, para. 14; and Taylor Affidavit, Tab 14, page 976 of the Application Record, Vol. 3, para. 26.

21. In the fall of 2007, there was vocal opposition to the Dean and the Provost's method of handling the proposed Burlington expansion.[21] As a result of their outspoken opposition to what they viewed as lack of consultation over the Burlington expansion plan, five professors in charge of their areas within the DSB (the Area Chairs), including the Applicant Dr. Pujari,[22] received disciplinary letters in their files from the Provost. These letters were later withdrawn after grievances were filed against the Provost.[23]

22. Although the Burlington expansion vote ultimately passed at a faculty meeting in December 2007, a great deal of division remained over the leadership and strategic direction of the DSB.[24]

23. In early 2008, Dean Bates announced his intention to seek a second term. An *Ad Hoc* Dean Selection Committee (the "Committee") was struck by the Provost, Dr. Ilene Busch-Vishniac. Two of the Applicants, Drs. Steiner and Taylor, who had been selected by their Areas to do so, were denied the opportunity to sit on the Committee by the Provost.[25]

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[21] Bart Affidavit, Tab 8, page 637 of the Application Record, Vol. 2, paras. 20-21; Pujari Affidavit, Tab 9, pages 675-676 of the Application Record, Vol. 2, paras. 13-18; Steiner Affidavit, Tab 13, pages 881-883 of the Application Record, Vol. 3, paras. 10, 12-13, 15; and Taylor Affidavit, Tab 14, page 977 of the Application Record, Vol. 3, para. 28.

[22] The Applicant Dr. Pujari was the Area Chair for Strategic Market Leadership and Health Services Area.

[23] The Komlen Report, page 7, at Tab 19, page 1541 of the Application Record, Vol. 5; and Pujari Affidavit, Tab 9, page 675-677 of the Application Record, Vol. 2, paras. 14-22.

[24] Steiner Affidavit, Tab 13, pages 882-883 of the Application Record, Vol. 3, para. 15; See also DSB-0094, at Tab 23, page 1607 of the Application Record, Vol. 5 (the "MUFA Vote"), which indicated that 82% of DSB faculty who voted in a mailed ballot conducted by the McMaster University Faculty Association ("MUFA") opposed Dean Bates's continued leadership of the DSB.

[25] Steiner Affidavit, Tab 13, pages 883-884 of the Application Record, Vol. 3, paras. 18-19; and Taylor Affidavit, Tab 14, page 977 of the Application Record, Vol. 3, para. 31.

24. The result of a professionally audited vote conducted by the McMaster University Faculty Association showed that 82% of the voting DSB faculty opposed Mr. Bates's continued leadership as Dean.[26]

25. Nevertheless, it appeared that the Committee struck and chaired by the Provost was likely to recommend the re-appointment of Dean Bates to the University.[27] In view of this impending recommendation, twenty-one tenured faculty members of the DSB commissioned a Performance Report which critically assessed Mr. Bates's tenure as Dean.[28] The Report, to which the Applicants Dr. Pujari, Dr. Rose, Dr. Steiner, Dr. Bart and Dr. Taylor were all signatories, was presented to the University administration in December 2008.[29]

26. The signatories to the Performance Report were collectively referred to as the "G21" during the Tribunal hearings.[30]

27. The Dean was re-appointed by the University in May 2009.[31]

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[26] The MUFA Vote, Tab 23, page 1607 of the Application Record, Vol. 5.
[27] Bart Affidavit, Tab 8, pages 638-639 of the Application Record, Vol. 2, paras. 28-30; and Taylor Affidavit, Tab 14, page 978 of the Application Record, Vol. 3, para. 33.
[28] Bart Affidavit, Tab 8, page 638 of the Application Record, Vol. 2, paras. 24-26; Rose Affidavit, Tab 11, page 747 of the Application Record, Vol. 3, paras. 17-18; and Taylor Affidavit, Tab 14, pages 977-978 of the Application Record, Vol. 3, paras. 30-34.
[29] See for instance DSB-0292, page 1, at Tab 24, page 1614 of the Application Record, Vol. 5 (the "Performance Report").
[30] Bart Affidavit, Tab 8, page 638 of the Application Record, Vol. 2, para. 27; Rose Affidavit, Tab 11, page 747 of the Application Record, Vol. 3, para. 19; and Taylor Affidavit, Tab 14, page 978 of the Application Record, Vol. 3, para. 35. This group included at least twenty-one professors in the DSB and included the Applicants in this proceeding. As discussed in Issue "D", the term G21 was then used by the Tribunal throughout the hearing to refer to the Applicants (and others) who were in receipt of emails relating to the debate and expressed opposition to Mr. Bates's re-appointment; it eventually became a negative term to label the evidence of the sanctioned Applicants (and their witnesses) in the proceedings and the Decisions.
[31] Bart Affidavit; Tab 8, page 639 of the Application Record, Vol. 2, para. 31; and Taylor Affidavit, Tab 14, page 978 of the Application Record, Vol. 3, para. 36. See also Chronology at Appendix "A" to this factum.

28. In June 2009, the Provost commissioned an investigation and report by the HRES and its Director, Mr. Milé Komlen, into allegations of workplace harassment and bullying, and the poisoned work environment generally at the DSB.[32]

29. This was an inconsistent application of the HRES' jurisdiction. The HRES had previously declined to consider Dr. Pujari's 2008 harassment complaint against senior administrators and faculty in the DSB, including the Provost, on the basis that it lacked the jurisdiction to investigate workplace harassment or bullying that did not relate to any enumerated grounds under human rights legislation, such as race, gender or religion.[33]

30. The Provost, who ultimately investigated Dr. Pujari's 2008 complaint, knew that HRES had declined to investigate because "it was not the right place for this issue".[34]

31. Although it is the evidence of the HRES Director (and the Officer) Mr. Komlen in this Application is that the HRES' jurisdiction expanded in 2010 to include workplace harassment as a result of the enactment of Bill 168 under the *Occupational Health and Safety Act*[35], this statutory change occurred *after* Mr. Komlen had already commenced his 2009 investigation at the Provost's behest,

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[32] The Komlen Report, pages 1-2, at Tab 19, pages 1535-1536 of the Application Record, Vol. 5.
[33] Pujari Affidavit, Tab 9, page 678 of the Application Record, Vol. 2, paras. 28-29 and DSB-0699, at Tab 22, pages 1602-1604 of the Application Record, Vol. 5 ("Pujari HRES Jurisdiction e-mail").
[34] DSB-0699, at Tab 22, pages 1602-1604 of the Application Record, Vol. 5 ("Pujari HRES Jurisdiction e-mail")
[35] Affidavit of Mile Komlen, sworn October 20, 2015 , Tab 3, page 463 of the Respondents' Record, Vol. 2, para. 4. ["Komlen Affidavit"].

and *after* the vast majority of the events which gave rise to the allegations of harassment against the Applicants had already occurred.[36]

32. Accordingly, the University's Human Rights mechanisms were applied to incidents that, based on the Officer's own evidence in this Application, pre-dated their jurisdiction pursuant to the Policy.

33. Bill 168 of the *Occupational Health and Safety Act* received Royal Assent on December 15, 2009[37]; it came into force six months later and was not given retroactive or retrospective effect.[38]

34. In March of 2010, Mr. Komlen released a report titled "Preliminary Audit on Allegations of Discrimination and Harassment at the School of Business, McMaster University" (the "Komlen Report"). It did not include any reference to HRES declining to investigate workplace harassment complaints in the DSB on jurisdictional grounds.

35. The Komlen Report identified a "fractious and divisive debate over the School's governance that has involved faculty members and administrators" at the DSB. It

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[36] See the Affidavit of Dr. Terry Flynn, DSB-2098, pages 11079-11099 of the Tribunal's Record, Vol. 16, at paras. 15-37, 40, 42, 44-95; the Affidavit of Peter Vilks, DSB-2100, pages 11115- 11122, 11124, 11127-11135 of the Tribunal's Record, Vol. 16, at paras. 15-48, 55-58, 69-90; the Affidavit of Ms. Rita Cossa, DSB-2102, pages 11177-11191 of the Tribunal's Record, Vol. 16, at paras. 12-56; the Affidavit of Dr. Brian Detlor, DSB-2103, pages 11205-11214 of the Tribunal's Record, Vol. 16, at paras.12-62; the Affidavit of Dr. Milena Head, DSB-2106, pages 11242-11253 of the Tribunal's Record, Vol. 16, at paras. 17-86; the Affidavit of Dr. Chris Longo in the 003 Complaint, DSB-2108, pages 11266-11267, 11268-11279 of the Tribunal's Record, Vol. 16, at paras. 7-14, 18-60; and the Affidavit of Ms. Linda Stockton, DSB-2111, pages 11301-11309, 11311-11320, 11323-11336 of the Tribunal Record, Vol. 16, at paras. 9-13, 17-44, 50-74, 84-85, 89-129.

[37] http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2181&detailPage=bills_detail_status

[38] Bill 168, *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)2009*, S.O. 2009 C. 23, s. 9.

outlined a number of causes of divisiveness within the DSB, chiefly the on-going debate about the Burlington expansion plan.[39] Mr. Komlen concluded that "McMaster University must act immediately to resolve the situation in order to ensure the timely opening of the Burlington campus".[40]

36. The Komlen Report also found that: "on the basis of statements from the faculty and observations in this preliminary audit, the Officer concludes there is a likelihood that harassment has been encountered at the School, including 'bullying' (or psychological harassment), intimidation and academic 'mobbing'"[41]; the DSB "has likely become a dysfunctional work environment, thereby requiring **immediate intervention**"[42]; and "[a] sufficient number of allegations of offences have been received through the course of this preliminary audit to warrant the advice to the President that **formal complaints** should be lodged against certain individual respondents."[43] [Emphasis added].

37. As a result, the Komlen Report recommended, *inter alia*, (a) the "Invocation of the Anti-Discrimination Policy/ Investigation and Resolution of Complaints with the University as Complainant" including the "utilization of the formal complaint procedures under the Policy before the University's Human Rights Tribunal" and

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[39] The Komlen Report described the Burlington expansion plan as follows: "Scheduled to open and receive students in September 2010, it is clear that the School has a vital interest in ensuring that the Burlington campus is successful." See the Komlen Report at page 7, at Tab 19, page 1541 of the Application Record, Vol. 5.
[40]The Komlen Report at page 18, at Tab 19, page 1552 of the Application Record, Vol. 5.
[41] The Komlen Report at pages 13-14, at Tab 19, pages 1547-1548 of the Application Record, Vol. 5.
[42] The Komlen Report at page 14, at Tab 19, page 1548 of the Application Record, Vol. 5.
[43] The Komlen Report at page 15, at Tab 19, page 1548 of the Application Record, Vol. 5.

(b) the "Invocation Of Group Conflict Policy/Appointment of Review Committee and Suspension of Faculty Bylaws".[44]

38. As noted in the Komlen Report, where the University seeks to act as Complainant under the Policy, the Vice-President/Provost, or where a conflict of interest exists (as was the case here) the President, must communicate with all alleged respondents and review all information prior to deciding whether to initiate formal procedures against those respondents within six weeks from the date of receiving the information.[45]

39. Following the release of the Komlen Report, the President of the University invoked the Policy and appointed the President's Advisory Committee on the DSB (PACDSB) to report on the status of the DSB.[46]

40. The proceedings below marked the first time the Policy was used to address allegations of personal harassment with respect to an inter-faculty dispute.[47] None of the Applicants had been briefed on the Policy by the University, nor had they even heard of it prior to their involvement with HRES and the Tribunal.[48] The

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[44] The Komlen Report, pages 14-15, at Tab 19, pages 1548-1549 of the Application Record, Vol. 5.
[45] The Komlen Report, page 14, at Tab 19, pages 1548 of the Application Record, Vol. 5.
[46] The PACDSB Report, page 4, at Tab 20, page 1559 of the Application Record, Vol. 5; and Steiner Affidavit, Tab 13, page 888 of the Application Record, Vol. 3, para. 34.
[47] Milne Affidavit, Tab 4, page 371 of the Application Record, Vol. 2, para. 13; Bart Affidavit, Tab 8, page 647 of the Application Record, Vol. 2, para. 66; Rose Affidavit, Tab 11, page 753 of the Application Record, Vol. 3, para. 49; Ray Affidavit, Tab 12, page 768 of the Application Record, Vol. 3, para. 21; Steiner Affidavit, Tab 13, page 885 of the Application Record, Vol. 3, para. 24; and Taylor Affidavit, Tab 14, page 979 of the Application Record, Vol.3, para. 43.
[48] Bart Affidavit, Tab 8, page 647 of the Application Record, Vol. 2, para. 66; Pujari Affidavit, Tab 9, page 685 of the Application Record, Vol. 2, para. 56; Affidavit of Dr. William Richardson, sworn February 2, 2015, Tab 10, page 737 of the Application Record, Vol. 3, para. 16 ("Richardson Affidavit"); Rose Affidavit, Tab 11, page 749 of the Application Record, Vol. 3, para. 26; Ray Affidavit, Tab 12, page 767 of the Application Record, Vol. 3, para. 14;

fact that no such training had been provided to the Applicants was raised before the Tribunal.[49]

41. Indeed, until the Policy was invoked against them, the sanctioned Applicants had understood that the Faculty Code of Conduct governed allegations of personal harassment between members of the faculty and between faculty and staff.[50]

42. The Faculty Code of Conduct and the Policy overlap in the type of conduct they purport to govern; however, unlike the Policy, the Faculty Code of Conduct has no provision for a "group complaint".[51]

43. After completing his investigation, which began in June 2009 and ended with his report in March 2010, more than six months later Mr. Komlen retained two investigators, Ms. Shari Novick and Ms. Catherine Milne, to conduct interviews with various individuals at the DSB.[52]

Steiner Affidavit, Tab 13, page 885 of the Application Record, Vol. 3, para. 22; and Taylor Affidavit, Tab 14, page 979 of the Application Record, Vol. 3, para. 39. Although Dr. Pujari had previously been directed to HRES by the Provost, he was not aware of the Policy at this time.

[49] See the Applicants' 003 Affidavits: Pujari 003 Affidavit, DSB 2291, Vol. 17, page 12301 of the Tribunal's Record, para. 8; Bart 003 Affidavit, DSB 2292, Vol. 17, page 12372 of the Tribunal's Record, para. 7; Steiner 003 Affidavit, DSB 2293, Vol. 17, page 12391 of the Tribunal's Record, para. 8; Rose 003 Affidavit, DSB 2294, Vol. 17, page 12462 of the Tribunal's Record, para. 12; and Ray 003 Affidavit, DSB 2295, Vol. 17, page 12476 of the Tribunal's Record, para. 13.

[50] See for instance Bart Affidavit, Tab 8, page 646 of the Application Record, Vol. 2, para. 63; Pujari Affidavit, Tab 9, page 684 of the Application Record, Vol. 2, para. 54; Rose Affidavit, Tab 11, page 753 of the Application Record, Vol. 3, para. 46; Ray Affidavit, Tab 12, page 767 of the Application Record, Vol. 3, para. 15; and Taylor Affidavit, Tab 14, page 979 of the Application Record, Vol. 3, para. 40.

[51] See DSB-0793, at Tab 21, pages 1592-1597 of the Application Record, Vol. 5, and section 5 of Appendix "A" at page 6 thereto, at page 1597 of the Application Record, Vol. 5 (the "Faculty Code"); Bart Affidavit, Tab 8, page 647 of the Application Record, Vol. 2, para. 65; Pujari Affidavit, Tab 9, pages 684-685 of the Application Record, Vol. 2, paras. 55-56; Rose Affidavit, Tab 11, page 753 of the Application Record, Vol. 3, paras. 47-48; Ray Affidavit, Tab 12, pages 767-768 of the Application Record, Vol. 3, paras. 16-20; and Taylor Affidavit, Tab 14, page 979 of the Application Record, Vol. 3, paras. 41-42.

[52] Milne Affidavit, Tab 4, pages 370-371 of the Application Record, Vol. 2, paras. 10-11.

44. All of the Applicants[53] were interviewed by Ms. Milne in aid of her report looking into their issues with the University and the Dean. At the direction of Mr. Komlen, Ms. Milne did not interview the respondent, Mr. Bates.[54]

45. During the Milne investigation, the Applicants were not aware that another set of individuals within the DSB was being interviewed by the investigator Ms. Shari Novick as part of a separate investigation laying the groundwork for a separate "group complaint" to be brought against the Applicants.[55] The Applicants were never contacted as respondents to any complaints by Ms. Novick, Mr. Komlen or the President and were not given notice as respondents until the Tribunal was struck and they received the 003 Complaint.

46. Ms. Novick was retained on or about October 18, 2010.[56] Ms. Milne was retained on or about November 3, 2010.[57]

47. At the outset of their retainers, both investigators understood that they would meet with both complainants and respondents[58], as is generally the case for a workplace investigator.[59]

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[53] Excluding Dr. Ray, who was not interviewed for either of the Milne or Novick Reports.
[54] Milne Affidavit, Tab 4, pages 370-371, 379 of the Application Record, Vol. 2, paras. 10, 45; and Supplementary Affidavit of Catherine Milne, sworn October 30, 2015, Tab 1, page 4 of the Supplementary Application Record, Vol. 1 ("Supplementary Milne Affidavit"), and E-mail between Catherine Milne and Mile Komlen, dated November 29, 2010, Tab 9(R), page 361 of the Supplementary Application Record, Vol. 2.
[55] Affidavit of Jeff C. Hopkins, sworn December 18, 2014, Tab 5, pages 565-566 of the Application Record, Vol. 2, para. 26 ("Hopkins Affidavit"); Bart Affidavit, Tab 8, page 644 of the Application Record, Vol. 2, paras. 50-53; Pujari Affidavit, Tab 9, page 682 of the Application Record, Vol. 2, para. 44; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 36; Steiner Affidavit, Tab 13, pages 893-894 of the Application Record, Vol. 3, paras. 55-56; and Taylor Affidavit, Tab 14, pages 984-985 of the Application Record, Vol. 3, paras. 61-63, 65.
[56] E-mail between Mile Komlen and Shari Novick, dated October 18, 2010, Tab 9(F), page 340 of the Supplementary Application Record, Vol. 2.
[57] Komlen Affidavit, Tab 4, page 470 of the Respondents' Record, Vol. 2, at para. 23.

48. The investigators were told by Mr. Komlen whom they should interview[60] and when the interviews were to be conducted[61], and they were provided with the anticipated evidence of the individual complainants prior to meeting with them.[62]

49. Although the events to be investigated dated as far back as 2005, the entire investigation, which at the time included 16 individual complainants, had to be completed by the HRES imposed deadline of mid-December, 2010.[63]

50. As a result of the short time-frame, and scheduling issues of the parties, Mr. Komlen was informed on multiple occasions by the investigators that they did not anticipate being able to meet his deadline in mid-December.[64] Shortly after receiving these concerns, Mr. Komlen informed each of the investigators that it

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[58] Komlen Affidavit, Tab 4, page 473 of the Respondents' Record, Vol. 2, at para. 32.
[59] Excerpt of the cross-examination of Shari Novick, dated December 14, 2015, Tab 7(A), page 81 of the Supplementary Application Record, Vol. 1.
[60] Milne Affidavit, Tab 4, pages 370-371, 379 of the Application Record, Vol. 2, paras. 10, 45; Steiner Affidavit, Tab 13, page 889 of the Application Record, Vol. 3, para. 39; excerpt of the transcript of the Shari Novick cross-examination, dated December 14, 2015, Tab 7(B), page 82 of the Supplementary Application Record, Vol. 1.
[61] Excerpt of the cross-examination of Shari Novick, dated December 14, 2015, Tab 7(B), page 82 of the Supplementary Application Record, Vol. 1; see also E-mail between Shari Novick and Mile Komlen, dated October 20, 2010, Tab 9(G), page 341 of the Supplementary Application Record, Vol. 2; E-mail between Shari Novick and Mile Komlen, dated November 1, 2010, Tab 9(H), page 343 of the Supplementary Application Record, Vol. 2; E-mail between Shari Novick and Mile Komlen, dated November 3, 2010, Tab 9(I), page 344 of the Supplementary Application Record, Vol. 2.
[62] E-mail between Shari Novick and Mile Komlen, dated October 20, 2010, Tab 9(G), page 341 of the Supplementary Application Record, Vol. 2; E-mail between Shari Novick and Mile Komlen, dated November 1, 2010, Tab 9(H), page 343 of the Supplementary Application Record, Vol. 2; and Exhibit "C" to the Supplementary Affidavit of Catherine Milne, Tab 1(C), pages 18-19 of the Supplementary Application Record, Vol. 1.
[63] E-mail between Mile Komlen and Catherine Milne, dated November 4, 2010 (3:14pm), Tab 9(J), page 345 of the Supplementary Application Record, Vol. 2; E-mail between Shari Novick and Mile Komlen, dated November 15, 2010 (10:56pm), Tab 9(M), page 349 of the Supplementary Application Record, Vol. 2. Ms. Milne initially met with 6 Complainants, while Ms. Novick's report indicated that she met with 10.
[64] Supplementary Affidavit of Catherine Milne, sworn October 30, 2015, Tab 1, pages 3-4 of the Supplementary Application Record, Vol. 1, at paras. 11-15; E-mail between Shari Novick and Mile Komlen, dated November 15, 2010, Tab 9(M), page 349 of the Supplementary Application Record, Vol. 2; E-mail between Shari Novick and Mile Komlen dated November 25, 2010 (10:24 am), Tab 9(O), page 353 of the Supplementary Application Record, Vol. 2; and E-mail between Catherine Milne and Mile Komlen, dated November 23, 2010, Tab 9(N), page 351 of the Supplementary Application Record, Vol. 2.

would no longer be necessary for them to meet with the respondents to the respective investigations.[65]

51. Indeed, Ms. Milne had scheduled a meeting with Mr. Bates, the respondent in her complaint dossiers.[66] On the same day he informed Ms. Milne she would no longer be meeting with Mr. Bates, Mr. Komlen cancelled her meeting and arranged to meet with Mr. Bates himself, instead of the investigator.[67]

52. The investigators' reports were provided to Mr. Komlen in December 2010.[68] After submitting them, the investigators had completed their retainers.[69] Mr. Komlen received these draft reports and edited them before forwarding them to the President. These edits are described below.

53. Ms. Milne's draft report was delivered to Mr. Komlen on December 20, 2010, without the supporting documents referenced in the report. This was done due to the time constraints in meeting HRES' deadline. In order to expedite the delivery

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[65] E-mail between Mile Komlen and Shari Novick, dated November 25, 2010 (11:15pm), Tab 9(P), page 355 of the Supplementary Application Record, Vol. 2; E-mail between Mile Komlen and Shari Novick, dated November 25, 2010, Tab 9(Q), page 357 of the Supplementary Application Record, Vol. 2; E-mail between Mile Komlen and Catherine Milne dated November 29, 2010, Tab 9(R), page 361 of the Supplementary Application Record, Vol. 2.

[66] Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(B), page 38 of the Supplementary Application Record, Vol. 1; Supplementary Affidavit of Catherine Milne, Tab 1, page 3 of the Supplementary Application Record, Vol. 1, at paras. 9-10, and Exhibit "B" thereto, at page 13 of the Supplementary Application Record, Vol. 1; E-mail between Paul Bates and Mile Komlen, dated November 11, 2010, Tab 9(K), page 347 of the Supplementary Application Record, Vol. 2; E-mail between Mile Komlen and Angela Fiorillo dated November 15, 2010 (8:35), Tab 9(S), page 362 of the Supplementary Application Record, Vol. 2.

[67] E-mail chain between Mile Komlen, Angela Fiorillo and Paul Bates ending November 29, 2010, Tab 9(S), page 362 of the Supplementary Application Record, Vol. 2.

[68] Milne Affidavit, Tab 4, page 373-374 of the Application Record, Vol. 2, paras. 18, 25; Excerpt of the cross-examination of Shari Novick dated December 14, 2015, Tab 7(C), page 86 of the Supplementary Application Record, Vol. 1; Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(C), page 41 of the Supplementary Application Record, Vol 1.

[69] Excerpt of the cross-examination of Shari Novick dated December 14, 2015, Tab 7(C), page 86 of the Supplementary Application Record, Vol. 1; Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(C), page 41 of the Supplementary Application Record, Vol 1.

of the report to the President, Mr. Komlen deleted any reference to supporting documents in the draft report and forwarded the report to the President, advising Ms. Milne that the appendices could "form part of the evidence later when the matter goes to the Tribunal."[70][Emphasis added].

54. Evidence obtained in this Application shows that Ms. Novick's draft report was delivered to Mr. Komlen on December 21, 2010, and her draft noted at paragraph 7 that in the preparation of the report she had not met with any of the alleged respondents.[71] This specific paragraph was subsequently removed by Mr. Komlen, as part of multiple changes he made to the draft Novick report before it was presented to the President on January 7, 2011.[72] The final Novick report that went to the President also added new complainants and further allegations that were not in Ms. Novick's December 21, 2010 report.[73]

55. During the investigation, the Applicants were advised by Mr. Komlen that their group complaint against Dean Bates would be brought forward by the University

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[70] Supplementary Affidavit of Catherine Milne, Tab 1, page 7 of the Supplementary Application Record, Vol. 1, at para. 25, and Exhibit "F" thereto, at page 27 of the Supplementary Application Record.
[71] Cross-examination of Shari Novick, dated December 14, 2015, Tab 7(C), pages 83-88 of the Supplementary Application Record, Vol. 1; and Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), page 98 of the Supplementary Application Record, Vol 1, at para. 7.
[72] Cross-examination of Shari Novick, dated December 14, 2015, Tab 7(C), pages 83-89 of the Supplementary Application Record, Vol. 1; and Exhibit 3 to the cross-examination of Shari Novick, Tab 7(E), page 113 of the Supplementary Application Record, Vol. 1.
[73] Excerpt of the cross-examination of James Heeney, dated December 1, 2015, Tab 8(A), page 132 of the Supplementary Application Record, Vol. 1; Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), pages 101-110 of the Supplementary Application Record, Vol. 1; Exhibit 3 to the cross-examination of Shari Novick, Tab 7(E), pages 114-116 of the Supplementary Application Record, Vol. 1. The additional complainants were Ms. Linda Stockton, Mr. Peter Vilks, and Ms. Pat Wakefield.

and prosecuted on their behalf pursuant to ss. 33-36 of the Anti-Discrimination Policy.[74]

56. On December 15, 2010, the PACDSB released its report (the "PACDSB Report") making several statements about the divisive environment in the DSB and recommended, *inter alia*, that Mr. Bates step down as Dean.[75] It also concluded that the failure to secure a seasoned academic in the role of Associate Dean helped to "ensure that this core decanal role could not be fulfilled,"[76] referring to the appointment of Dr. Milena Head, a relatively junior faculty member, as Associate Dean during Dean Bates's tenure.

57. Immediately after the release of the PACDSB Report, the President announced Mr. Bates's intention to resign as Dean.[77] Mr. Bates subsequently became Special Advisor to the President.[78]

58. Having completed the investigation process, Mr. Komlen provided his edited versions of the Milne and Novick Reports to the President, the University's Human Rights Tribunal's "gatekeeper", since it was the President who would

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[74] Bart Affidavit, Tab 8, pages 642-643 of the Application Record, Vol. 2, paras. 44-45; Pujari Affidavit, Tab 9, pages 681-682 of the Application Record, Vol. 2, paras. 41-42; Richardson Affidavit, Tab 10, pages 737-738 of the Application Record, Vol. 3, paras. 19-22; Rose Affidavit, Tab 11, pages 749-750 of the Application Record, Vol. 3, paras. 30-32; Ray Affidavit, Tab 12, page 775 of the Application Record, Vol. 3, para. 46, and Exhibit "D" thereto; Steiner Affidavit, Tab 13, page 890 of the Application Record, Vol. 3, para. 44; Taylor Affidavit, Tab 14, pages 980, 982 of the Application Record, Vol. 3, paras. 46, 52-54, and Exhibit "B" thereto; see also DSB-2181 at Tab 25, pages 1625-1626 of the Application Record, Vol. 5 ("Komlen Group Complaint Email").
[75] The PACDSB Report, pages 1 and 27, at Tab 20, pages 1556 and 1582 of the Application Record, Vol. 5. The PACDSB interviewed some 60 staff, faculty, alumni and business leaders – see page 5, page 1560 of the Application Record.
[76] The PACDSB Report, page 9, at Tab 20, page 1564 of the Application Record, Vol. 5.
[77] Milne Affidavit, Tab 4, pages 373-374 of the Application Record, Vol. 2, para. 22.
[78] *Ibid.*

ultimately decide whether or not the specific complaints against the respondents would be forwarded to the Tribunal as formal complaints under the Policy.[79]

59. Mr. Komlen advised the Applicants[80] that if approved by the President, the University would prosecute their "group complaint" (ultimately the 002 Complaint) on their behalf and would likely retain counsel for the Applicants in order to do so.[81]

60. On March 21, 2011, the Applicants[82] were advised by Mr. Komlen that the President had decided to refer their complaints to what he referred to as the "Human Rights Tribunal", pursuant to ss. 33-36 of the Policy, "with the 'University as complainant'."[83]

61. Section 33 of the Anti-Discrimination Policy provides that the University may act as a complainant "if the Officer [i.e.: Mr. Komlen] receives repeated allegations of offenses against the same person but each of the persons making allegations is unwilling to file a written complaint and appear as a complainant". [Emphasis added].

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[79] Taylor Affidavit, Tab 14, pages 980-981 of the Application Record, Vol. 3, para. 47, and Exhibit "B" thereto; Milne Affidavit, Tab 4, pages 373, 375 of the Application Record, Vol. 2, paras. 18, 21, 28; and Heeney Affidavit, page 50 of the Respondent's Record, Tab 2, Vol. 1, at para. 9.
[80] Excluding Dr. Ray who was not yet a complainant.
[81] Komlen Group Complaint Email, at Tab 25, pages 1625-1626 of the Application Record, Vol. 5. The various complaints were organized by Mr. Komlen and HRES into group complaints in order to trigger the provisions in the Policy which provide for the University to cover the complainants' legal fees by bringing the complaints to the Tribunal on the complainants' behalf.
[82] Again, excluding Dr. Ray.
[83] Taylor Affidavit, Tab 14, page 983 of the Application Record, Vol. 3, para. 58, and Exhibit "D" thereto.

62. Mr. Komlen knew that at least one complainant was willing to file his own complaint.[84] Also, the 002 and 003 Complainants each filed individual affidavits in support of their complaints, and appeared before the Tribunal to provide their testimony.

63. Further, for complaints to be brought by the University, the Policy requires the appropriate Vice-President to communicate with, and receive responses from, any witnesses *and* the alleged respondent before deciding whether to commence formal proceedings against the respondent.[85] As respondents, the Applicants received no such communication from the appropriate Vice-President or anyone else.[86]

64. The two group complaints were filed on March 31, 2011: the 002 Complaint which involved allegations of harassment by the Applicants against Mr. Bates and the University; and the 003 Complaint which involved allegations of harassment by various DSB professors and staff against six of the Applicants and the University.[87]

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[84] Taylor Affidavit, Tab 14, pages 982-983 of the Application Record, Vol. 3, paras. 55-56, and Exhibit "D" thereto.
[85] Appendix "B" to this factum, the Anti-Discrimination Policy of McMaster University, most recently approved October 25, 2001, ss. 33-36. (the "Policy").
[86] Milne Affidavit, Tab 4, page 376 of the Application Record, Vol. 2, para. 33; Hopkins Affidavit, Tab 5, page 563 of the Application Record, Vol. 2, para. 17; Bart Affidavit, Tab 8, page 645 of the Application Record, Vol. 2, para. 57; Pujari Affidavit, Tab 9, pages 683-684 of the Application Record, Vol. 2, para. 51; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 38; Ray Affidavit, Tab 12, page 774 of the Application Record, Vol. 3, para. 41; Steiner Affidavit, Tab 13, pages 891-892 of the Application Record, Vol. 3, para. 48; and Taylor Affidavit, Tab 14, page 986 of the Application Record, Vol. 3, para. 70.
[87] See for instance the title of proceedings on the Confidential Decision, Tab 2, page 12 of the Application Record, Vol. 1; and Taylor Affidavit, Tab 14, page 985 of the Application Record, Vol. 3, para. 68.

65. Although the 003 Complaint ultimately included the complaints of Dr. Brian Deltor, and Ms. Carolyn Colwell, neither complainant was included in any version of the Novick Report.[88] Accordingly, these complaints could not be reviewed, nor forwarded, by the President in order to be prosecuted by the University.

66. It is the evidence of prior counsel to the Applicants (and the Applicants themselves) that each of the Applicants[89] was reluctant to participate in the HRES-directed investigation by Mr. Komlen and the subsequent investigation by Ms. Milne.[90] However, the Applicants were actively encouraged, and in some cases, strong-armed by Mr. Komlen to participate in both investigations in a good faith attempt to improve the environment at the DSB.[91]

67. For example:

(a) Dr. Bart withdrew from participating in the Komlen Audit in February 2010 only to have Mr. Komlen contact him and implore him not to withdraw because in participating he was acting in the "best interest" of

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[88] Excerpt of the cross-examination of James Heeney, dated December 1, 2015, Tab 8(A), page 132 of the Supplementary Application Record, Vol.1; Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), pages 101-110 of the Supplementary Application Record, Vol. 1; Exhibit 3 to the cross-examination of Shari Novick, Tab 7(E), pages 114-116 of the Supplementary Application Record, Vol. 1.

[89] Excluding Dr. Ray, who was not interviewed for the Komlen Report, nor invited to meet with Ms. Milne, and Dr. Richardson who was not interviewed for the Komlen Report.

[90] Milne Affidavit, Tab 4, pages 371-372 of the Application Record, Vol. 2, paras. 14-16; Hopkins Affidavit, Tab 5, page 561 of the Application Record, Vol. 2, para. 10.

[91] Supplementary Affidavit of Catherine Milne, Tab 1, page 6 of the Supplementary Application Record, Vol. 1. Mr. Komlen appears to have also exerted influence over potential 003 Complainants, see E-mail between Mile Komlen and Shari Novick, dated December 29, 2010, Tab 9(X), page 375 of the Supplementary Application Record, Vol. 2.

the University, and that losing his portion would significantly weaken the Audit;[92]

(b) although at Mr. Komlen's urging, Dr. Bart ultimately participated in the HRES preliminary audit, he later declined to participate in the Milne investigation, only to be implored *again* by Mr. Komlen over a period of weeks to participate in Ms. Milne's fall 2010 investigation;[93]

(c) Dr. Steiner initially indicated that he was unwilling to speak with Mr. Komlen due to a perceived conflict of interest as Mr. Komlen's office reported to the Provost. In their December 2009 meeting, Dr. Steiner asked if there were any complaints against him, and was advised by Mr. Komlen that there were not, and that the investigation was about divisiveness in the DSB, and in providing information for the Audit he would be acting in the "best interests" of the University;[94] and

(d) following the release of the Komlen Report, Dr. Taylor expressed concern regarding the independence of Mr. Komlen's office. By e-mail in November 2010, Mr. Komlen wrote to Dr. Taylor urging him to participate, stating "we need to be able to prepare a case dossier based on your information", while also promising to ensure a "neutral", "fair", "impartial", "transparent" and "independent" process.[95]

68. It is also the Applicants'[96] evidence that they were extremely reluctant to move forward and file a formal complaint under the Policy, especially since Mr. Bates

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[92] Bart Affidavit, Tab 8, pages 641-642, of the Application Record, Vol. 2, paras. 39-41.
[93] Exhibit 5 to the cross-examination of Mile Komlen, dated December 8, 2015, Tab 9(C), pages 326-329 of the Supplementary Application Record, Vol. 2.
[94] Steiner Affidavit, Tab 13, pages 885-886 of the Application Record, Vol. 3, at paras. 25-27. Mr. Komlen did not dispute this in his evidence.
[95] Taylor Affidavit, Tab 14, pages 980-981 of the Application Record, Vol. 3, paras. 46-48, as well as Exhibit "B" thereto.
[96] Dr. Ray was not a complainant in the 002 Complaint.

had resigned prior to filing.[97] However, Mr. Komlen strongly urged each of them to continue. He advised them that i) their formal complaint under the Policy was necessary and ii) their formal complaint was in their individual best interests and the best interests of the DSB.[98] He also represented to the Applicants in the lead up to filing that iii) they had the support of the University which was filing the complaint on their behalf.[99]

69. At a meeting a few days before their formal complaint against Mr. Bates and the University was due, it is the evidence of Dr. Bart, Dr. Pujari, Dr. Rose, Dr. Steiner, Dr. Taylor and Ms. Milne that Mr. Komlen, in response to some of the Applicants' expressions of reluctance in proceeding, advised the Applicants that they did not know what was coming from the "other side" and that filing their complaint was necessary in light of a pending battle of some sort which they would soon be engaged with.[100]

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[97] Milne Affidavit, Tab 4, pages 371-372 of the Application Record, Vol. 2, paras. 14-17; Bart Affidavit, Tab 8, pages 643-645 of the Application Record, Vol. 2, paras. 49-54; Pujari Affidavit, Tab 9, page 683 of the Application Record, Vol. 2, para. 49; Richardson Affidavit, Tab 10, page 739 of the Application Record, Vol. 3, paras. 24-25; Rose Affidavit, Tab 11, pages 750-751 of the Application Record, Vol. 3, para. 35; Steiner Affidavit, Tab 13, page 890 of the Application Record, Vol. 3, para. 43; and Taylor Affidavit, Tab 14, pages 983-985 of the Application Record, Vol. 3, paras. 59-66.

[98] Milne Affidavit, Tab 4, page 372 of the Application Record, Vol. 2, para. 17; Bart Affidavit, Tab 8, pages 644-645 of the Application Record, Vol. 2, paras. 52, 54; Pujari Affidavit, Tab 9, pages 682-683 of the Application Record, Vol. 2, paras. 45, 50; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 36; Steiner Affidavit, Tab 13, pages 890-891 of the Application Record, Vol. 3, paras. 44-47; and Taylor Affidavit, Tab 14, pages 982, 984-985 of the Application Record, Vol. 3, paras. 53, 62-67.

[99] Milne Affidavit, Tab 4, page 377 of the Application Record, Vol. 2, para. 36; Bart Affidavit, Tab 8, pages 642-643 of the Application Record, Vol. 2, paras. 44-46; Pujari Affidavit, Tab 9, pages 681-682 of the Application Record, Vol. 2, paras. 41-42; Richardson Affidavit, Tab 10, pages 737-738 of the Application Record, Vol. 3, para. 19-21; Rose Affidavit, Tab 11, pages 749-750 of the Application Record, Vol. 3, paras. 29-31; Steiner Affidavit, Tab 13, pages 886, 890-891, 894 of the Application Record, Vol. 3, paras. 27, 44-47, 56; and Taylor Affidavit, Tab 14, page 982 of the Application Record, Vol. 3, paras. 52-53.

[100] Milne Affidavit, Tab 4, page 372 of the Application Record, Vol. 2, para. 17; Bart Affidavit, Tab 8, page 644 of the Application Record, Vol. 2, para. 50; Pujari Affidavit, Tab 9, page 683 of the Application Record, Vol. 2, para. 50; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 36; Steiner Affidavit, Tab 13, page 893 of

70. The Applicants did not know that at the same time they were being urged by Mr. Komlen to file a group complaint against the University and Mr. Bates, Mr. Komlen was formulating a group complaint against them brought by several professors and staff within the DSB.[101]

71. It is each of the Applicants' evidence that none of them would have agreed to participate in the HRES-directed complaint had they been informed by Mr. Komlen that he was simultaneously constructing the 003 Complaint against them.[102]

72. The Applicant Dr. Ray was not at the March 24 meeting described above.[103] His subsequent involvement in the Tribunal proceedings arose out of unique circumstances; his interaction with another professor over the supervision of a PhD student.[104] It was at Mr. Komlen's direction that Dr. Ray's separate issues were ultimately folded into the two group complaints.[105]

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the Application Record, Vol. 3, para. 53; and Taylor Affidavit, Tab 14, page 984 of the Application Record, Vol. 3, para. 62; and Exhibit "V" to the Affidavit of Mile Komlen, Tab 4(V), page 643 of the Responding Record, Vol. 3.

[101] Hopkins Affidavit, Tab 5, pages 565-566 of the Application Record, Vol. 2, para. 26; Bart Affidavit, Tab 8, page 644 of the Application Record, Vol. 2, paras. 50-53; Pujari Affidavit, Tab 9, page 682 of the Application Record, Vol. 2, para. 44; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 36; Steiner Affidavit, Tab 13, page 893-894 of the Application Record, Vol. 3, paras. 55-56; and Taylor Affidavit, Tab 14, pages 984-985 of the Application Record, Vol. 3, paras. 61-63, 65.

[102] Bart Affidavit, Tab 8, page 644 of the Application Record, Vol. 2, para. 53; Pujari Affidavit, Tab 9, page 682 of the Application Record, Vol. 2, para. 46; and Taylor Affidavit, Tab 14, page 985 of the Application Record, Vol. 3, para. 65.

[103] See for instance Milne Affidavit, Tab 4, page 372 of the Application Record, Vol. 2, para. 17.

[104] Hopkins Affidavit, Tab 5, page 567 of the Application Record, Vol. 2, para. 30; Ray Affidavit, Tab 12, pages 767, 769-770 of the Application Record, Vol. 3, paras. 11, 22-28. The Applicant Dr. Ray was not a complainant in the 002 Complaint.

[105] Hopkins Affidavit, Tab 5, page 567 of the Application Record, Vol. 2, para. 30; Ray Affidavit, Tab 12, page 776 of the Application Record, Vol. 3, para. 47.

73. The Applicants were never interviewed by Ms. Novick, HRES, or the University to discuss the 003 allegations or a pending group complaint against them.[106] Their first notice from the University of a group complaint against them occurred upon receipt of the 003 Complaint, after they filed their 002 Complaint against Mr. Bates and the University.[107] These violations of ss. 35 and 36 of the Policy were raised before the Tribunal during the hearing of the 002/003 Complaints in their affidavits[108] and throughout their *viva voce* testimony.[109]

74. At the hearing, counsel to the University noted the many procedural objections of the Applicants stating, "that the affidavits of the Respondents are littered, littered with complaints and dismay about the process. So they have declared it an issue,

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[106] Hopkins Affidavit, Tab 5, pages 563, 565 of the Application Record, Vol. 2, paras. 17, 26; Bart Affidavit, Tab 8, pages 645-646 of the Application Record, Vol. 2, paras. 57, 59; Pujari Affidavit, Tab 9, page 682-683 of the Application Record, Vol. 2, para. 44, 51; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, paras. 38-39; Ray Affidavit, Tab 12, pages 766, 774 of the Application Record, Vol. 3, paras. 10, 41; Steiner Affidavit, Tab 13, page 889, 891-892 of the Application Record, Vol. 3, paras. 40, 48; and Taylor Affidavit, Tab 14, pages 984-985, 986 of the Application Record, Vol. 3, paras. 64, 70-71.

[107] Milne Affidavit, Tab 4, page 376 of the Application Record, Vol. 2, para. 33; Hopkins Affidavit, Tab 5, page 563 of the Application Record, Vol. 2, para. 17; Bart Affidavit, Tab 8, page 645 of the Application Record, Vol. 2, para. 57; Pujari Affidavit, Tab 9, pages 683-684 of the Application Record, Vol. 2, para. 51; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, paras. 37-38; Ray Affidavit, Tab 12, page 774 of the Application Record, Vol. 3, paras. 40-41; Steiner Affidavit, Tab 13, page 894 of the Application Record, Vol. 3, para. 57; and Taylor Affidavit, Tab 14, page 986 of the Application Record, Vol. 3, para. 70.

[108] See the Applicants' 003 Responding Affidavits: Affidavit of Dr. Devashish, DSB-2291, page 12300 of the Tribunal's Record, Vol. 17, at paragraph 6; Affidavit of Dr. Chris Bart, DSB-2292, page 12372 of the Tribunal's Record, Vol. 17, at paragraph 5; Affidavit of Dr. Joe Rose, DSB-2294, page 12462 of the Tribunal's Record, Vol. 17, paragraph 10; Affidavit of Dr. Sourav Ray, DSB-2295, page 12477 of the Tribunal's Record, Vol. 17, paragraph 15; see especially Affidavit of Dr. Steiner, DSB-2293, Tab 11, pages 452-456 of the Supplementary Application Record, Vol. 2, at paragraphs 98-102 regarding procedural unfairness generally, and paragraph 101(iv) specifically.

[109] Excerpt of the transcript of Dr. Pujari's testimony during the April 24, 2012 hearing day, Tab 14(E), pages 513-519 of the Supplementary Application Record, Vol. 2; Excerpt of the transcript of Dr. Rose's testimony during the April 26, 2012 hearing day, Tab 14(F), pages 521-530 of the Supplementary Application Record, Vol. 2; Excerpt of the transcript of Dr. Bart's testimony during the April 26, 2012 hearing day, Tab 14(F), pages 531-534 of the Supplementary Application Record, Vol. 2; and Excerpt of the transcript of Dr. Steiner's testimony during the May 23, 2012 hearing day, Tab 14(G), pages 535-547 of the Supplementary Application Record, Vol. 2.

not us; not the University and not Mr. Heeney's clients [the 003 Complainants]."[110]

75. For his part, Mr. Heeney, argued that the Tribunal ought to ignore the Applicants' procedural complaints on the basis that the same procedure was employed by Ms. Milne in investigating Mr. Bates.[111] The Tribunal also heard similar submissions from Mr. Avraam, counsel to the University.[112] However, it was Mr. Komlen, the HRES Director, who had directed Ms. Milne and Ms. Novick's investigation processes, and not the Applicants.

76. The Tribunal considered these procedural fairness objections raised by the Applicants, but did not grant any remedy.[113]

77. The University, a respondent to both group complaints, was provided with both the Milne Report and the Novick Report.[114] Furthermore, it appears that HRES discussed the allegations against Mr. Bates with Mr. Bates prior to the filing of the 002 Complaint.[115]

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[110] Excerpt of the transcript of the April 26, 2012 hearing day, Tab 14(F), pages 529-530 of the Supplementary Application Record, Vol. 2.
[111] Excerpt of the transcript of the April 24, 2012 hearing day, Tab 14(E), pages 516-518 of the Supplementary Application Record, Vol. 2.
[112] The Confidential Decision, Tab 2 of the Application Record, Vol. 1, page 311, at page 338 of the Application Record.
[113] The Confidential Decision, Tab 2 of the Application Record, Vol. 1, pages 310-311, 313, and 317-318, at pages 338-339, 341, 344-345 of the Application Record.
[114] Milne Affidavit, Tab 4, page 375 of the Application Record, para. 28; Hopkins Affidavit, Tab 5, page 567 of the Application Record, Vol. 2, para. 32; and Steiner Affidavit, Tab 13, page 890 of the Application Record, Vol. 3, para. 42.
[115] Milne Affidavit, Tab 4, page 376 of the Application Record, Vol. 2, para. 34; Steiner Affidavit, Tab 13, page 893 of the Application Record, Vol. 3, para. 54, and page 23 of Exhibit "F" thereto, at page 937 of the Application Record,

78. The Tribunal hearing commenced by way of preliminary hearings on June 24, 2011. The University's lawyer represented the University and Mr. Bates, and counsel was retained by the University to represent only the complainants in the 002 and 003 Complaints.[116] Thus the 003 Respondents[117] were not provided with representation by the University at this time (although Drs. Bart and Ray had retained counsel at their own expense).

79. During this initial pre-hearing, Dr. Steiner who was then unrepresented, sought clarity from the Tribunal Chair and Tribunal counsel about how to address any concerns he might have about "fair treatment" and fairness of processes that had occurred up to that point. In response, Tribunal counsel stated that under the Policy, "there did not appear to be any ambit of jurisdiction provided to the Tribunal in that regard" and the Chair stated that issues that concerned the Officer and/or related to the issues of fair treatment occurring outside of the hearing process should not be brought to the Tribunal for adjudication.[118]

Vol. 3; and E-mail between Mile Komlen and Paul Bates, dated March 23, 2011, Tab 9(Y), page 376-377 of the Supplementary Application Record, Vol. 2.

[116] Milne Affidavit, Tab 4, page 377 of the Application Record, Vol. 2, para. 38; Hopkins Affidavit, Tab 5, page 562 of the Application Record, Vol. 2, para. 14; Bart Affidavit, Tab 8, page 647 of the Application Record, Vol. 2, para. 67; Pujari Affidavit, Tab 9, page 685 of the Application Record, Vol. 2, para. 57; Rose Affidavit, Tab 11, page 754 of the Application Record, Vol. 3, para. 50; and Steiner Affidavit, Tab 13, page 895 of the Application Record, Vol. 3, para. 62.

[117] Excluding Dr. Pujari who was provided with counsel by the President since in the President's view, Dr. Pujari was a member of "management" as an area chair.

[118] Exhibit 3 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(C), pages 149-153 of the Supplementary Application Record, Vol. 1; see also Exhibit 2 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8B, pages 136-137 of the Supplementary Application Record, Vol. 1, (1:05:04-1:22:24).

80. Counsel to the 003 Respondents, Mr. Hopkins, was also advised by University counsel that any fees incurred in an external challenge to the Tribunal's jurisdiction would not be covered by the University.[119]

ii. The Composition and Conduct of the Tribunal

81. The Tribunal was made up of three faculty members of the University. All three members signed the Decisions. The facts relating to one of the Tribunal members, Dr. Bonny Ibhawoh, are significant to this Application in that (i) Dr. Ibhawoh was absent for material portions of the hearing and (ii) Dr. Ibhawoh was appointed to the University's senior administration while he was seized of the Tribunal proceedings.

82. Pursuant to s. 54 of the Policy, parties were permitted to file any objections to the slate of proposed Tribunal members within 10 days of receipt of the slate. The Applicants delivered detailed submissions objecting to several proposed members on the basis of potential bias and/or conflict of interest, including bias due to the appearance of interference by the Administration.[120]

83. While still an adjudicating Tribunal member, Dr. Ibhawoh was appointed Associate Dean of Research and Graduate Studies for the Faculty of Humanities effective on or about July 4, 2012.[121] This appointment occurred less than a

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[119] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(D), pages 66-67 of the Supplementary Application Record, Vol. 1.
[120] Milne Affidavit, Tab 4, page 381 of the Application Record, Vol. 2, para. 50, and also Tab 26, pages 1627-1628 of the Application Record, Vol. 5 ("Milne Letter").
[121] Steiner Affidavit, Tab 13, page 903 of the Application Record, Vol. 3, para. 88, and Exhibit "H" thereto.

month after the Tribunal's hearing phase ended on June 6, 2012, prior to the receipt of remedy submissions, and a year before the release of the Tribunal Decisions in May and September 2013.[122]

84. In his application for Assistant Dean submitted April 13, 2012, Dr. Ibhawoh highlighted his position as a four-year tenured member of the Board Senate Hearing Panel for Sexual Harassment/Antidiscrimination under the McMaster University Antidiscrimination Policy (the Tribunal).[123] Dr. Ibhawoh was one of two candidates interviewed for the position on April 20, 2012[124] and he was informed on or before May 30, 2012 that he was the chosen candidate for the position by both the Selection Committee and the Senate Committee on Appointments, pending only final approval by the Senate and Board of Governors'.[125]

85. During the hearing phase, the University's chief administrative officer to the Senate and the Board of Governors, Dr. Bruce Frank, who was present throughout the hearing, knew of Dr. Ibhawoh's application and pending appointment.[126]

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[122] Milne Affidavit, Tab 4, page 380 of the Application Record, Vol. 2, para. 48; Hopkins Affidavit, Tab 5, page 574 of the Application Record, Vol. 2, para. 57; and Steiner Affidavit, Tab 13, page 903 of the Application Record, Vol. 3, para. 88.
[123] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(B), page 380 of the Supplementary Application Record, Vol. 2 at question number 33; and Application Materials of Dr. Ibhawoh for Associate Dean, Tab 10(D), page 387 of the Supplementary Application Record, Vol. 2.
[124] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(B), page 381 of the Supplementary Application Record, Vol. 2 at question number 25; and E-mail between Dean of Humanities and Lynn Marie Holland, dated April 17, 2012, Tab 10(D), page 403 of the Supplementary Application Record, Vol. 2.
[125] Letter from George Avraam to Peter M. Jacobsen dated February 18, 2016, Tab 10(H), page 447 of the Supplementary Application Record, Vol. 2.
[126] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(F), page 417 of the Supplementary Application Record, Vol. 2; and Exhibit 4 to the cross-examination of James Heeney, dated

86. No notice was provided to the parties about Dr. Ibhawoh's application and recommendation for the position of Associate Dean, despite the knowledge of both Dr. Ibhawoh and Dr. Frank.[127]

87. The role of Associate Dean of Research and Graduate Studies carries a fixed stipend of $9,000.00, as well as teaching relief.[128]

88. Furthermore, Dr. Ibhawoh was absent for portions of the Tribunal hearing on April 13, 2012 and April 24, 2012.[129]

89. On the first occasion, counsel did not object to the Tribunal proceeding in this manner[130], and on the second occasion, counsel were not afforded the opportunity to object.[131]

90. On April 13, 2012, Dr. Ibhawoh was absent for a portion of the cross-examination of the 003 Complainant, Dr. Milena Head and all of the re-direct of Dr. Head.[132] Dr. Head's testimony related to her harassment complaint against the Applicant

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December 1, 2015, Tab 8(D), pages 155, 159, 165, 170, 174, 180, 182, 187, 192, 197, 202, 209, 214, 219, 223, 228, 233, 239, and 248 of the Supplementary Application Record, Vol. 1. Dr. Frank was present for the March 3, 4, 25, 27, 30, 31, April 4, 10, 12, 13, 19, 22, 23, 24, 30, May 8, 23, and June 5, 2012 hearing days.

[127] See section III(B) of this memorandum of fact and law.

[128] Affidavit of Dr. Rafael Kleiman, sworn February 2, 2015, Tab 15, page 1014 of the Application Record, Vol. 3, para. 4 ("Kleiman Affidavit").

[129] Milne Affidavit, Tab 4, page 382 of the Application Record, Vol. 2, para. 55; and Hopkins Affidavit, Tab 5, page 575 of the Application Record, Vol. 2, para. 60.

[130] Excerpt of the transcript of the April 13, 2012 hearing day, Tab 14(D), pages 509-510 of the Supplementary Application Record, Vol. 2

[131] Excerpt of the transcript of the April 24, 2012 hearing day, Tab 14(E), page 512 of the Supplementary Application Record, Vol. 2; and excerpt of the Jeff Hopkins cross-examination, dated November 11, 2015, Tab 5(A), pages 53-55 of the Supplementary Application Record, Vol. 1.

[132] Milne Affidavit, Tab 4, pages 382-383 of the Application Record, Vol. 2, para. 56; and Hopkins Affidavit, Tab 5, page 575 of the Application Record, Vol. 2, para. 61.

Dr. Steiner, which formed one of the primary reasons for Dr. Steiner's three year suspension penalty.[133]

91. On April 24, 2012, Dr. Ibhawoh was absent during a significant portion of the cross-examination of the Applicant Dr. Devashish Pujari, during which Dr. Pujari's credibility was put in issue in relation to the allegations of harassment made against him.[134] Dr. Pujari was subsequently found liable for harassment and punished with a one year suspension.[135]

iii. The Procedural Framework of the Tribunal Hearing

(a) *Tribunal's Timelines & Consolidation*

92. Originally, the 002 and 003 Complaints were not consolidated and were to be heard one after the other, with 003 being heard first.

93. On June 10, 2011, the Tribunal served a Notice of Joint Pre-Hearing Conference on all of the parties to both the 002 and 003 Complaints.[136] The Notice enclosed both group complaints and it was the first time that the two group complaints were shared amongst the various parties.[137] The Notice advised of the various procedural issues to be discussed at the pre-hearing conference, including, *inter*

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[133] Milne Affidavit, Tab 4, page 383 of the Application Record, Vol. 2, paras. 57-59; Hopkins Affidavit, Tab 5, pages 575-576 of the Application Record, Vol. 2, paras. 61-65; Steiner Affidavit, Tab 13, page 899 of the Application Record, Vol. 3, para 73; pages 193-206 of the Confidential Decision, at Tab 2, pages 220-233 of the Application Record, Vol. 1.
[134] Milne Affidavit, Tab 4, page 383 of the Application Record, Vol. 2, para. 57; and Hopkins Affidavit, Tab 5, page 576 of the Application Record, Vol. 2, paras. 66-69.
[135] Pujari Affidavit, Tab 9, pages 689-690 of the Application Record, Vol. 2, para. 73, and Exhibit "C" thereto.
[136] See Notice of Joint Pre-Hearing Conference, Tab 27, pages 1629-1686 of the Application Record, Vol. 6 ("Notice of Joint Pre-Hearing Conference"), .
[137] Milne Affidavit, Tab 4, pages 386-387of the Application Record, Vol. 2, para. 69; and Hopkins Affidavit, Tab 5, page 589 of the Application Record, Vol. 2, para. 81.

alia, hearing dates, submission deadlines and the "appropriate consolidation, hearing together or simultaneous hearing of the related Complaints".[138]

94. On October 7, 2011, the Tribunal agreed with the Applicants' submissions opposing consolidation and ordered that it could not order the consolidation of the hearings.[139]

95. In so ordering, the Tribunal examined sections 9.1(1)(a)-(b) and (3)(a) and 3(b) of the *Statutory Powers and Procedures Act* (the "*SPPA*"), and section 66 of the Policy, and concluded that the combined operation of the relevant legislation was that it "does not provide the tribunal with the legal authority to rule that the matters be heard on a Consolidated basis."[140]

96. By order of the Tribunal, the Applicants were required to file all relevant documents by December 19, 2011, all of their 002 Complainant affidavits by January 6, 2012 and all of their 003 Respondent affidavits by January 31, 2012.[141] The requirement that the Applicants[142] file both complainant and respondent

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[138] Milne Affidavit, Tab 4, pages 386-387 of the Application Record, Vol. 2, para. 70; Hopkins Affidavit, Tab 5, page 589 of the Application Record, Vol. 2, para. 81.
[139] Milne Affidavit, Tab 4, page 388 of the Application Record, Vol. 2, para. 73; Hopkins Affidavit, Tab 5, page 580 of the Application Record, Vol. 2, para. 83; Procedural Order #3, dated October 7, 2011, page 4, at Tab 28, page 1690 of the Application Record, Vol. 6 ("Procedural Order #3").
[140] Procedural Order #3", Tab 28, page 1714 of the Application Record, Vol. 6.
[141] Milne Affidavit, Tab 4, pages 389, 390 of the Application Record, Vol. 2, paras. 78, 80; Hopkins Affidavit, Tab 5, pages 582,583 of the Application Record, Vol. 2, paras. 88, 93.
[142] With the exception of Dr. Steiner and Dr. Richardson.

affidavits made it "practically impossible" to commence the latter until the former had been completed.[143]

97. On November 28, 2011, the Tribunal held its second of two pre-hearing conferences. At the time of the pre-hearing conference, the hearings were to begin on February 7, 2012,[144] with the 003 matter being heard first.[145]

98. As a result of the original schedule, the Applicants, in their capacity as 003 Respondents, were going to have to begin cross-examinations of the 003 complainants mere days after finalizing their own responding materials, which would have been impossible in the circumstances.[146]

99. By contrast, the 003 Complainants (who were not respondents to any complaints) were to file their complainant affidavits on January 6, 2012,[147] and were only faced with opening their case, and beginning to lead in-chief evidence on February 7, 2012.

100. During the pre-hearing conference on November 28, 2011, Mr. Aaron Rousseau, then counsel to the 003 Complainants, objected to the first two dates of the hearing, February 7 and 10, on the basis that those days would be required to prepare for the hearing because otherwise "there's not enough time to get a dozen

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[143] Milne Affidavit, Tab 4, page 389 of the Application Record, Vol. 2, para. 78; and Hopkins Affidavit, Tab 5, page 582 of the Application Record, Vol. 2, para. 88.
[144] Procedural Order #5, Tab 12, pages 458-459 of the Supplementary Application Record, Vol. 2.
[145] Procedural Order #3", Tab 28, pages 1687-1691 of the Application Record, Vol. 6.
[146] Hopkins Affidavit, Tab 5, page 582-583 of the Application Record, Vol. 2, paras. 91-92.
[147] Procedural Order #6, Tab 32, page 1828 of the Application Record, Vol. 6.

affidavits, and then immediately start our opening arguments within a couple of days over the weekend. It's just not doable."[148] Despite Mr. Rousseau's objection, the Chair ordered that the schedule should stay in place.[149] Counsel for the University submitted that the University wished to have the matter proceed as expeditiously as possible and that the timetable should not be amended."[150]

101. It was clear at the November 28, 2011 pre-hearing conference that the Tribunal would not be amending the schedule.[151]

102. On January 18, 2012, Tribunal counsel wrote to counsel for all parties advocating a reconsideration of the consolidation issue, in light of the pleadings and evidentiary record then before counsel, and the time-pressure facing all parties due to the hearings set to commence on February 7, 2012.[152] As was the case in the November 28, 2011 pre-hearing, this request was strongly supported by counsel for the University and the 003 Complainants.[153]

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[148] Exhibit 7 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(G), pages 266-269 of the Supplementary Application Record, Vol. 1, especially page 268.
[149] See Exhibit 7 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(G), pages 268-269 of the Supplementary Application Record, Vol. 1 where the Chair stated: "I'll reserve for my counsel, but my inclination is that's not an acceptable reason to not – I'll just finish before you interrupt – to not go forward ." and where Tribunal counsel stated: "there's an order, and everybody should comply with the order…" and that "[w]e need to start the hearing."
[150] Excerpt of the Transcript of the November 28, 2012 pre-hearing day, Tab 14(B), page 486(A) of the Supplementary Application Record, Vol. 2.
[151] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(C), pages 59-61of the Supplementary Application Record, Vol. 1; and Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(D), pages 63-68 of the Supplementary Application Record, Vol. 1.
[152] Milne Affidavit, Tab 4, pages 389-390 of the Application Record, Vol. 2, para. 79; and Hopkins Affidavit, Tab 5, page 582 of the Application Record, Vol. 2, para 90; and December 9, 2011 e-mail from Mark Zega to counsel, Tab 4(A), page 52 of the Supplementary Application Record, Vol. 1.
[153] Milne Affidavit, Tab 4, page 390 of the Application Record, Vol. 2, para. 81; and Hopkins Affidavit, Tab 5, page 583 of the Application Record, Vol. 2, para. 94.

103. As of January 18, 2012, Counsel for the 003 Respondents was still under order by the Tribunal to prepare affidavits and exhibits for the Applicants and their 26 witnesses by January 31, 2012, and to prepare for the cross-examination of all of the 003 Complainants and their witnesses beginning on February 7, 2012 and continuing on February 10, 12, and 18.[154]

104. Faced with i) the impossibility of meeting the above deadlines, ii) the unwillingness of the other parties to consent to adjusting the timelines, and iii) potential sanction for failure to comply with the existing timelines, the Applicants agreed to the University's – and Tribunal counsel's - request for consolidation in exchange for having the commencement of the hearings being pushed back to March 3, 2012 and the order being reversed so that the 002 Complaint would proceed first.[155]

105. The Applicants believed that they had no choice but to agree to consolidation.[156] Although the Applicants considered the potential for seeking a Judicial Review due to the structure of the hearing, they were informed by counsel to the University that any legal costs incurred on matters not directly before the Tribunal would not be covered by the University.[157]

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[154] Hopkins Affidavit, Tab 5, pages 582-583 of the Application Record, Vol. 2, paras. 90-92.
[155] Milne Affidavit, Tab 4, page 390 of the Application Record, Vol. 2, para. 81; and Hopkins Affidavit, Tab 5, page 583 of the Application Record, Vol. 2, paras. 93-94.
[156] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(C), pages 59-61 of the Supplementary Application Record, Vol. 1; and also Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(D), pages 63-68 of the Supplementary Application Record, Vol. 1.
[157] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(D), pages 66-67 of the Supplementary Application Record, Vol. 1.

(b) ***Timeframe***

106. The preliminary hearings commenced on June 24, 2011. The hearing of the two complaints commenced on March 3, 2012 and ended on June 6, 2012.

107. Prior to and during the preliminary hearings, counsel provided an estimate of time for their case – in total, counsel's estimation added up to 74 days.[158]

108. Ultimately, the Tribunal established a firm schedule of 21 days with hearing dates on weekends and into the evenings.[159] In order to meet the firm deadline for the end of the hearing, the Tribunal did not permit adjournments.[160]

109. The Tribunal announced on several occasions that there was a firm end-date to the hearings and that the Panel would not be available to sit after June 2012 because one of the panel members was to be away on sabbatical.[161]

110. Over the course of 21 days, evidence was heard from 65 witnesses, including the 002/003 Complainants.[162]

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[158] Milne Affidavit, Tab 4, page 395 of the Application Record, Vol. 2, para. 96; and Hopkins Affidavit, Tab 5, page 587 of the Application Record, Vol. 2, para. 104. See explanation at footnote 8, *supra*.
[159] See the Chronology attached as Appendix "A" to this factum and the Tribunal's Index to the Audio Record, filed with the Tribunal's Record, and attached to the Saccucci Affidavit, Tab 16, as Exhibit "YY" thereto, Vol 4 of the Application Record.
[160] Milne Affidavit, Tab 4, page 394 of the Application Record, Vol. 2, para. 93; and Hopkins Affidavit, Tab 5, pages 587, 589 of the Application Record, Vol. 2, paras. 103, 110; and December 9, 2011 e-mail from Mark Zega to counsel, Tab 4(A), page 52 of the Supplementary Application Record, Vol. 1.
[161] Exhibit 5 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(E), pages 253 of the Supplementary Application Record, Vol. 1; Exhibit 6 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(D), pages 256-263 (especially 261) of the Supplementary Application Record, Vol. 1; and excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(C), page 62 of the Supplementary Application Record, Vol 1.

111. As a result of the compressed hearing schedule, the Applicants had no choice but to withdraw witnesses[163], and the Panel was informed of the reason for their withdrawal.[164]

(c) *Evidence & Findings Without Notice*

112. The Tribunal permitted evidence to be heard against the Applicants without notice on three occasions, with the result that the affected Applicants were not able to be present during the hearing to hear the testimony against them or assist their counsel.[165]

113. In Procedural Order #3, the Tribunal ordered that the parties were required to file evidence of any witness they intended to call at the hearing prior to the testimony being received. Counsel for the 003 Complainants was also provided with a limited right to cross-examine witnesses to the limited extent that an 002 witness's testimony addressed the 003 Complaint.[166] The significance of this hybrid form of questioning will be discussed in Part III (Issues and Law).

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[162] As discussed below in Part III, Issues & Law, as a result of the Tribunal insisting on a firm end date with a view to urgent completion, witnesses were re-scheduled to dates when some of the affected Applicants could not be in attendance and five of the Applicants' witnesses to be called in the 003 Complaint were not called due to time constraints, see for instance Hopkins Affidavit, Tab 5, page 589 of the Application Record, Vol. 2, para. 110.
[163] Hopkins Affidavit, Tab 5, page 589 of the Application Record, Vol. 2, para. 110.
[164] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(E), pages 72-76 of the Supplementary Application Record, Vol. 1; and answer to undertaking of Jeff Hopkins, Tab 3, page 49 of the Supplementary Application Record, Vol. 1, at question 2.
[165] Milne Affidavit, Tab 4, pages 383-384 of the Application Record, Vol. 2, paras. 61-63; Hopkins Affidavit, Tab 5, pages 576-578 of the Application Record, Vol. 2, paras. 70-75.
[166] Hopkins Affidavit, Tab 5, page 577 of the Application Record, Vol. 2, para. 71; Procedural Order #8 at para. 2(c), at Tab 29, page 1723 of the Application Record, Vol. 6 ("Procedural Order #8").

114. On March 3, 2012, Dr. Catherine Connelly was called as a witness in support of the 002 Complaint.[167] Dr. Connelly had submitted an affidavit in respect of the 002 Complaint for which she was testifying. Neither her affidavit, nor her *viva voce* testimony concerned the 003 Complaint.[168]

115. Despite the multiple objections of counsel, the Tribunal allowed 003 Complainants' counsel Mr. Heeney to cross-examine the witness Dr. Connelly on matters pertaining to the 003 Complaint including alleged bullying in her own tenure and promotion hearing, and positive testimony regarding the 003 Complainants Dr. Detlor and Ms. Colwell.[169] This evidence was particularly damaging to the Applicants Drs. Ray and Steiner as respondents to the 003 Complaint.[170] As they had no prior notice of this evidence, Drs. Ray and Steiner were not present during Dr. Connelly's testimony to hear the evidence against them or assist their counsel.[171]

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[167] Hopkins Affidavit, Tab 5, page 577 of the Application Record, Vol. 2, para. 73.
[168] Hopkins Affidavit, Tab 5, page 577 of the Application Record, Vol. 2, para. 73.
[169] Hopkins Affidavit, Tab 5, pages 577-578 of the Application Record, Vol. 2, paras. 74-75. The evidence was permitted over the objection of Applicants' counsel, see Hopkins Affidavit, Tab 5, page 578 of the Application Record, Vol. 2, para. 76; and Saccucci Affidavit, Tab 16, page 1048 of the Application Record, Vol. 4, para. 76 as well as Exhibit "BBB" thereto.
[170] Hopkins Affidavit, Tab 5, pages 577-578 of the Application Record, Vol. 2, paras. 74-75; Ray Affidavit, Tab 12, pages 779, 784 of the Application Record, Vol. 3, paras. 60, 89-90; Steiner Affidavit, Tab 13, page 902 of the Application Record, Vol. 3, para. 81.
[171] Ray Affidavit, Tab 12, page 779 of the Application Record, Vol. 3, para. 61; Steiner Affidavit, Tab 13, page 901 of the Application Record, Vol. 3, para. 79(d).

116. On April 12, 2012, Mr. Avraam, counsel for the University and Mr. Bates as respondents to the 002 Complaint, was permitted by the Tribunal to examine Ms. Rita Cossa, in respect of Dr. Richardson's complaint in 002.[172]

117. Ms. Cossa, an 003 Complainant, had not filed an affidavit in respect of the 002 Complaint.[173] As no notice was provided, Dr. Richardson was not present to hear her evidence against him or assist his counsel in addressing the evidence.[174] Over the objection of his counsel, who noted Dr. Richardson's absence, the Tribunal allowed the examination to proceed.[175]

118. On April 13, 2012, Mr. Avraam was once again permitted to examine a witness in the absence of an affidavit or sufficient notice, over the objection of counsel. This time the Tribunal permitted Mr. Avraam to examine the 003 Complainant, Dr. Head.[176]

119. Applicants' counsel had agreed to receive a synopsis of Dr. Head's proposed evidence;[177] however, during his examination, Mr. Avraam went beyond the

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[172] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 62.
[173] *Ibid*.
[174] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 62; and excerpt of the transcript of the April 12, 2012 hearing day, Tab 14(C), pages 494-506 of the Supplementary Application Record, Vol. 2. See specifically Ms. Milne`s objections at page 497.
[175] Richardson Affidavit, Tab 10, pages 740-741 of the Application Record, Vol. 3, paras. 32-36. The evidence was permitted over the objection of counsel for the Applicants. See Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 62; and excerpt of the transcript of the April 12, 2012 hearing day, Tab 14(C), pages 494-506 of the Supplementary Application Record, Vol. 2.
[176] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.
[177] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.

scope of the summary provided, including eliciting evidence regarding the Applicant, Dr. Pujari.[178]

120. Without notice that Dr. Head's testimony would address him, Dr. Pujari was not present to receive this testimony.[179] Nevertheless, the Tribunal allowed the questioning to proceed.

(d) *Findings Without Notice Under the Policy & Receipt of Submissions*

121. The Applicant Dr. Ray was a respondent in the 003 Complaint for allegations brought against him by a fellow professor named Dr. Detlor. Dr. Ray subsequently filed a counter-complaint against Dr. Detlor, with leave of the Tribunal, on October 7, 2011.[180]

122. The counter-complaint, being the opposing viewpoint of Dr. Detlor's 003 Complaint against Dr. Ray, alleged that Dr. Detlor had harassed Dr. Ray by abusing his position as Ph.D. Director to interfere with Dr. Ray's oversight of a Ph.D. student then under Dr. Ray's supervision.[181]

123. The Policy provides that in instances where the Tribunal determines by a "preponderance of reliable evidence a complaint has been fraudulent, malicious, frivolous or vexatious, or is entirely without factual basis" that it will find the

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[178] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.
[179] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63; Pujari Affidavit, Tab 9, page 687 of the Application Record, Vol. 2, paras. 64-67.
[180] Ray Affidavit, Tab 12, page 777 of the Application Record, Vol. 3, para. 52.
[181] Ray Affidavit, Tab 12, page 770 of the Application Record, Vol. 3, para. 27.

complainant in breach of the Policy. The Policy also provides that "[p]rior to finding that a complaint has been fraudulent, malicious, frivolous or vexatious or is entirely without factual basis, the Tribunal will advise the parties that it is considering making such a ruling and specifically invite submissions on this point."[182]

124. At the conclusion of the cross-examination of Dr. Ray on April 23, 2012, the Tribunal Chair, Dr. Maureen MacDonald asked Dr. Ray whether:

> "In light of the extent to which you've been able to participate in the hearings this far, and all the points of view which have been expressed and all of the evidence we've seen so far. Notwithstanding the questions Mr. Avraam asked you about your remedies, is there anything that you would like to, now, with your knowledge you have right now, alter about your complaint."[183]

125. Nothing further was added to the aforementioned comment by the Chair.[184]

126. The Tribunal ultimately concluded that Dr. Ray had not harassed Dr. Detlor and made no findings of liability against him.[185] Relying heavily on the testimony of Dr. Connelly, the Tribunal found that Dr. Ray's counter-complaint against Dr.

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[182] Section 70(e) of the Policy, Appendix "B" to this factum.
[183] Hopkins Affidavit, Tab 5, pages 592-593 of the Application Record, Vol. 2, paras. 117-119; and Ray Affidavit, Tab 12, pages 780-781 of the Application Record, Vol. 3, paras. 62-69, and Exhibit "H" thereto.
[184] *Ibid*. Dr. Ray was not advised that the Tribunal was considering finding that his counter-complaint was in breach of the Policy, and he was not specifically invited to provide submissions regarding such a breach – see Hopkins Affidavit, Tab 5, page 593 of the Application Record, Vol. 2, para. 119. This is contrary to the Policy at s. 70(e) and will be discussed below in Issue "G(iv)".
[185] The Confidential Decision, at page 173, at Tab 2, page 200 of the Application Record, Vol. 1. The Tribunal also did not make any findings against Dr. Ray in connection with any of his administrative or governance positions within the University.

Detlor was fraudulent, malicious, frivolous or vexatious, or entirely without factual basis in breach of the Policy, and therefore sanctioned him.[186] Dr. Ray received a one academic term suspension.

(e) *Time-barred Complaint Against Dr. Steiner*

127. In the fall of 2011, counsel for the Applicants brought a motion to dismiss a number of complaints against various 003 Respondents, including Dr. Steiner.[187]

128. Dr. Head's complaint against Dr. Steiner originated from a single event that is alleged to have taken place in December 2009.[188]

129. The complaint was not filed until March 31, 2011.[189] It was brought outside the 12-month limitation period under the Policy[190] and would have been beyond the additional three month extension period permissible even if an extension had been requested.[191]

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[186] Ray Affidavit, Tab 12, pages 784, 785 of the Application Record, Vol. 3, paras. 88, 91; page 192 of the Confidential Decision, and pages 2-4 of the Remedies Decision, at Tab 2, page 219 and Tab 3 pages 349-351 of the Application Record, Vol. 1, respectively.
[187] Hopkins Affidavit, Tab 5, pages 570-571 of the Application Record, Vol. 2, para. 44; Steiner Affidavit, Tab 13, pages 897-898 of the Application Record, Vol. 3, para. 69. The motion was ruled upon by the Tribunal on October 7, 2011 in Procedural Order #3, at Tab 28, page 1703 of the Application Record, Vol. 6. See also the Motion to Dismiss Dr. Head's Complaint Against Dr. Steiner, dated July 22, 2011, at Tab 30, pages 1730-1780 of the Application Record, Vol. 6 ("Steiner Motion to Dismiss"). In their submissions on the motion, counsel to Dr. Steiner argued that hearing the complaint of Dr. Head was beyond the jurisdiction of the Tribunal, as provided by the Policy, and therefore could not proceed, see pages 1731-1734 of the Application Record.
[188] Hopkins Affidavit, Tab 5, page 571 of the Application Record, Vol. 2, para. 45; and Steiner Affidavit, Tab 13, page 898 of the Application Record, Vol. 3, para. 70.
[189] Hopkins Affidavit, Tab 5, page 571 of the Application Record, Vol. 2, para. 46; and Steiner Affidavit, Tab 13, page 898 of the Application Record, Vol. 3, para. 70.
[190] Hopkins Affidavit, Tab 5, page 571 of the Application Record, Vol. 2, para. 45; Steiner Affidavit, Tab 13, page 898 of the Application Record, Vol. 3, para. 70; and Appendix "B" to this factum, the Policy, s. 43.
[191] Hopkins Affidavit, Tab 5, page 571 of the Application Record, Vol. 2, para. 47.

130. Dr. Head's August 2011 Affidavit filed in the proceedings below indicates that she first approached Mr. Komlen to complain about Dr. Steiner's conduct in her tenure and promotion meetings on November 25, 2009. However, Dr. Head's tenure and promotion meetings did not begin until November 29, 2009.[192]

131. The Head complaint against Dr. Steiner was nonetheless allowed to proceed and was one of the primary bases for Dr. Steiner's suspension.[193]

iv. Penalties Sought by the University and Issued by the Tribunal

132. All complainants were ordered to submit their remedy demands early in the hearing by January 6, 2012.[194] The University, a respondent in each of the 002 and 003 Complaints, was not invited to make remedy submissions, and did not provide notice that it was seeking any remedies against the Applicants in accordance with the Order.[195]

133. Later, during its closing submissions on June 5, 2012, the University requested removal of some of the Applicants.[196] The University also filed written

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[192] Hopkins Affidavit, Tab 5, pages 571-572 of the Application Record, Vol. 2, para. 48; Affidavit of Dr. Milena Head, sworn August 11, 2011, pages 1-2, at Tab 31, pages 1781-1782 of the Application Record, Vol. 6 ("Head Affidavit").
[193] Hopkins Affidavit, Tab 5, page 572 of the Application Record, Vol. 2, para 49; Steiner Affidavit, Tab 13, page 899 of the Application Record, Vol. 3, para. 73; the Confidential Decision, at pages 193-206, at Tab 2, pages 220-233 of the Application Record, Vol. 1.
[194] Milne Affidavit, Tab 4, page 398 of the Application Record, Vol. 2, para 106; Hopkins Affidavit, Tab 5, page 594 of the Application Record, Vol. 2, para. 122; and Procedural Order #6, para. 2(b), at Tab 32, page 1829 of the Application Record, Vol. 6 ("Procedural Order #6").
[195] Milne Affidavit, Tab 4, page 398 of the Application Record, Vol. 2, para. 107; Hopkins Affidavit, Tab 5, page 594 of the Application Record, Vol. 2, para. 123.
[196] Milne Affidavit, Tab 4, pages 398-399 of the Application Record, Vol. 2, para 108; and Hopkins Affidavit, Tab 5, page 594 of the Application Record, Vol. 2, para. 125.

submissions on remedy in June 2013[197] arguing that some of the Applicants should receive termination and others should receive suspension.[198]

134. Ultimately the sanctioned Applicants received penalties ranging from a formal reprimand to multiple lengthy suspensions, including three year suspensions (forcing the early retirement for Drs. Taylor, Steiner and Bart). All of the penalties had devastating effects on the Applicants. The three Applicants who have since returned to the University continue to suffer the prejudicial effects of the Decisions on their re-integration into McMaster and the hope of any career prospects outside of the University are seriously diminished. leaving Drs. Pujari, Ray and Rose with virtually no prospects for career advancement.[199]

v. The Tribunal's Conduct After the Tribunal Decisions

(a) *The Tribunal's Deficient Audio Record of the Proceedings*

135. Section 64 of the Policy mandates that the Tribunal arrange for a "permanent" audio recording of the proceedings. In Procedural Order #3, the Tribunal also ordered that audio would be made for each day. [200] The fact that the Tribunal's

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[197] The University filed both initial and reply submissions on remedy. The Applicants objected to the filing of these submissions. See Milne Affidavit, Tab 4, pages 398-399 of the Application Record, Vol. 2, para. 108, and Exhibit "B" thereto; Hopkins Affidavit, Tab 5, pages 594-595 of the Application Record, Vol. 2, paras. 125-126.
[198] Milne Affidavit, Tab 4, pages 398-399 of the Application Record, Vol. 2, paras 107-109
[199] Pujari Affidavit, Tab 9, pages 696-697 of the Application Record, Vol. 2, paras. 95-104; Ray Affidavit, Tab 12, pages 786-787 of the Application Record, Vol. 3, paras. 98-107; Rose Affidavit, Tab 11, pages 758-759 of the Application Record, Vol. 3, paras. 67-69; and Hitner Affidavit, Tab 3, pages 443-455 of the Responding Record, Vol. 2, paras. 16-18, 21, 23, 24.
[200] Procedural Order #3, para. 4, at Tab 28, page 1717 of the Application Record, Vol. 6.

audio recordings contain significant deficiencies is clear from even a cursory review of the audio.[201]

136. On February 11, 2014, the University Secretariat informed Applicants' counsel that the audio recordings of the proceedings had quality issues at the outset of the proceedings, but advised that as a result of a change in equipment, and a later change in venue, the audio quality improved.[202]

137. Subsequently, the Applicants were also informed that two audio files were never recorded and were therefore unavailable.[203] The missing audio files contained, among other things, the cross-examination, re-examination and questions from the Panel of a non-party witness, Dr. Maureen Hupfer.[204] This witness's testimony is referenced extensively throughout the Decisions in respect of the 003 Complaints against the Applicants.[205]

138. As is detailed in 'Issue F' in Part III of this factum, from a review of the audio record of the proceedings, the Applicants have identified a number of other corrupted, missing, or inaudible audio portions, during which *viva voce* witness

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[201] Listen to, for instance, March 3, 2012; March 23, 2012.
[202] Saccucci Affidavit, Tab 16, page 1043 of the Application Record, Vol. 4, para. 63, and Exhibit "VV" thereto.
[203] Saccucci Affidavit, Tab 16, pages 1043-1044 of the Application Record, Vol. 4, para. 64, and Exhibit "WW" thereto.
[204] Saccucci Affidavit, Tab 16, pages 1043-1044 of the Application Record, Vol. 4, para. 64, and Exhibit "WW" thereto.
[205] Excluding Dr. Richardson. Saccucci Affidavit, Tab 16, page 1044 of the Application Record, Vol. 4, para. 65; the Confidential Decision, pages 220, 270, 282-283, and 285, at Tab 2, pages 247, 297, 309-310 and 312 of the Application Record, Vol. 1.

testimony, cross-examination, re-examination, questions from the Tribunal Panel, and the Panel's handling of objections was occurring.[206]

139. As a result, the Applicants are unable to review and analyze certain contentious rulings to objections of Tribunal Chair Maureen MacDonald[207]; the Tribunal's treatment of and reliance on important *viva voce* witness testimony[208]; and the Tribunal's potential failure, or unwillingness, to consider other *viva voce* witness testimony.[209]

(b) *The Tribunal's Deficient Evidentiary Record Filed with the Divisional Court*

140. The Applicants served their Notice of Application for Judicial Review on the University and the Tribunal on May 8, 2014.[210]

141. The Tribunal filed its record with the Divisional Court on or about July 16, 2014.[211]

142. In August 2014, Applicants' counsel identified certain evidentiary documents which were before the Tribunal but did not appear to form part of the Record filed

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[206] Saccucci Affidavit, Tab 16, page 1046 of the Application Record, Vol. 4, paras. 70-72.
[207] Saccucci Affidavit, Tab 16, pages 1045, 1048 of the Application Record, Vol. 4, paras. 68, 76, and Exhibit "BBB" thereto.
[208] Saccucci Affidavit, Tab 16, pages 1043-1044, 1046-1047 of the Application Record, Vol. 4, paras. 64-65, 73.
[209] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, paras. 95-98; and Saccucci Affidavit, Tab 16, pages 1047-1048 of the Application Record, Vol. 4, para. 75. The testimony of Drs. Agarwal and Kwan regarding improvements to the atmosphere of the DSB following Dean Bates's resignation does not appear in the Tribunal's Decisions, nor does the testimony of Mr. Saed Sheekari, and Drs. Miltenburg, Wiesner, Hassini, and Connelly in regards to the improved DSB atmosphere as described in the Steiner Affidavit, Tab 13, pages 904-906 of the Application Record, Vol. 3, paras. 91-100.
[210] Saccucci Affidavit, Tab 16, page 1040 of the Application Record, Vol. 4, para. 53.
[211] Saccucci Affidavit, Tab 16, page 1040 of the Application Record, Vol. 4, para. 54, and Exhibit "NN" thereto.

with the Divisional Court.[212] For example, these documents included the critical Affidavit of the 003 Complainant Dr. Milena Head, sworn August 11, 2011.[213]

143. On September 25, 2014, the Tribunal filed a supplementary record with the Divisional Court[214] after it was informed by Applicants' counsel of omissions in the Divisional Court Record.[215]

144. On November 26, 2014, the Tribunal served a second supplementary record,[216] once again after being informed by Applicants' counsel of omissions in the Divisional Court Record.[217]

145. On January 15, 2015, the Tribunal provided a further set of unfiled documents to counsel, noting that it was satisfied that the complete Record had now been filed with the Court and stating that "what constitutes the record could be open to interpretation."[218] The Applicants were invited to review the documents and request that the Tribunal file with the Court any documents they felt necessary for

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[212] Saccucci Affidavit, Tab 16, page 1040 of the Application Record, Vol. 4, para. 55.
[213] *Ibid.* Dr. Head's August 11, 2011 Affidavit was part of the evidence in the complaint of Dr. Head against the Applicant Dr. Steiner for which Dr. Steiner was ultimately sanctioned. The Applicants also identified other missing documents from the Tribunal Record including affidavits filed by the Applicants in respect of a motion by the University in October 2013 to compel disclosure of the Confidential Decisions to the public.
[214] Saccucci Affidavit, Tab 16, page 1041 of the Application Record, Vol. 4, para. 57, and Exhibit "PP" thereto.
[215] Saccucci Affidavit, Tab 16, page 1041 of the Application Record, Vol. 4, para. 56, and Exhibit "OO" thereto. The request included all affidavits and/or documentary evidence referenced in the Orders (as filed at pages 1 to 132 of the Tribunal's Record), as well as any other affidavit or documentary evidence not specifically referenced therein but otherwise filed with the Tribunal in respect of those Orders, as well as any and all affidavits and documentary evidence filed with the Tribunal in respect of the U/SHAD 002 & 003 proceedings for any other reason, not currently forming part of the record filed with the Divisional Court.
[216] Saccucci Affidavit, Tab 16, page 1041 of the Application Record, Vol. 4, para. 59, and Exhibit "RR" thereto.
[217] Saccucci Affidavit, Tab 16, page 1041 of the Application Record, Vol. 4, para. 58, and Exhibit "QQ" thereto. Applicants' counsel requested that the Tribunal redouble its efforts to ensure that a complete record is filed with the Divisional Court in the very near future.
[218] Saccucci Affidavit, Tab 16, page 1042 of the Application Record, Vol. 4, para. 61, and Exhibit "TT" thereto.

the Judicial Review.[219] Included among these documents were documents that University counsel had put before the Tribunal Panel during closing submissions, which focused on membership in, and activities of, the "G21".[220]

(c) *The Tribunal's Orders Following the Release of the Decisions Under Review*

146. After the release of the Tribunal Decisions, the Tribunal continued to issue orders affecting the Applicants. These included (i) the University's motion for broad release of the Tribunal Decisions, (ii) the University's motion for further release of the Tribunal Decisions, (iii) the Applicants' request for disclosure of the Tribunal Decisions to an advisor at the Canadian Association of University Teachers (CAUT) and (iv) the University's motion for an extension to implement the orders set out in the Tribunal's Remedies Decision.[221]

147. In October 2013, the University sought to publicly release the confidential Tribunal Decisions.[222] The Applicants took the position that they would consent to the release of the Tribunal Decisions if, and only if, the entire record of proceedings, including the evidentiary exhibits and audio recordings was simultaneously released.[223] The University refused to consent to the simultaneous

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[219] Saccucci Affidavit, Tab 16, page 1042 of the Application Record, Vol. 4, para. 61, and Exhibit "TT" thereto
[220] Saccucci Affidavit, Tab 16. pages 1042-1043 of the Application Record, Vol. 4, para. 62, and Exhibit "UU" thereto.
[221] Saccucci Affidavit, Tab 16, pages 1025-1040 of the Application Record, Vol. 4, paras. 3-52.
[222] Saccucci Affidavit, Tab 16, page 1025 of the Application Record, Vol. 4, para. 5, and Exhibit "A" thereto.
[223] Saccucci Affidavit, Tab 16, pages 1025-1026 of the Application Record, Vol. 4, para. 6, and Exhibits "B" and "D" thereto.

release of the record of proceedings[224], and no agreement on public disclosure was reached.

148. On October 28, 2013, University counsel brought a motion to the Tribunal seeking disclosure of the Tribunal Decisions to the Senate Committee on Appointments and the entire MUFA Executive, and an Order permitting the University to release the Decisions "as necessary to other specified parties where such disclosure would 'facilitate the remedial purposes of the Policy'."[225] After receiving submissions from the parties including the Applicants' evidence that this requested release, absent the entire evidentiary record, would cause them prejudice,[226] the Tribunal issued its Implementation Order on December 12, 2013 dismissing the University's request on the basis that it was not reasonably necessary.[227]

149. On December 16, 2013, the Applicants requested that the Tribunal issue an Order allowing Dr. James Turk, then Executive Director of the CAUT to review the Tribunal Decisions so that the CAUT could advise the Applicants as to whether it would support a potential application for Judicial Review; they requested the relief on an urgent basis so that Dr. Turk could begin reviewing the Decisions as quickly as possible, but in any event during the holiday break.[228] Both the

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[224] Saccucci Affidavit, Tab 16, pages 1026-1027 of the Application Record, Vol. 4, para. 10, and Exhibit "E" thereto, at pages 1070-1071 of the Application Record, Vol. 4.
[225] Saccucci Affidavit, Tab 16, pages 1028-1029 of the Application Record, Vol. 4, paras. 16, 18, and Exhibit "F" thereto.
[226] Saccucci Affidavit, Tab 16, page 1029 of the Application Record, Vol. 4, para 19, and Exhibit "I" thereto.
[227] Saccucci Affidavit, Tab 16, page 1030 of the Application Record, Vol. 4, para. 22, and Exhibit "K" thereto.
[228] Saccucci Affidavit, Tab 16, page 1031 of the Application Record, Vol. 4, para. 23, and Exhibit "L" thereto.

University and the 003 Complainants opposed the request.[229] After requesting the Applicants' submissions by December 20, 2013 and further submissions by January 3, 2014, the Tribunal issued its decision nearly four months later (April 22, 2014), denying the Applicants' request.[230]

150. In its Remedies Decision, the Tribunal ordered the University to complete a review of the Policy (including a review of several key points in the Policy relevant to this Application). The review was to commence within 90 days and be completed within twelve months, or by September 23, 2014.[231]

151. On September 12, 2014, Tribunal counsel wrote to the Applicants enclosing an "Interim Report" from the University President, Patrick Deane, indicating that the University would not meet the deadline imposed by the Tribunal and seeking an eight-month extension.[232] The Interim Report indicated that the University did not anticipate completing the review until April 2015.[233]

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[229] Saccucci Affidavit, Tab 16, pages 1031-1032 of the Application Record, Vol. 4, paras. 24, 26, 27, and Exhibits "M" and "P" thereto.
[230] Saccucci Affidavit, Tab 16, page 1035 of the Application Record, Vol. 4, para. 38, and Exhibit "AA" thereto.
[231] Saccucci Affidavit, Tab 16, pages 1035-1036 of the Application Record, Vol. 4, para. 39, and the Remedies Decision, at page 18, at Tab 3, page 365 of the Application Record, Vol. 1.
The Review was to include: (1) The proper scope of HRES; (2) The scope of HRES' obligation to keep matters confidential; (3) Processes which require the HRES Office to expeditiously dismiss or refer complaints to a Tribunal if they meet minimal thresholds and if they cannot be promptly settled; (4) Whether an investigator under the Policy should interview all parties (the complainant(s) and the respondent(s)), before finalizing and submitting a report concerning a complaint; (5) Whether an investigator must specify the reason for the extra time in his or her report if circumstances warrant an investigation longer than three months; (6) Whether the Policy should require mandatory mediation as soon as possible, and before a Tribunal adjudicates the matter; and (7) Confidentiality provisions related to the Tribunal hearing processes reviewed to balance confidentiality with public accountability.
[232] Saccucci Affidavit, Tab 16, pages 1036-1037 of the Application Record, Vol. 4, para. 40, and Exhibit "BB" thereto.
[233] *Ibid*.

152. The Tribunal requested and received submissions from the parties, including the Applicants who took the position that the University had breached the Tribunal order and should be sanctioned to maintain the appearance of fairness.[234]

153. Almost three months later on December 4, 2014, the Tribunal released its Implementation Order and Reasons, which found that the University had breached the Order, but that no sanction was appropriate and that the University's proposed timeline was reasonable and acceptable.[235]

PART III - ISSUES AND THE LAW

154. The Applicants submit that the following issues are to be addressed in this Application for Judicial Review:

(a) What is the appropriate standard of review?

(b) Did the Tribunal exceed its jurisdiction and violate the principles of natural justice and procedural fairness by proceeding in the absence of one of its members during two critical portions of the hearing?

(c) Did the promotion of one of the Tribunal members, without notice to the Applicants, to the University's senior administration while still an adjudicating member of the Tribunal give rise to a reasonable apprehension of bias?

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[234] Saccucci Affidavit, Tab 16, pages 1039-1040 of the Application Record, Vol. 4, para. 50, and Exhibit "LL" thereto.
[235] Saccucci Affidavit, Tab 16, page 1040 of the Application Record, Vol. 4, para. 51, and Exhibit "MM" thereto, at page 1282 of the Application Record, Vol. 4.

(d) Did the Tribunal make an error of law by imposing unreasonable and punitive sanctions against the Applicants?

(e) Did the Tribunal err in jurisdiction and violate the principles of natural justice and procedural fairness by ordering consolidation?

(f) Did the Tribunal violate the principles of natural justice and procedural fairness by filing a prejudicially deficient record?

(g) Was the Tribunal proceeding nullified by a fundamentally flawed and unfair pre-hearing investigation process?

(h) Did the Tribunal breach the Policy and lack jurisdiction by:

1. Failing to determine whether the Applicants wished to pursue an informal resolution as required by s. 44 of the Policy before proceeding with their formal complaint;

2. Proceeding with "group complaints", purportedly pursuant to s. 33-36 of the Policy rather than individual complaints, in breach of the Policy;

3. Proceeding with the complaint of Dr. Head against Dr. Steiner despite it being time barred by s. 43(b) of the Policy; and

4. Finding that Dr. Ray's counter-complaint was frivolous, vexatious or retaliatory without complying with the Policy?

(i) Did the Tribunal err in jurisdiction and violate the principles of natural justice and procedural fairness through its structure and conduct of the hearing by:

1. Imposing a prejudicial and unreasonable hearing schedule;

2. Permitting the University to act in a prosecutorial role; and

3. Permitting evidence of certain witnesses to be led without proper notice to the Applicants?

ISSUE A. Standard of Review & Content of the Duty of Procedural Fairness

155. The standard of review on issues of procedural fairness is correctness.[236]

156. Furthermore, where a decision is attacked on the basis of a denial of natural justice, it is unnecessary for a court to engage in an assessment of the review standard; the only question is whether the rules of procedural fairness have been adhered to.[237]

157. The extent of the sanctions ordered by the Tribunal against the Applicants must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[238]

158. In interpreting their own or reasonably related statutes, Tribunals are ordinarily accorded reasonable deference. However, on "true questions of jurisdiction" and in exceptional cases of general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness applies.[239]

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[236] *Exeter v. Canada (Attorney General)*, 2014 FCA 251, para 31; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 43.
[237] *Scheerer v. Walbilliq* (2006), 265 D.L.R. (4th) 749 (Ont. S.C.J. (Div. Ct.)), at para. 33; *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Ont. Div. Ct.), para. 16, and *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (Ont. C.A.), para. 10.
[238] *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at para. 47 ["*Dunsmuir*"] and *Cape Breton-Victoria Regional School Board v. C.U.P.E., Local 5050* (2011),18 Admin. L.R. (5th) 75 (N.S.C.A.), at paras. 27-31.
[239] *Canada (Attorney General) v Mowat*, [2011] 3 S.C.R. 471 ["*Mowat*"], at para. 22 and *Dunsmuir*, *supra*, at para. 60.

159. With respect to the content of the duty of procedural fairness required in the circumstances, the Applicants submit that the *Baker* factors support a higher degree of procedural fairness in the present case:[240]

(a) the nature of the decision made and the process followed in making it – in this case, the Tribunal purported to proceed in a manner akin to a court and the Applicants submit that they should be afforded procedural protections befitting the process followed;

(b) the statutory scheme in which the administrative body operates – there is no provision for an internal appeal of the Tribunal Decisions and therefore, greater procedural protections are required;

(c) the importance of the decision to the individual or individuals affected – courts have found that this is a significant factor impacting the content of the duty of procedural fairness – the Applicants have suffered significant harm as a result of the Tribunal Decisions including, in the cases of Drs. Bart, Steiner and Taylor, the end of their academic careers and in the cases of the three other sanctioned Applicants serious detriment to their academic careers, thereby warranting a high standard of procedural fairness;

(d) the legitimate expectations of the individual(s) challenging the decision – the Applicants had the legitimate expectation that the process would carry a high level of fairness and transparency; and

(e) the choice of procedure of the administrative body itself – pursuant to the procedure set out in its enabling document, the Tribunal conducted the

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[240] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), paras. 23-28. ["*Baker*"].

hearing in a manner akin to a court proceeding with procedural orders, *viva voce* evidence and detailed oral and written submissions from counsel.[241]

160. The nature of the decision, the critical interests at stake and the importance of the issues to the Applicants, whose very livelihoods hung in the balance, required the Tribunal to afford the Applicants a high degree of procedural fairness.

ISSUE B. Proceeding in the Absence of a Tribunal Member

161. It is undisputed that one of the Tribunal members, Dr. Ibhawoh, who participated in the hearing and was a signatory to the Decisions, was absent from the hearing on two separate occasions. This is a fundamental breach of the natural justice maxim "he who decides must hear" and cannot be cured.

162. On April 13, 2012, Dr. Ibhawoh was absent for i) a portion of the 003 Respondents' counsel Mr. Hopkins's cross-examination of the 003 Complainant Dr. Milena Head, and ii) all of the re-direct of Dr. Head by her counsel Mr. Heeney.[242] Dr. Ibhawoh missed 24 minutes and 4 seconds of hearing critical evidence during this first absence.[243]

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[241] Appendix "B" to this factum, the Policy, ss. 64, 67-70.
[242] Milne Affidavit, Tab 4, pages 382-383 of the Application Record, Vol. 2, para. 56; Hopkins Affidavit, Tab 5, page 575 of the Application Record, Vol. 2, para. 61.
[243] Audio file 2 for April 13, 2012, filed with the Divisional Court.

163. During the portion that Dr. Ibhawoh missed[244] Mr. Hopkins cross-examined Dr. Head on the events surrounding her 2009 tenure and promotion proceeding as it pertained to her complaint against Dr. Steiner, and challenged the reliability of her evidence.[245]

164. Although the Applicants' counsel did not object on April 13, 2012 when asked by the Tribunal chair if there was any objection to *"a brief absence"* of Dr. Ibwahoh "*with the concept that he will have an opportunity to review the audiotapes from that prior to – – and that if he has questions, it will be with the panel when Ms Milne questions*"[246], as will be discussed, this fundamental breach of the natural justice maxim "he who decides must hear" cannot be cured by waiver or consent.

165. On April 24, 2012, Dr. Ibhawoh was again absent for a portion of the hearing. On this occasion the Tribunal chair advised counsel that Dr. Ibhawoh "…*has to step out of the room briefly at four o'clock and we're proposing that we continue as we did previously, that whatever section of the transcript that we'll just continue on and then we can review that when he comes back (sic).*"[247] On this occasion, Dr. Ibhawoh's absence occurred during a significant portion of the cross-

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[244] Prior to his absence on that day, the Tribunal stated on the record that Dr. Ibhawoh would be stepping out but that he could later listen to the audio. See Tribunal's filed Audio file 1, April 13, 2012, 01:32:20-1:01:33:00.
[245] Milne Affidavit, Tab 4, pages 382-383 of the Application Record, Vol. 2, para. 56; Hopkins Affidavit, Tab 5, page 575 of the Application Record, Vol. 2, paras. 62-63.
[246] Excerpt of the transcript of the April 13, 2012 hearing day, Tab 14(D), pages 509-510 of the Supplementary Application Record, Vol. 2.
[247] Excerpt of the transcript of the April 24, 2012 hearing day, Tab 14(E), page 512 of the Supplementary Record, Vol. 2.

examination of the Applicant Dr. Devashish Pujari, during which Dr. Pujari's credibility was put at issue by 003 Complainants' counsel, Mr. Heeney.[248]

166. The audio indicates that Dr. Ibhawoh missed no less than 43 minutes and 22 seconds of the cross-examination of the Applicant Dr. Pujari on April 24, 2012.[249]

167. During the period when Dr. Ibhawoh was absent, Mr. Heeney twice put Dr. Pujari's credibility directly at issue in questions to him, and Dr. Ibhawoh was not present to observe Dr. Pujari's response.[250]

168. Although Dr. Ibhawoh did pose questions of Dr. Pujari upon his return to the hearing, the questions asked did not relate in any way to the line of questioning conducted by Mr. Heeney during his absence from the hearing.[251]

169. Section 53 of the Policy requires that a Hearing Panel consist of three members. In this case, all three members of the Tribunal participated in the decision-making process and signed the Tribunal Decisions. During these two absences, key evidence was elicited which was later used in the Decisions to anchor findings of credibility, affecting several of the sanctioned Applicants.

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[248] Milne Affidavit, Tab 4, page 383 of the Application Record, Vol. 2, para 57; Hopkins Affidavit, Tab 5, page 576 of the Application Record, Vol. 2, para. 66.
[249] Milne Affidavit, Tab 4, page 383 of the Application Record, Vol. 2, para. 58; Hopkins Affidavit, Tab 5, page 576 of the Application Record, Vol. 2, para. 67.
[250] Hopkins Affidavit, Tab 5, page 576 of the Application Record, Vol. 2, para. 68.
[251] See Exhibit 9 to the cross-examination of Mr. Heeney, dated December 1, 2015, Tab 8(H), pages 272-314 of the Supplementary Application Record, Vol. 1, being the portion of Dr. Pujari's cross-examination that Dr. Ibhawoh missed, and which is confirmed by answer to undertaking, Tab 8(I), pages 317-318 of the Supplementary Application Record, Vol. 1, at question 1025, and also answer to undertaking , Tab 8(I), pages 318 of the Supplementary Application Record, Vol. 1, at question 1035 where Mr. Heeney confirms that upon returning Dr. Ibhawoh asked questions unrelated to what he missed.

170. It is a fundamental principle of natural justice that he who decides must hear.[252] This rule affects the trier of fact's jurisdiction,[253] and the parties cannot by their express or implied waiver, or consent, grant jurisdiction where it does not exist.[254]

171. As stated by the Ontario Court of Appeal: "[p]rocedural fairness precludes a tribunal member from participating in the making of a decision if the member has not fully heard the matter."[255] The result is to vitiate the decision unless the legislation provides "express" authorization for the absence.[256]

172. It is not sufficient that all the members of the tribunal who rendered the decision reviewed the evidence and the arguments after the fact; rather, "the rule requires that they hear them in the manner prescribed by law".[257]

173. Section 58 of the Anti-Discrimination Policy provides: "[m]embers of the tribunal must not hear evidence or receive representations regarding the substance of the case other than through the procedures described in this document". The Policy provides for the receipt of *viva voce* witness evidence by examination before the hearing panel—it does not provide for the after-the-fact receipt of evidence by

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[252] *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, at para. 66 and *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.) at para. 33 ["*Consolidated Bathurst*"].
[253] *Doyle v. Canada (Restrictive Trade Practices Commissions)*, [1985] 1 F.C. 362 (F.C.A.) at para. 13, leave to appeal to S.C.C. refused (1985), 7 C.P.R. (3d) 235 (S.C.C.). ["*Doyle*"].
[254] *Goertz v. College of Physicians & Surgeons*, [1989] 6 W.W.R. 11 (Sask. C.A.) at para. 21. See also *Essex Incorporated Congregational Church Union v Essex CC*, [1963] 1 All E.R. 326 (H.L), which was applied in Ontario in *Gough v. Peel Regional Police Service* (2009), 248 O.A.C. 105, 309 D.L.R. (4th) 439 (Ont. Div. Ct.) at paras. 30-31.
[255] *Piller v. Assn. of Land Surveyors (Ontario)* (2002), 43 Admin. L.R. (3d) 151 (Ont. C.A.), at para. 52.
[256] *Mannion v. Avalon East School Board*, 1999 CarswellNfld 260 (N.S.C. [Trial Div.]), para. 60, citing Jones and deVillars, *Principles of Administrative Law* (2d) (Carswell), at pp.288, 293 and *Doyle*, *supra*, at para. 6.
[257] *Doyle*, *supra*, at para. 13.

review of audio,[258] nor does it provide for the absence of a panel member during the hearing.

174. In any event, there is no evidence to suggest that Dr. Ibhawoh did indeed review the audio of the portions of the proceedings for which he was absent.

175. Section 60 of the Policy provides that Hearing(s) shall be scheduled at a time and place convenient for the Tribunal *and* the parties to the Hearing; however it expressly allows the Tribunal to continue in the absence of the parties in exceptional circumstances.[259] There is no corresponding grant of jurisdiction for a Tribunal member's absence, and the Applicants submit that implicit in s. 60 is that each panel member's presence is of such fundamental importance that scheduling shall favour its full attendance over that of even the parties.

176. In *Doyle v. Canada (Restrictive Trade Practices)*, the Federal Court of Appeal noted in reference to the maxim "he who decides must hear" that:

> "[t]his maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said this rule is a corollary of the *audi alteram partem* rule. This is true to the extent the litigant is not truly "heard" unless he is heard by the person who will be deciding the case. In my view, however, the rule expresses more than that; it is a rule which actually affects the judge's jurisdiction. For that reason its violation may be invoked even by a litigant who waived his right to be heard by the court

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[258] See Appendix "B" to this factum, the Policy, ss. 67, 68, 69.
[259] The Policy permits this if the party's reasons for absence are not considered valid or their absence may cause unreasonable delay.

> which passed judgment on him.… Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in the decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard. It can therefore not be argued that the requirements of the law have been met merely because the members of the tribunal who rendered a decision heard the evidence and arguments; the rule requires that they hear them in the manner prescribed by law."[260]

177. The Tribunal has breached its Policy and exceeded its jurisdiction by conducting a hearing without the full panel present at all times. It has violated the principles of procedural fairness and natural justice by rendering a decision, which was decided and signed by all three Tribunal members, without all of three members having been in attendance to receive the evidence in the manner required by law.

178. It is submitted that the violation of natural justice is all the more egregious in light of the nature of the evidence for which the Tribunal member was absent. The Tribunal member missed evidence that went straight to credibility findings which formed a basis for its Decisions.

179. In discussing the importance of assessing credibility without hearing all of the evidence, the Supreme Court of Canada in *Consolidated Bathurst* stated:

> "the determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the

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[260] *Doyle*, *supra*, at para. 13.

> evidence, and the rules of natural justice do not allow such a person to vote on the result."[261]

180. Although Dr. Ibhawoh was not present in order to receive all of Dr. Head's evidence, especially during this critical portion of the hearing, in the Confidential Decision, Dr. Ibhawoh (as a member of the Tribunal) found that Dr. Head was a credible witness, and preferred her evidence where it contradicted that of Dr. Steiner.[262]

181. Furthermore, in the Decisions, Dr. Ibhawoh (as a member of the Tribunal) found that Dr. Steiner had harassed Dr. Head, and he, along with the other Tribunal members, levied a severe, career-ending penalty on Dr. Steiner, being a three year suspension without pay, benefits, privileges or access to the University premises.[263]

182. Despite missing more than 43 minutes of his cross-examination, Dr. Ibhawoh (as a member of the Tribunal) also concluded that Dr. Pujari was not a credible witness[264] and punished him with a one year suspension without pay, benefits, privileges or access to the University's premises.[265]

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[261] *Consolidated Bathurst*, *supra*, para. 43.
[262] The Confidential Decision, at page 193, at Tab 2, page 220 of the Application Record, Vol. 1.
[263] Steiner Affidavit, Tab 13, pages 899, 906 of the Application Record, Vol. 3, paras. 73, 102, 104, and Exhibit "N" thereto; the Confidential Decision at pages 193-206, at Tab 2, pages 220-233 of the Application Record, Vol. 1; and the Remedies Decision at pages 4, 12, at Tab 3, pages 351 and 359 of the Application Record, Vol. 1.
[264] The Confidential Decision at page 171, at Tab 2, page 198 of the Application Record, Vol. 1.
[265] The Remedies Decision at page 10, at Tab 3, page 357 of the Application Record, Vol. 1; Pujari Affidavit, Tab 9, page 691 of the Application Record, Vol. 2, paras. 77-78, and Exhibit "C" thereto.

183. The Applicants submit that the fundamental fact of the Tribunal member's absence during portions of the hearing constitutes clear jurisdictional error and a denial of procedural fairness and natural justice and warrants the *certiorari* order requested.[266]

ISSUE C. The Appointment of a Tribunal Member to the University Administration Prior to Filing of Remedy Submissions and Release of the Decisions

184. The duty of fairness owed by the Tribunal to the Applicants is measured against the "reasonable apprehension of bias" standard; "the test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator".[267]

185. Since the functions of the Tribunal are primarily adjudicative, it must comply with the standard applicable to courts: "That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision".[268]

186. In this case, s. 54 of the Policy specifically incorporates this fundamental principle into the Tribunal's framework: complainants and respondents are permitted to object in writing to the names on the slate of potential panel members

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[266] The fact that counsel did not object to the Tribunal's request on two occasions that Dr. Ibhawoh "step out" briefly during the hearing does not cure this fundamental breach, as the Applicants could not by their waiver grant jurisdiction that the Tribunal did not have.
[267] *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board),* [1992] 1 S.C.R. 623 (S.C.C.), at para. 22. ["*Newfoundland Telephone*"].
[268] *Newfoundland Telephone*, *supra*, para. 27.

by identifying bias, conflict of interest or any other valid reason why a panel member would violate the reasonable appearance of bias.[269]

187. The Applicants made use of s. 54 to deliver written objections to certain proposed members of the panel. Of particular note is the following basis for the Applicants' objection to a particular proposed panel member as set out in a letter from Applicants' counsel to Hearings Officer, Michelle Bennett, dated May 11, 2011:

> "Dr. Waiman's appointment has the appearance of being hastily and deliberately carried out by the University. It is not clear who within the University administration was responsible for putting his name forward. Given that our Complaint alleges, amongst other things, that administrative interference with membership on committees and inappropriate treatment of my clients by some within the University administration, it is imperative that there be no apprehension of bias or potential partiality by reason of how an appointee was placed on the hearing panel."[270]

188. The Applicants submit that implicit in the above objection is a concern for the reasonable apprehension of bias arising from the proposed panel member's affiliation with and/or being beholden to the University administration.

189. The Tribunal hearing ended on June 6, 2012. Less than a month later, on July 4, 2012, while still adjudicating, Dr. Ibhawoh was elevated to the University

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[269] See for instance *Rao v. McMaster University*, 2010 HRTO 1051, at para. 27 for a discussion of the protections in place to avoid the reasonable appearance of bias with the Tribunal herein at issue. Pursuant to section 54, objections are permitted within 10 working days of receipt of the slate.

[270] Milne Affidavit, Tab 4, pages 381-382 of the Application Record, Vol. 2, paras. 49-51; Milne Letter, Tab 26, pages 1627-1628 of the Application Record, Vol. 6.

administration as Associate Dean, Graduate Research Studies for the Faculty of Humanities.[271]

190. The position occupies a "senior academic administrative office" and candidates are recommended by an *ad hoc* selection committee to the Senate Committee on Appointments, who in turn recommends them to the Senate.[272]

191. Given the fact that the position is of a certain "administrative level", candidates for the position also require the final approval of the Board of Governors.[273]

192. Unbeknownst to the Applicants, on April 13, 2012 – 11 days into the 21 day hearing – Dr. Ibhawoh submitted his application materials for the position of Associate Dean Graduate and Research Studies.[274] He was one of only two applicants.[275] He was interviewed on April 20, 2012 by the *ad hoc* Selection Committee.[276]

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[271] The Applicants' evidence was that they did not learn of this appointment until the early fall of 2012, at which time they expected the Confidential Decision to be released at any time, see Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(D), page 43 of the Supplementary Record, Vol. 1.
[272] Excerpt of the McMaster University Senate bylaws, Tab 13, pages 468-469 of the Supplementary Application Record, Vol. 2.
[273] Excerpt of the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(A), pages 378-379 of the Supplementary Application Record, Vol. 2.
[274] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(B), pages 380-381 of the Supplementary Application Record, Vol. 2 at question number 33.
[275] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(B), page 381 of the Supplementary Application Record, Vol. 2 at question number 25.
[276] Answers to undertakings from the cross-examination of Helen Ayre, Tab 10(B), page 381 of the Supplementary Application Record, Vol. 2, question 40.

193. On May 3, 2012, the *ad hoc* Selection Committee recommended Dr. Ibhawoh, as its only choice of candidate, for the position of Associate Dean to the Senate Committee on Appointments.[277]

194. On May 14, 2012 the Senate Committee on Appointments met and approved Dr. Ibhawoh's candidature for the position of Associate Dean.[278] The Senate Committee on Appointments provided its recommendations to the members of the Senate on or about May 30, 2012.[279] Dr. Ibhawoh was informed of this on or before May 30, 2012[280], and continued to sit with the Panel on June 5 and 6, 2012, but no mention was made of the likely appointment.

195. In recognition of the additional administrative responsibility that comes with the job, the position of Associate Dean, Research and Graduate Studies carries a fixed stipend of $9,000.00, and generally includes teaching relief.[281]

196. The nominal teaching load for a member of the Faculty of Humanities, of which Dr. Ibhawoh is a member[282], is twelve units.[283] Each course taught in the Faculty of Humanities is worth either three or six units.[284] Dr. Ibhawoh is presently

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[277] Recommendation of the *Ad Hoc* Selection Committee, Tab 10(E), page 413 of the Supplementary Application Record, Vol. 2.
[278] Recommendation of the *Ad Hoc* Selection Committee, Tab 10(E), pages 410, 415 of the Supplementary Application Record, Vol. 2.
[279] Affidavit of Helen Ayre, sworn October 20, 2015, Tab 1, page 7 of the Responding Record, Vol. 1, para. 16.
[280] Letter from George Avraam to Peter M. Jacobsen dated February 18, 2016, Tab 10(H), page 447 of the Supplementary Application Record, Vol. 2.
[281] Teaching relief is typically negotiated between the individual Associate Dean and the responsible faculty Dean. See Kleiman Affidavit, Tab 15, pages 1014, 1015 of the Application Record, Vol. 3, paras. 4, 6, 7.
[282] Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 78, and Exhibit "CCC" thereto.
[283] Kleiman Affidavit, Tab 15, page 1014 of the Application Record, Vol. 3, para. 5, and Exhibit "B" thereto.
[284] Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 79, and Exhibit "CCC" thereto.

teaching only one six-unit course,[285] and accordingly, he is receiving 50% teaching relief.

197. Dr. Bruce Frank, then the University Secretary - the "chief administrative officer of the Board of Governors and the Senate responsible for directing the operations of the University Secretariat"[286] - was a member of the Senate[287], and was present throughout the hearings – including on June 5, 2012 - and knew that Dr. Ibhawoh was a sitting Tribunal member.[288]

198. Dr. Ibhawoh's candidature, along with all other recommendations of the Senate Committee on Appointments, was formally approved by the Senate on June 6, 2012[289], and the Board of Governors on June 7, 2012.[290]

199. Almost a year after Dr. Ibhawoh's promotion to the University administration, the Tribunal released the Confidential Decision on liability on May 15, 2013. The

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[285] Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 79, and Exhibit "CCC" thereto.
[286] http://www.mcmaster.ca/univsec/#
[287] Answers-to-undertakings from the cross-examination of Helen Ayre, dated December 2, 2015, Tab 10(F), page 417 of the Supplementary Application Record, Vol. 2.
[288] Exhibit 4 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(D), pages 155, 159, 165, 170, 174, 180, 182, 187, 192, 197, 202, 209, 214, 219, 223, 228, 233, 239, and 248 of the Supplementary Application Record, Vol. 1. Dr. Frank was present for the hearings days on March 3, 4, 25, 27, 30, 31, April 4, 10, 12, 13, 19, 22, 23, 24, 30, May 8, 23, and June 5, 2012.
[289] Summary of the business arising in the closed Senate session of June 6, 2012, Tab 10(F), pages 432-433 of the Supplementary Application Record, Vol. 2.
[290] Minutes of the Board of Governors meeting, June 7, 2012, Tab 10(G), pages 443 of the Supplementary Application Record, Vol. 2. Although the Applicant Dr. Steiner was a member of the Senate at the time, there is no evidence in this Application that Dr. Steiner actually received the package of materials for the Senate meeting as attached to the Affidavit of Helen Ayre at Exhibit "F", which appears to have included the Agenda for the meeting and the list of all the recommended candidates for Senate approval. Rather, it was Dr. Steiner's evidence that he did not receive the package of materials and he was not present at the Senate meeting of June 6, 2012 (being the last day of the Tribunal hearing). See excerpt of the cross-examination of Dr. George Steiner, dated November 18, 2015, Tab 6(A), page 77 of the Supplementary Application Record, Vol. 1; and answers to undertakings of Dr. Steiner, Tab 6(B), page 78 of the Supplementary Application Record, Vol. 1.

Tribunal subsequently received remedy submissions on June 10, 2013 and released the Remedies Decision on September 23, 2013.

200. The Applicants submit that Dr. Ibhawoh's promotion to the University administration is a more serious example of the very issue they had raised in respect of their objection to the proposed member Dr. Waiman.

201. Indeed, the appointment of a Tribunal member to a senior academic administrative position within the University administration, at a time when he was still tasked with determining the liability of and consequences for the Applicants *and* the University, gives rise to the reasonable apprehension of bias and the violation of natural justice, particularly in light of the newly received benefits of his appointment.

202. Furthermore, the Applicants only learned of Dr. Ibhawoh's promotion months *after* the oral portion of the hearing had finished, at a time when the Applicants believed the release of the Decision was imminent.[291]

203. Notwithstanding the fact that on or about May 30, 2012, the University Secretary Dr. Frank and Dr. Ibhawoh were both aware of the pending appointment to Associate Dean[292], no notice of this appointment was provided to the Applicants

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[291] Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(d), page 44 of the Supplementary Application Record, Vol 1.
[292] Dr. Frank was present on the June 5, 2012 hearing day. See Exhibit 4 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(D), pages 247-248 of the Supplementary Application Record, Vol. 1.

by the University.[293] Indeed, no notice was ever provided to the Applicants throughout the Tribunal process of Dr. Ibhawoh's potential appointment to a senior academic administrative position within the University administration; rather the Applicants only learned of it from a University website posting in the late summer of 2012.[294]

204. The stealth promotion of Dr. Ibhawoh and the process that led up to his promotion to the University's senior administration exacerbates the seriousness of this breach of natural justice.

205. However, the appointment alone is sufficient to warrant quashing the Tribunal's Decisions. The Applicants submit that the fact that a Tribunal member occupied two key positions simultaneously, as a Tribunal member *and* as a member of the University's senior administration – itself a party to the proceedings – at a time well before receiving remedy submissions from the University and the rendering of the Tribunal Decisions gives rise to the reasonable apprehension of bias and constitutes yet another fundamental breach of natural justice.[295]

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[293] See Rose Affidavit, Tab 11, page 756 of the Application Record, Vol. 3, para. 59, and Exhibit "A" thereto. Prior to the appointment of Tribunal panel members, Dr. Rose had written to Mr. Komlen indicating that the University should be considering whether potential panel members were in a conflict position that might be unknown to the parties, and for which they should recuse themselves.

[294] Excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(d), page 44 of the Supplementary Application Record, Vol 1.

[295] See for instance *Thomas v. Mount Saint Vincent University* (1986), 28 D.L.R. (4th) 230 (N.S.S.C. T.D.), which involved similar considerations as the present case. ["*Thomas*"].

ISSUE D. The Unreasonableness of the Penalties Issued by the Tribunal

206. The Applicants submit that the penalties recommended by the Tribunal against Dr. Pujari, Dr. Bart, Dr. Taylor, Dr. Steiner, Dr. Ray and Dr. Rose and ultimately carried out by the University are unreasonable on the facts and the law, are unduly punitive, and should be quashed.

207. The sanctioned Applicants received penalties ranging from: (i) three year suspensions that were *de facto* terminations (Dr. Bart, Dr. Steiner and Dr. Taylor); (ii) to a one year suspension (Dr. Pujari); (iii) to suspension for one term (Dr. Ray); and (iv) to a formal reprimand to be kept on record for five years (Dr. Rose). Five of the six Applicants who were respondents to the 003 Complaint were suspended without pay, benefits, privileges or access to the University's premises.[296]

208. All of the sanctioned Applicants were also stripped from positions of authority and prohibited from holding any such positions for a minimum of five years after their return to the University with any future positions of authority subject to approval by the President.[297]

209. The sanctions recommended by the Tribunal are excessively harsh and unprecedented given the Tribunal's findings against them. The Applicants submit that they are beyond the range of sanctions that would reasonably be assessed,

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[296] See Appendix "C" to this factum, Sanctions Levied Against the Sanctioned Applicants.
[297] The Remedies Decision, pages 10-13, at Tab 3, pages 357-360 of the Application Record, Vol. 1.

based upon the same factual findings, by an independent arbitrator hearing a discharge and discipline grievance under a collective agreement. By virtue of their respective collective agreements, faculty at virtually every other University in Canada have recourse to such a grievance procedure including independent third party arbitration.[298]

210. It has been noted that academia occupies a unique space in the labour arbitration context and that "a University is not an industrial plant, but is a place for the free and forceful exchange of ideas and views."[299]

211. The Applicants submit that the Tribunal's findings against them - which as summarized by the Tribunal in its Confidential Decision amount to a "general inability of some faculty members to respectfully engage in vigorous debate, accept different visions and outcomes and to act collegially" and which "resulted in an unacceptable poisoned work/ academic environment for which… primary responsibility falls on the individual 003 Respondents to varying extents"[300] - cannot in any way substantiate the draconian sanctions issued by the Tribunal.

212. In assessing the reasonableness of the penalties levied against the sanctioned Applicants, three of which included **three year** unpaid suspensions, it is relevant and instructive to consider that in labour arbitration cases, "a **three month**

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[298] See the union status of Canadian universities' academic staff associations at http://www.caut.ca/docs/default-source/professional-advice/union-status-of-academic-staff-associations-at-canadian-universities.pdf?sfvrsn=0.
[299] *The University of Windsor and University of Windsor Faculty Association* (Manley) unreported award of arbitrator Kenneth P. Swan dated June 28th, 2000, at page 23. ["*University of Windsor* (Manley)"]
[300] The Confidential Decision, page 4, at Tab 2, pages 31 of the Application Record, Vol. 1. Except for Dr. Ray who was sanctioned solely based on his counter-complaint against Dr. Detlor.

suspension is a very heavy penalty in *any* context, and is virtually unheard of in a University except for very unusual circumstances." [301] [Emphasis added].

213. Labour arbitration cases dealing with analogous 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 toward students;

(iv) denigrating assigned teaching materials;

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[301] *University of Windsor* (Manley), *supra*, at page 25.

(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 allusions to sexual harassment and impropriety, as well as complaints about resource allocation and funding; and

(vi) repeated instances insubordination.

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 very heavy penalty all by itself…" and that it "strikes at the very heart of a Professor's reputation, and will not soon be forgotten by the students involved, many of whom will be at the University for some years thereafter."[302]

(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

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[302] *University of Windsor* (Manley), *supra*, see especially pages 23-27.

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 behavior such as occurred here will not be tolerated."[303]

(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 method 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.[304]

214. The Applicants submit that, as is demonstrated by these cases, where a professor engages in a course of conduct that gives rises to a poisoned or dysfunctional work environment, arbitrators have issued unpaid suspensions of less than three months, bearing in mind also the "heavy penalty" involved in removing a

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[303] *University College of the North v. Manitoba* (Thompson Grievance), [2011] M.G.A.D. No. 33 (R.A. Simpson, Chair), see especially page 17. ["*University College of the North*"].
[304] *The University of Calgary Faculty Association (Prof. Polzer et. al) v. The University of Calgary* unreported award of the board of arbitration chaired by Andrew C.L. Sims, Q.C. dated September 21, 1999, at pages 112-113. ["*University of Calgary*"]

professor from the classroom, which "strikes at the very heart of the professors' reputation…"[305]

215. By contrast, examples of the kind of egregious cases that give rise to unpaid suspensions exceeding three months, but still well short of termination or a three year unpaid suspension, 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**.[306]

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[305] *University of Windsor* (Manley), *supra,* see especially pages 23-27.
[306] *St. Lawrence College v. Ontario Public Service Employees Union (Young Grievance),* [1998] O.L.A.A. No. 746. (O.L.R.B.). ["*St. Lawrence College*"].

(b) An arbitration involving a professor found to have abused his position of authority and having engaged in 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.[307]

(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 willfully dishonest conduct of the grievor, against the grievor's relatively long-service of ten years, his previous good record, and the fact

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[307] *Okanagan University College and Okanagan University College Faculty Assn. (Craig Grievance)*, [1997] B.C.C.A.A.A. No. 313 (S. Lyon). ["*Okanagan*"].

that the termination would all but assuredly end the grievor's career, and instead issued a **one-year unpaid suspension**.[308]

216. The Applicants submit that the types of egregious cases giving rise to unpaid suspensions in excess of three months, but still far less than three year suspensions, include conduct which is criminal, blatant sexual harassment, or discrimination based upon protected grounds, including gender. This type of conduct is distinguishable from allegations of workplace harassment and it is in no way tied to the participation of a tenured academic in University governance, or in the exercise of academic freedom, found to create a poisoned or dysfunctional work environment.

217. The Applicants submit that the Tribunal's findings against them are consistent with the first category of arbitral decisions described above, rather than the latter. The Tribunal's sanctions significantly exceed the range of appropriate sanctions established by arbitral jurisprudence, and are demonstrably unreasonable.

218. Adding weight to the Applicants' argument that the Tribunal meted out significantly disproportionate penalties is the fact that they have been unable to identify even a single labour arbitration case, in any context, that resulted in a three-year unpaid suspension.

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[308] *The Mount Saint Vincent University Faculty Association and Mount Saint Vincent University* (Stebbins) unreported decision of arbitrator Outhouse dated February 20th, 1995, see especially pages 62-74. ["*Mount Saint Vincent University*"]

219. In assessing the appropriateness of employer issued sanctions, Canadian arbitrators will have recourse to a well-documented series of considerations, which include:[309]

(i) The previous good record of the grievor;

(ii) the long service of the grievor;

(iii) whether or not the offence was an isolated incident in the employment history of the grievor;

(iv) provocation;

(v) whether the offence was committed in the spur of the moment as a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated;

(vi) whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances;

(vii) Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination;

(viii) circumstances negativing intent;

(ix) the seriousness of the offence in terms of company policy and company obligations; and

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[309] Brown and Beatty Canadian Labour Arbitration, Chapter 7 "Discipline", 7:4000 "Disciplinary Penalties", 7:4400 "Mitigating Factors". ["Brown and Beatty"].

(x) any other considerations, including the grievor's unwillingness or failure to apologize or settle when given the chance.

220. Many of these considerations are engaged in the present case, as are other mitigating factors, including that:

(i) None of the sanctioned Applicants had any history of discipline prior to Hearing;[310]

(ii) Each of the sanctioned Applicants' had a long record of service to the University at the time of the Remedies Decision; [311]

(iii) The unpaid suspensions issued to the sanctioned Applicants have created severe economic hardship for them;[312]

(iv) The University chose to single out for punishment only six of the twenty-one faculty members it found to be responsible for creating a poisoned work-environment, demonstrating discrimination by not uniformly enforcing its rules of conduct;[313]

(v) The University was found to share, to some degree, in the blame for the poisoned work environment[314], which the Tribunal

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[310] Bart Affidavit, Tab 8, page 65 of the Application Record, Vol. 2, para. 99; Pujari Affidavit, Tab 9, page 673 of the Application Record, Vol. 2, para. 6; Rose Affidavit, Tab 11, page 745 of the Application Record, Vol. 3, para. 9; Ray Affidavit, Tab 12, page 765 of the Application Record, Vol. 3, para. 6; Steiner Affidavit, Tab 13, page 881 of the Application Record, Vol. 3, para. 8; and Taylor Affidavit, Tab 14, page 973 of the Application Record, Vol. 3, para. 12.
[311] Bart Affidavit, Tab 8, page 65 of the Application Record, Vol. 2, para. 7; Pujari Affidavit, Tab 9, page 673 of the Application Record, Vol. 2, para. 3; Rose Affidavit, Tab 11, page 745 of the Application Record, Vol. 3, para. 3; Steiner Affidavit, Tab 13, page 880 of the Application Record, Vol. 3, paras. 3-5; Taylor Affidavit, Tab 14, page 972 of the Application Record, Vol. 3, para. 5.
[312] Bart Affidavit, Tab 8, pages 653-654 of the Application Record, Vol. 3, paras. 94-95, 102-104; Pujari Affidavit, Tab 9, page 692 of the Application Record, paras. 82-85; Ray Affidavit, Tab 12, pages 788-790 of the Application Record, Vol. 3, paras. 108-113, 117-118; Steiner Affidavit, Tab 13, pages 909-910 of the Application Record, Vol. 3, paras. 113-115, 118-121; Taylor Affidavit, Tab 14, page 992 of the Application Record, Vol. 3, paras. 90-96.
[313] The Confidential Decision, pages 3, 313, at Tab 2, pages 30, 340 of the Application Record, Vol. 1.
[314] The Confidential Decision, pages 3, 4, 312, at Tab 2, pages 30, 31, 339 of the Application Record, Vol. 1.

identified as being "systemic and cultural"[315], and which the Tribunal found was compounded by the conduct of Dean Bates and the Provost Ilene Busch-Vishniac;[316]

(vi) the Applicants continued their employment at the University without incident during the 14 month period between the completion of the oral hearing and the issuing of the remedy decision; and

(vii) Each of the sanctioned Applicants attempted to express remorse for their conduct.[317]

221. In sum, the Applicants submit that a consideration of the relevant labour arbitration jurisprudence, the Tribunal's own findings[318] and of these arbitral factors clearly indicates that the penalties carried out against the Applicants - which range from one-and-a-half times to twelve times the length of a three month suspension, which is "virtually unheard of in the university context"[319] - do not fall within a reasonable range of outcomes having regard to both the facts and the law.

222. Furthermore, in the case of Drs. Bart, Steiner and Taylor, the Applicants submit that the cumulative effect of the sanctions, including the: (i) extraordinary financial penalties reflecting loss of all salary and benefits for a senior academic

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[315] The Confidential Decision, page 312 , at Tab 2, page 339 of the Application Record, Vol. 1.
[316] The Confidential Decision, page 314, at Tab 2, page 341 of the Application Record, Vol. 1.
[317] The Remedies Decision, page 7, at Tab 3, page 354 of the Application Record, Vol. 1. The Tribunal acknowledged this, but appears to have given it little weight, believing that apologies were not sufficient.
[318] These are summarized at pages 3-4 of the Confidential Decision, at Tab 2, pages 30-31 of the Application Record, Vol. 1.
[319] *University of Windsor* (Manley), *supra*, at page 25.

over a three year term;[320] (ii) age, stage and curtailing effect on career development on them during the suspensions; and (iii) the further five-year ban from participating in governance after the suspension, is career-ending and tantamount to termination.

223. The Applicants also rely on the following additional factors in support of the submission that the penalties issued by the Tribunal were unreasonable and should be quashed.

224. Firstly, the University's Tenure and Promotion Policy (the "Yellow Document") renders the penalty of suspension to be in effect worse than termination as termination invokes the right to a procedural fairness review process while suspension does not.[321] The Applicants submit that the sanctions levied upon Drs. Bart, Steiner and Taylor were for all intents and purposes terminations, but structured in a way that denied them the procedural safeguards otherwise associated with a termination.[322]

225. Secondly, the unreasonableness of the penalties is evidenced by their extremely harmful effects on the Applicants.[323] The evidence establishes that the

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[320] Bart Affidavit, Tab 8, Tab 8, pages 653-654 of the Application Record, Vol. 3, paras. 94-95, 102-104; Steiner Affidavit, Tab 13, pages 909-910 of the Application Record, Vol. 3, paras. 113-115, 118-121; Taylor Affidavit, Tab 14, page 992 of the Application Record, Vol. 3, paras. 90-96.
[321] See the Yellow Document, commencing at Tab 18, page 1492 of the Application Record, and specifically sections V and VI, at pages 1522 and 1523-1527, respectively, of the Application Record, Vol. 5.
[322] The combined operation of s. 74 of the Policy (Appendix 'B' hereto) and Section VI, paragraph 2, of the Yellow Document is that any recommendation for termination shall only be carried out in the manner prescribed in the Yellow Document, which by virtue of paragraph 15 thereto includes recourse to the Board of Governors (or its designate) to make submissions on procedural fairness issues arising during the hearings on the merits of "cause" for termination.
[323] Bart Affidavit, Tab 8, pages 651-656 of the Application Record, Vol. 2, paras. 83-105; Pujari Affidavit, Tab 9, pages 691-697 of the Application Record, Vol. 2, paras. 79-104; Rose Affidavit, Tab 11, pages 757-759 of the

consequences of the penalties have caused significant damage to the professional and personal reputations of all of the sanctioned Applicants.[324]

226. Even the individual Applicants who have returned to the University after completing their suspensions (Dr. Ray, Dr. Pujari and Dr. Rose) continue to suffer the prejudicial effects of the Tribunal Decisions on their career prospects and/or re-integration in the school.[325]

227. Finally, the unreasonableness of the penalties is underscored by the fact that until the penalties were issued, between the end of the hearing in June 2012 and the release of the Remedies Decision in September 2013, each of the sanctioned Applicants continued to remain in his DSB position without any controversy, with some Applicants being bestowed additional responsibilities and accolades.[326]

Application Record, Vol. 3, paras. 62-69; Ray Affidavit, Tab 12, pages 788-790 of the Application Record, Vol. 3, paras. 108-119; Steiner Affidavit, Tab 13, pages 907-911 of the Application Record, Vol. 3, paras. 105-124; Taylor Affidavit, Tab 14, pages 991-993 of the Application Record, Vol. 3, paras. 88-98.

[324] Bart Affidavit, Tab 8, pages 651, 652, 655-656 of the Application Record, Vol. 2, paras. 83, 87-88, 99, 101-105; Pujari Affidavit, Tab 9, pages 694-695 of the Application Record, Vol. 2, paras. 89-90, 92-93; Rose Affidavit, Tab 11, page 757-758 of the Application Record, Vol. 3, para. 63-65; Ray Affidavit, Tab 12, pages 789-790 of the Application Record, Vol. 3, paras. 114-116, 118-119; Steiner Affidavit, Tab 13, page 911 of the Application Record, Vol. 3, para. 123; Taylor Affidavit, Tab 14, pages 989-990, 992, 993 of the Application Record, Vol. 3, paras. 81, 92-94, 98.

[325] Dr. Ray and Dr. Pujari were advised by the consultant hired by HRES to conduct their mandatory re-integration training that their career advancement prospects were severely limited and their reputations permanently tarnished in light of the Tribunal's decisions. Dr. Rose was advised that the formal reprimand on his record for five years was serious and it is his evidence that he feels prohibited from expressing his opinion on any DSB matters and has become generally isolated from the rest of the University. See the Pujari Affidavit, Tab 9, page 696 of the Application Record, Vol. 2, paras. 97-99, and Exhibit "D" thereto; Rose Affidavit, Tab 11, page 758 of the Application Record, Vol. 3, para. 67; and Ray Affidavit, Tab 12, pages 786-788 of the Application Record, Vol. 3, paras. 97-106, and Exhibit "J" thereto; and the Affidavit of Trevor Hitner, sworn October 20, 2015, Tab 3, pages 443-445 of Responding Record, Vol. 2, paras. 19-21, 23-25.

[326] Bart Affidavit, Tab 8, pages 634, 650 of the Application Record, Vol. 2, paras. 4(i), 77; Pujari Affidavit, Tab 9, pages 688, 689 of the Application Record, Vol. 2, paras. 70, 72; Rose Affidavit, Tab 11, page 756 of the Application Record, Vol. 3, para. 61; Ray Affidavit, Tab 12, pages 781-782 of the Application Record, Vol. 3, paras. 71-80; Steiner Affidavit, Tab 13, page 904 of the Application Record, Vol. 3, para. 90;Taylor Affidavit, Tab 14, page 989 of the Application Record, Vol. 3, para. 80. As shown in their evidence, Drs. Bart, Pujari and Ray were the recipients of additional, and in some cases high profile, awards, responsibilities, grants, and accolades during the intervening time between the end of the Tribunal hearings and the release of the Confidential Decision and Remedies Decision.

228. Indeed, in their remedy submissions to the Tribunal the Applicants raised the fact that they had continued their employment without incident following the completion of the Tribunal's hearings[327], while the 003 Complainants raised the fact that certain Applicants had received additional responsibilities and accolades in their respective remedy submissions.[328]

229. In the case of Dr. Steiner, by virtue of a research leave he was eligible for at the time of his suspension, he would already have been off-campus for a year whether he was suspended or not.[329]

230. If it was truly necessary, as found by the Tribunal, for Dr. Steiner to be absent from campus to improve the poisoned workplace, this would have been achieved in any event, with his leave of absence exceeding – by 9 months – the term of a three month suspension, which is considered a "heavy suspension" and "virtually unheard of in the university context."[330]

231. Furthermore, the objective evidence of a number of non-party witnesses at the hearing was that the overall environment at the DSB was improving following the resignation of Mr. Bates. In fact, at least seven non-party witnesses[331] provided testimony indicating that under new Dean Dr. McNutt the atmosphere at the DSB

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[327] Milne Affidavit, Exhibit "C" thereto, Tab 4, page 496 of the Application Record, Vol. 2, para. 29.
[328] Milne Affidavit, Exhibit "A" thereto, Tab 4, page 411, of the Application Record, Vol. 2, para. 36.
[329] Steiner Affidavit, Tab 13, pages 909-910 of the Application Record, Vol. 3, para. 117.
[330] *University of Windsor* (Manley), *supra*, at page 25.
[331] These witnesses were Drs. Miltenburg, Wiesner, Kwan, Agarwal, Hassini and Connelly, and Mr. Shekari. See Steiner Affidavit, Tab 13, pages 904-906 of the Application Record, Vol. 3, paras. 91-100, and Exhibits "I", "J", "K", "L", "M" thereto. The evidence of Dr. Connelly was relied upon heavily throughout the Decisions, but is conspicuously absent in the Decisions on this point.

was "a lot better than it was,"[332] "tremendously improved. There seems to be a lot of optimism",[333] "very collegial,"[334] "more supportive,"[335] that there was more engagement and co-operation,[336] that things in the DSB were "going well" and that there didn't appear to be "any major issues,"[337] and that it was "really good", "collegial" and that members of the faculty were "laughing and joking" together.[338]

232. The Tribunal does not reference any of the evidence about the improved environment in the Decisions, despite it having been raised by the Applicants in their remedy submissions.[339] Rather, it concluded that it was "most concerned that the individual 003 Respondents' presence in the workplace will jeopardize true reconciliation at the DSB and preclude the development of an environment where all faculty and staff, including the 003 Complainants, can reasonably function in the workplace required under the Policy.[340]

233. A tribunal that fails to consider all of the evidence in relation to the ultimate decision commits an error of law.[341] The Applicants submit that by failing to

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[332] Steiner Affidavit, Tab 13, page 904 of the Application Record, Vol. 3, para. 93, and Exhibit "J" thereto.
[333] Steiner Affidavit, Tab 13, page 904 of the Application Record, Vol. 3, para. 94, and Exhibit "K" thereto.
[334] Steiner Affidavit, Tab 13, page 904 of the Application Record, Vol. 3, para. 92, and Exhibit "I" thereto.
[335] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, para. 95.
[336] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, para. 97.
[337] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, para 99, and Exhibit "L" thereto.
[338] Steiner Affidavit, Tab 13, pages 904-905 of the Application Record, Vol. 3, para 100, and Exhibit "M" thereto.
[339] Milne Affidavit, Exhibit "C" thereto, Tab 4, page 496 of the Application Record, Vol. 1, para. 29.
[340] The Remedies Decision, page 7, at Tab 3, page 354 of the Application Record, Vol. 1.
[341] See for instance *R v. H. (J.M.)*, 2011 SCC 45 (S.C.C.), at paras. 24-32, which was applied in the administrative context in *Byblow v. Yukon Territory (Workers' Compensation Appeal Tribunal)*, 2014 YKSC 38 (Y.T.S.C.), at para. 89.

consider the evidence of the improved atmosphere in the DSB in rendering its Decisions, the Tribunal issued an unreasonable penalty.

234. Section 73 of the Policy makes it clear that the "tribunal of the hearing panel must recommend any appropriate sanction or remedies it deems necessary to guarantee that the behaviour is not repeated." Thus, the Policy should be understood as having a remedial, rather than punitive purpose. It is clear from the above analysis that the Tribunal's penalties were punitive, contrary to the Policy's intent.[342]

235. The Applicants submit that since that the penalties meted out against the Applicants do not fall within a reasonable range of outcomes the Decisions must be quashed.

ISSUE E. Did the Tribunal err in jurisdiction and violate the principles of natural justice and procedural fairness by ordering the consolidation of the hearings?

236. The Applicants submit that the Tribunal lacked the jurisdiction pursuant to the Policy and the *SPPA* to order consolidation of the 002 & 003 Proceedings.

237. During the pre-hearing proceedings, the University requested that the Tribunal issue an order consolidating the proceedings, which the Applicants opposed,

[342] Note also that since McMaster is not unionized, the Applicants do not have the protection of collectively bargained arbitration rights as is contemplated by s. 74 of the Policy.

arguing that s. 9.1(3) removed any authority of the Tribunal to consolidate the hearings.[343]

238. In ruling on the University's request, the Tribunal found that "…the nature of the evidence clearly is that of intimate personal matters or other matters which, until proven, affect a person in a manner which outweighs hearing the matter in public", and that "…it is clearly intended under the Policy and in the interest of all concerned to hold the matters *in camera*."[344]

239. Having considered both the Policy and s. 9 of the *SPPA*, the Tribunal determined that it had no jurisdiction to consolidate the two group complaints and dismissed the University's consolidation request in Procedural Order #3. In the Order, the Tribunal correctly held that "legally the SPPA does not provide the tribunal with the legal authority to rule that the matters be heard on a Consolidated basis."[345] However, the Tribunal subsequently ordered consolidation on consent and in doing so, erred for the following reasons.

240. Section 9.1(1) of the *SPPA* provides that where there are two or more proceedings before a Tribunal that involve the same or similar questions of fact, law or policy, the Tribunal may:

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[343] Procedural Order #3,Tab 28, pages 1712 of the Application Record, Vol. 6
[344] Procedural Order #3,Tab 28, pages 1712-1714 of the Application Record, Vol. 6
[345] Procedural Order #3,Tab 28, pages 1713-1714 of the Application Record, Vol. 6.

(a) combine the proceedings or any part of them, with the consent of the parties; and/or

(b) hear the proceedings at the same time, with the consent of the parties.

241. Section 9.1(3) of the *SPPA* states that sub-clauses 9.1(1)(a) and (b) **do not** apply to a proceeding if:

(a) any other Act or regulation that applies to the proceeding requires that it be heard in private; or

(b) the Tribunal is of the opinion that clauses 9 (1) (a) or (b) applies to the hearing.

242. Section 9(1) (a) and (b) of the *SPPA* state that an oral hearing shall be open to the public except where a tribunal is of the opinion that:

(a) matters of public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

243. The Applicants submit that because the Tribunal found in Procedural Order #3 that "…the nature of the evidence clearly is that of intimate personal matters or other matters which, until proven, affect a person in a manner which outweighs hearing the matter in public",[346] the Tribunal's jurisdiction to order consolidation was ousted by s. 9.1(3)(b) of the *SPPA* regardless of whether there was the consent of the parties.

244. The Applicants submit that the Tribunal's jurisdiction was also ousted by the effect of s. 9.1(3)(a) of the *SPPA*.

245. Section 66 of the Policy states that the hearing is to proceed *in camera*, unless either a complainant or respondent objects, in which case the Tribunal may exercise its discretion to open the hearing *after* considering whether matters of an intimate or financial or personal nature are to be raised, whether an issue of public safety is involved, as well as the desirability of holding an open hearing.

246. No objections to proceeding *in camera* were received by the Tribunal.[347] Accordingly the 002 & 003 Proceedings were ordered to be, and were, held *in camera*.

247. Where the relevant act or regulation – here the Policy – defaults to an *in camera* hearing, even if the Tribunal has the statutory authority to order a public hearing,

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[346] Procedural Order #3, Tab 28, page 1713 of the Application Record, Vol. 6.
[347] Excerpts of the transcript of the June 24, 2011 pre-hearing day, Tab 14(A), pages 472-484 of the Supplementary Application Record, Vol. 2.

the Tribunal is nevertheless prevented from consolidating the hearing by s. 9.1(3)(a).[348]

248. Notwithstanding: (i) its own ruling in Procedural Order #3; (ii) the express wording of s. 66 of the Policy; and (iii) ss.9.1(1)(a),(b), (3)(a) and 3(b) of the *SPPA*, the Tribunal later ordered that the hearings be consolidated in Procedural Order #8[349], erroneously proceeding *ex post facto* as though the parties could confer jurisdiction by consent which neither the Policy nor the *SPPA* provided it, and which it had already determined it did not have.

249. In so doing, the Applicants submit that the Tribunal exceeded its jurisdiction, which simply cannot be extended by the waiver or consent of the parties.[350]

250. Even if it were possible for the Applicants to consent to or waive their objection regarding consolidation and thereby bestow jurisdiction upon the Tribunal, which as a matter of law they cannot,[351] any such consent would be entitled to no weight by this reviewing court.[352]

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[348] See *A.(J.) v. B.(N.)*, 2007 CarswellOnt 4210 (Ont. Child and Family Services Review Board), at paras. 4, 9-11, where it was held that notwithstanding that a Tribunal had the statutory discretion to open a presumptively closed hearing, that s. 9.1(3) meant that the Tribunal did not have the power to combine the hearings.
[349] Procedural Order #8, Tab 29, pages 1723-1729 of the Application Record, Vol. 6.
[350] *Goertz v. College of Physicians & Surgeons*, [1989] 6 W.W.R. 11 (Sask. C.A.) at para. 21 see also *Essex Incorporated Congregational Church Union v Essex CC*, [1963] 1 All E.R. 326 (H.L), which was applied in Ontario in *Gough v. Peel Regional Police Service* (2009), 248 O.A.C. 105, 309 D.L.R. (4th) 439 (Ont. Div. Ct.) at paras. 30-31.
[351] See *Newton v. Tataryn*, [1990] M.J. No. 209 (Man. Ct. Q.B.), at para. 13. Acquiescence and waiver apply to rights of the parties, *inter se*, and are simply not relevant to the jurisdiction of a court or tribunal.
[352] *Herrera v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 1724 (F.C.), paras. 5-7. In the present case counsel could not have known at the time of their consent to consolidation that it would permit the University, a respondent, to make punitive remedy submissions against them. Nor could counsel have known that a panel member would be appointed to the University senior administration during proceedings, thereby receiving remedy submissions

251. In order for waiver to be effective it must be exercised freely and with full knowledge.[353] A recognized exception to waiver exists where the parties do not know all the facts relevant to the issue that they should have objected to.[354]

252. Due to the timelines imposed by the Tribunal the Applicants had no choice but to agree to consolidation of the two group complaints into one single hearing after initially objecting to it.[355]

253. The effect of consolidation, and the associated order requiring the 002 Complaint to be heard first, was seriously and unforeseeably prejudicial in that:

(a) it essentially allowed the two very distinct sets of complaints to be conflated, resulting in improper and overlapping questioning and the mingling of evidence throughout the conduct of the entire hearing (for example, the prejudicial "hybrid questioning" that occurred, such as the cross-examination of the 002 witness Catherine Connelly by counsel for the 003 complainants, during the 002 hearing, discussed in further below in Issue "I(iii)");

(b) it permitted the University and the individual 003 Complainants to make their case against the Applicants twice and permitted the University to

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from the administration, and then recommending them back to the administration to carry out. See the Hopkins Affidavit, Tab 5, pages 574, 594-596 of the Application Record, Vol. 2, paras. 57, 122-129.

[353] *Zundel v. Canada (Human Rights Commission)*, [2000] F.C.J. No. 1838 (F.C.A.), para. 8.

[354] *Geza v. Canada (Minister of Citizenship & Immigration)*, [2006] 4 F.C.R. 377 (F.C.A.), at paras. 66-68. Even if counsel *could* have brought a motion, they could not have known that the failure to bring a motion objecting to the Tribunal's timelines would lead to a truncated hearing forcing them to drop witnesses, or that the consolidated hearing would give the 003 Complainants the opportunity to observe the 002 hearing and potentially tailor their evidence in presenting 003, or for the University and the 003 Complainants to conduct extremely damaging cross-examinations in chief, including of Ms. Cossa and Dr. Connelly. Hopkins Affidavit, Tab 5, pages 584, 589 of the Application Record, Vol. 2, paras. 95, 110.

[355] Milne Affidavit, Tab 4, page 390 of the Application Record, Vol. 2, paras. 80-81; and Hopkins Affidavit, Tab 5, pages 580, 583 of the Application Record, Vol. 2, paras. 84, 93.

seek penalties against the Applicants despite having no standing to do so as it was a respondent in both complaints;

(c) it permitted the 003 Complainants to hear the 002 Complainants/003 Respondents' evidence in advance of presenting their own evidence, providing them the opportunity to tailor their evidence during the 003 Complaint; and

(d) because of consolidation opposing counsel was able to make use of the documents contained in the global evidentiary record[356] that were only relevant to 003 to discredit the Applicants and their witnesses in 002 (e.g. by virtue of their "membership" in the so-called "G-21") before 003 even began.[357]

254. The Applicants submit that making the Consolidation Order constitutes an incurable jurisdictional error, which especially in view of the profound procedural fairness implications of the consolidation, and the circumstances giving rise to the Order in the first place, warrants the granting of an order in the nature of a *certiorari* quashing the Tribunal's Decisions.

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[356] Excerpt of the transcript of the November 28, 2011 pre-hearing day, Tab 14(B), pages 486-491 of the Supplementary Application Record, Vol. 2. Ms. Milne objected to the University's motion for a global hearing record on the bases of relevancy, privacy and transparency.

[357] Milne Affidavit, Tab 4, pages 390-392 of the Application Record, Vol. 2, paras. 82-83, 85-86; Hopkins Affidavit, Tab 5, pages 570, 584 of the Application Record, Vol. 2, paras. 42-43, 95. See, for instance, the Confidential Decision at pages 93, 97, 108, 129, 132, 137, 203, 218, and 257, at Tab 2, pages 120, 124, 135, 156, 159, 164, 230, 245, and 284 of the Application Record, Vol. 1, for a non-exhaustive list of examples of so-called "membership" in the G21 and/or G21+ and the Tribunal making adverse reliability or credibility findings with respect to evidence provided in responding to the 003 Complaints.

ISSUE F. Tribunal's Release of Deficient Audio Recordings of the Tribunal Proceedings

255. It is undisputed that the audio recordings kept by the Tribunal are seriously deficient and therefore the record of proceedings is incomplete. Missing are large portions of the hearing and hours of testimony including key witnesses and the receipt of contentious evidence.

256. The Supreme Court of Canada has held that where an enabling statute mandates a recording of the hearing and defects or gaps in the transcript raise a serious possibility of the denial of a ground of review, a new hearing will be ordered as to do otherwise would violate the principles of natural justice.[358]

257. Section 64 of the Policy mandates that the Tribunal arrange for a "permanent" audio recording of the proceedings.[359] In Procedural Order #3, the Tribunal also ordered that audio would be made for each day.[360]

258. The Tribunal provided its audio recordings of the hearing on or about January 17, 2014. The Tribunal acknowledged that the audio quality for the first few hearing days was poor but that the quality twice improved after new equipment was

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[358] *City of Montreal v. C.U.P.E., Local 301*, [1997] S.C.J. No. 39, para. 81.
[359] Section 57 of the Policy states that, in the event of conflict between the *SPPA* and the Policy, the provisions of the Policy are to govern. Accordingly, pursuant to s. 64 of the Policy, a permanent audio recording was required.
[360] Procedural Order #3, para. 4, at Tab 28, page 1717 of the Application Record, Vol. 6.

employed, and the hearing was moved to a new building.[361] This has proven not to be the case.

259. In fact, audio quality issues persisted, to varying degrees, throughout the entirety of the proceedings. The Applicants have identified several instances where the Tribunal's deficient audio raises a serious possibility that a ground of review otherwise available to them cannot be made out. These instances include corrupted, missing, and/or inaudible audio portions leading to missing or undecipherable party and witness testimony, cross-examinations and re-examinations of key witnesses, questions from the Panel, and the Tribunal's handling of objections.

March 23, 2012 - Lost testimony of Dr. Taylor, Mr. Weiner and Mr. Swirsky

260. The March 23, 2012 hearing day comprised of five hours of audio. Of the five total hours, only three hours and 49 minutes can be detected on the audio, leaving the rest of that day completely inaudible. In addition, much of the audio that can be detected is largely indecipherable, and it is often impossible to hear the question being asked of the witness by counsel.[362]

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[361] Saccucci Affidavit, Tab 16, page 1043 of the Application Record, Vol. 4, para. 63, and Exhibit "VV" thereto.
[362] Saccucci Affidavit, Tab 16, pages 1046-1047 of the Application Record, Vol. 4, para. 73.

261. The result is that the testimony of the Applicant Dr. Taylor and the witnesses Mr. Weiner and Mr. Swirsky is, at segments, entirely lost and where it can be made out at all, much of it cannot be reviewed.[363]

262. Dr. Taylor was both an 002 Complainant and an 003 Respondent, and as a result of the poor quality of the audio, the majority of his 002 testimony is incapable of review.[364]

May 8, 2012 - Lost testimony of Dr. Naresh Agarwal and Dr. Clarence Kwan

263. The audio for the May 8, 2012 hearing day is missing four hours and six minutes of audio, meaning that nearly all the testimony of the witness Dr. Naresh Agarwal, and all of the testimony of Dr. Clarence Kwan, is not available.[365]

264. Drs. Agarwal and Kwan testified on behalf of the Applicants in the 003 Complaint. According to his affidavit, Dr. Agarwal was to provide *viva voce* testimony (i) in support of Drs. Steiner and Ray in responding to 003 Complaints, and (ii) in specific response to the complaints of Dr. Detlor and Ms. Colwell upon which he was cross-examined.[366] According to the affidavit of Dr. Kwan, he was

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[363] Saccucci Affidavit, Tab 16, pages 1046-1047 of the Application Record, Vol. 4, para. 73. Mr. Weiner and Mr. Swirsky were witnesses for the Applicant, Dr. Bart in the 002 Complaint against Mr. Bates and the University. On March 23, 2012, they provided *viva voce* evidence regarding Dr. Bart's interaction with Mr. Bates, as well as Dr. Bart's involvement with and conduct at the Directors College. These two witnesses only testified on this day. Mr. Swirsky's evidence detailed the negative impact on the Directors College from its move to Ottawa. Mr. Weiner's evidence was that Dr. Bart's removal of Dr. Flynn from the Directors College was the result of a legitimate managerial decision. See Saccucci Affidavit, Tab 16, page 1047 of the Application Record, Vol. 4, para. 74.

[364] *Ibid.*

[365] Saccucci Affidavit, Tab 16, pages 1047-1048 of the Application Record, Vol. 4, para 75.

[366] Saccucci Affidavit, Tab 16, pages 1047-1048 of the Application Record, Vol. 4, para. 75, and Exhibit "YY" thereto, specifically page 80 of Exhibit "YY".

to provide evidence in support of Drs. Steiner's and Rose's responses to the 003 Complaints of Drs. Flynn, Longo and Head.[367] None of this is captured in the surviving audio. Both witnesses testified with respect to the improved state of the DSB at the time of the hearings as a result of Mr. Bates's resignation and replacement by Dr. McNutt.[368] However, their testimony regarding the improved state of the DSB is not reflected in the audio, [369]nor, as mentioned above, is it reflected in the Tribunal Decisions.

March 3, 2012 – Lost Testimony of Dr. Catherine Connelly

265. In addition to the deficient audio provided, the Tribunal also concedes that there are two audio files that simply do not exist as a result of what the Tribunal describes as its own "insufficient" recording facilities.[370] Entire audio files for parts of March 3, 2012 and April 19, 2012 do not exist, and accordingly, the Applicants are denied the opportunity to review and scrutinize those portions.

266. Of the audio that does exist for March 3, 2012 much of it cannot be made out. For instance, "file 07", which features two hours and seven minutes of audio

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[367] Saccucci Affidavit, Tab 16, pages 1047-1048 of the Application Record, Vol. 4, para. 75.
[368] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, paras. 95-98.
[369] Steiner Affidavit, Tab 13, page 905 of the Application Record, Vol. 3, paras. 96, 98.
[370] Saccucci Affidavit, Tab 16, pages 1043-1044 of the Application Record, Vol. 4, para. 64, and Exhibit "WW" thereto.

(including all of the testimony of the witness Dr. Catherine Connelly), is at many points completely inaudible.[371]

267. As a result of the deficient audio, the Applicants have been denied the opportunity to raise a specific ground of review in regard to the evidence of Dr. Connelly. A review of the transcript generated from the audio recording of the March 3, 2012 hearing indicates multiple and lengthy inaudible portions of audio during the course of Dr. Connelly's testimony.[372]

268. The testimony received from Dr. Connelly as a result of Mr. Heeney's (counsel to 003 complainants) cross-examination was highly contentious. As a result, each of the Applicants' counsel objected, at separate times, to Mr. Heeney's line of questioning.[373] In each case, the Chair, Dr. Maureen MacDonald's explanation for why the questioning is allowed to continue is unavailable to be properly reviewed by the Applicants because of the deficient quality of the audio recording.[374] Nevertheless, it is clear from the transcript that the objections were overruled and Mr. Heeney was permitted to continue the controversial line of questioning.[375]

269. Dr. Connelly's testimony was relied upon heavily by the Tribunal. Despite having been a witness called to provide evidence on behalf of the Applicants in the 002

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[371] Saccucci Affidavit, Tab 16, page 1048 of the Application Record, Vol. 4, para. 76. Indeed, the Respondents' Affiant, Mr. Heeney, himself noted that a review of Dr. Connelly's testimony is impossible given the state of the audio: see answer to undertaking of James Heeney, Tab 8(I), page 318 of the Supplementary Application Record, Vol. 2, question 1059.
[372] Saccucci Affidavit, Tab 16, page 1048 of the Application Record, Vol. 4, para. 76, and Exhibit "BBB" thereto.
[373] Saccucci Affidavit, Tab 16, page 1048 of the Application Record, Vol. 4, para. 76, and Exhibit "BBB" thereto.
[374] Saccucci Affidavit, *Ibid.*
[375] Saccucci Affidavit, *Ibid*.

Complaint, as a result of Mr. Heeney's contentious cross-examination, Dr. Connelly's evidence was adduced in support of Dr. Detlor in his 003 Complaint against Drs. Steiner and Ray[376], and was given "substantial weight" by the Tribunal.[377] Dr. Connelly's evidence was also relied upon in (i) finding that Dr. Ray's counter-complaint against Dr. Detlor was without merit and retaliatory in breach of the Policy,[378] (ii) in Dr. Head's complaint against Dr. Steiner,[379] and (iii) in the complaints of Mr. Vilks, Ms. Stockton and Ms. Cossa against Drs. Pujari, Ray, Taylor and Bart.[380] As Dr. Connelly's testimony was of material value to the Tribunal's findings regarding Drs. Ray, Steiner, Pujari, Bart and Taylor and as its receipt was contentious at the time, the inability to review the Chair's reasons for allowing the line of questioning despite multiple objections raises the serious possibility that the Applicants are denied the opportunity to raise a ground of review by virtue of the Tribunal's deficient audio recording.

April 19, 2012 – Lost Testimony of Dr. Maureen Hupfer

270. According to the Tribunal, the missing audio from April 19, 2012 includes the cross-examination by Applicants' counsel of the non-party witness Dr. Hupfer, as

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[376] Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 77; and the Confidential Decision, pages 153, 167, and 169, at Tab, 2 are pages 180, 194, and 196 of the Application Record, Vol. 1.
[377] The Confidential Decision, page 169, at Tab 2, page 196 of the Application Record, Vol. 1.
[378] Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 77; and the Confidential Decision, pages 174, 180-181, at Tab 2, pages 201, 207-208 of the Application Record, Vol. 1.
[379] Saccucci Affidavit, *Ibid*; and the Confidential Decision, pages 199 and 206, at Tab 2, pages 226 and 233 of the Application Record, Vol. 1.
[380] Saccucci Affidavit, *Ibid*; and the Confidential Decision, page 220, at Tab 2, page 247 of the Application Record, Vol. 1.

well as questions from the Panel.[381] This important witness was called on behalf of the 003 Complainants against the Applicants, and the Tribunal concluded that her testimony was reliable and consistent.[382]

271. Much like Dr. Connelly, Dr. Hupfer's non-party *viva voce* testimony was relied upon heavily by the Tribunal in the complaints against nearly all of the Applicants.[383] For instance, Dr. Hupfer's testimony was relied upon by the Tribunal in the complaints of Mr. Vilks, Ms. Stockton and Ms. Cossa against Drs. Pujari, Ray, Taylor and Bart;[384] in Dr. Flynn's complaint against Drs. Taylor, Bart, Pujari, Ray, Steiner and Rose;[385] in Dr. Longo's complaint against Drs. Bart, Taylor, Steiner, Rose and Pujari;[386] and in finding Dr. Ray's counter-complaint against Dr. Detlor to be "without merit" and in breach of the Policy.[387]

272. As the Applicants are unable to review the cross-examinations of Dr. Hupfer, and the Tribunal's questions to her, they are unable to scrutinize the Tribunal's treatment of Dr. Hupfer's vital evidence, and there is a serious possibility that a ground of review may be denied.

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[381] Saccucci Affidavit, Tab 16, pages 1043-1044 of the Application Record, Vol. 4, para. 64, and Exhibit "WW" thereto.
[382] See for instance the Confidential Decision, at page 181, which is at Tab 2, page 208 of the Application Record, Vol. 1.
[383] Except Dr. Richardson. Saccucci Affidavit, Tab 16, page 1044 of the Application Record, Vol. 4, para 65; the Confidential Decision, pages 220, 270, 282-283, 285, and 288, at Tab 2, pages 247, 297, 309-310, 312, and 315 of the Application Record, Vol. 1.
[384] The Confidential Decision, at page 220, at Tab 2, page 247 of the Application Record, Vol. 1.
[385] The Confidential Decision, at pages 270, 282-283, and 285, at Tab 2, pages 297, 309-310, and 312 of the Application Record, Vol. 1.
[386] The Confidential Decision, page 288, at Tab 2, page 315 of the Application Record, Vol. 1.
[387] The Confidential Decision, page 181, at Tab 2, page 208 of the Application Record, Vol. 1.

273. In light of these examples of clearly corrupted, missing or inaudible audio recordings of the proceedings, the Tribunal has violated the principles of natural justice and section 64(d) of the Policy by failing to arrange "*…for a permanent audio-tape recording of the proceedings, which shall constitute the official record of those proceedings*" thereby denying the Applicants the ability to raise specific grounds of review. This failure by the Tribunal to ensure that an adequate record was kept is all the more serious, and prejudicial to the Applicants, given the career ending stakes at play at the Tribunal hearing.

274. The Applicants submit that the Tribunal's deficient audio recording of the proceedings, in breach of its own Policy, is a violation of procedural fairness and natural justice sufficient to justify the *certiorari* herein requested.

ISSUE G. The Tribunal Proceeding Was Nullified by a Fundamentally Flawed and Unfair Pre-Hearing Investigation Process

275. The Applicants submit that the fatally flawed pre-hearing process, which is a condition precedent to the hearing, nullifies the Tribunal's Decisions as the Tribunal lacked the jurisdiction to hear the "group complaint" brought against the Applicants.

276. The University purported to act as a complainant pursuant to ss. 33-36 of the Policy. However, s. 35 mandates that the Officer provide an appropriate University Official with copies of any written complaints and responses submitted to the Officer relating to the alleged offence(s) of the respondent.

277. Section 36 requires an appropriate University official to communicate with the proposed respondent and review all of the information gathered for the proposed complaint *before* deciding to initiate formal proceedings against the respondent.

278. None of the Applicants ever received any such communication (as required by s. 36) from any University official prior to receiving copies of the filed formal complaints against them.[388]

279. Furthermore, at no point were the Applicants interviewed by, nor given the opportunity to present submissions to, the investigator retained on behalf of HRES to investigate the complaints against them.[389]

280. As a result, in reviewing the Novick Report and ultimately forwarding the complaints contained therein to the Tribunal, the President had only a one-sided account of the allegations within, which is contrary to the express requirements of ss. 33-36 of the Policy.

281. The President would have been specifically informed of this very issue if the paragraph Ms. Novick had drafted in her December 21, 2010 report disclosing

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[388] Milne Affidavit, Tab 4, page 376 of the Application Record, Vol. 2, para. 33; Hopkins Affidavit, Tab 5, page 563 of the Application Record, Vol. 2, para. 17; Bart Affidavit, Tab 8, page 645 of the Application Record, Vol. 2, para. 57; Pujari Affidavit, Tab 9, pages 683-684 of the Application Record, Vol. 2, para. 51; Rose Affidavit, Tab 1, page 751 of the Application Record, Vol. 3, paras. 37-38; Ray Affidavit, Tab 12, page 774 of the Application Record, Vol. 3, paras. 40-41; Steiner Affidavit, Tab 13, page 894 of the Application Record, Vol. 3, para. 57; Taylor Affidavit, Tab 14, page 986 of the Application Record, Vol. 3, para. 70.

[389] Hopkins Affidavit, Tab 5, pages 565-566 of the Application Record, Vol. 2, para. 26; Bart Affidavit, Tab 8, page 646 of the Application Record, Vol. 2, para. 59; Rose Affidavit, Tab 11, page 751 of the Application Record, Vol. 3, para. 39; Ray Affidavit, Tab 12, page 766 of the Application Record, Vol. 3, para. 10; Steiner Affidavit, Tab 13, page 889 of the Application Record, Vol. 3, para. 40; Taylor Affidavit, Tab 14, page 986 of the Application Record, Vol. 3, para. 71.

this fact (i.e. that she had not met with any respondents in preparing her report) had not subsequently been deleted by Mr. Komlen prior to the report's submission to the President on January 7, 2011.[390]

282. Furthermore, two of the 003 Complainants, Dr. Detlor and Ms. Colwell, were never interviewed by Ms. Novick, and their complaints were not contained in the report considered by the President before forwarding the 003 group complaint to the Tribunal. Thus, for these two complainants and their corresponding respondents[391] it was not even possible for the University to comply with the jurisdictional requirements of ss. 33-36 of the Policy.

283. The Applicants raised objections to the Tribunal during the proceedings regarding the failure of the University to i) provide them with notice of the allegations, ii) contact them, and iii) permit Ms. Novick to speak with them regarding the allegations against them.[392] The Tribunal considered these objections, and dismissed them in the Confidential Decision.[393]

284. In *Kupeyan v. Royal College of Dental Surgeons Ontario*[394], the court found that because the investigative arm of the administrative body had failed to exercise

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[390] Excerpt from the cross-examination of Shari Novick, dated December 14, 2015, Tab 7(C), pages 84-89 of the Supplementary Application Record, Vol. 1; and Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), page 98 of the Supplementary Application Record, Vol. 1, para. 7.
[391] Drs. Steiner and Ray.
[392] *Supra*, footnotes 108 and 109.
[393] See the Confidential Decision, Tab 2, pages 310-311, at pages 337-338 of the Application Record, Vol. 1.
[394] [1982] O.J. No. 3376, 137 D.L.R. (3d) 446 (Ont. Supreme Court). ["*Kupeyan*"].

their powers as required by the statute, the resulting hearing must be found to be "nugatory".[395]

285. Specifically, in *Kupeyan*, the *Health Disciplines Act* provided that before any matter could be referred to a hearing stage, the investigative arm was required to draft and file a written complaint, with notice of the complaint to the respondent, and an opportunity for the respondent to provide any explanations or representations regarding the substance of the complaint.[396]

286. The court found this requirement to be a condition precedent to any exercise of the power to refer the matter to a hearing[397], and stated that:

> "…before a member is to be put in the unenviable position of having complaints or allegations of misconduct heard by the Discipline Committee, the conduct which is to be the subject of such hearing must have been defined and considered by the Complaints Committee…"[398] [Emphasis added].

287. In the present case, the record is clear that the Policy's condition precedent was not met, thus preventing the subject matter of the hearing from being properly considered before it was referred to the Tribunal: (i) the President was provided only a one-sided account of the allegations made against the Applicants; (ii) he did not seek to communicate with the Applicants; and (iii) the investigator Ms. Novick was not permitted to speak to the Applicants, all of which are

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[395] *Kupeyan*, *ibid*, at para. 16.
[396] *Kupeyan*, *ibid*, at para. 17.
[397] *Kupeyan*, *ibid*, at para. 18.
[398] *Kupeyan*, *ibid*, at para. 31.

contraventions of the Policy, and all of which prevent the subject matter of the hearing from having been considered prior to being referred to the Tribunal.

288. As noted by the court in *Kupeyan*, but equally relevant by analogy to this case is that:

> "[t]he power to discipline their members, which is conferred upon self-governing professions, is a very great one, involving as it does the loss of professional standing, pecuniary loss and, indeed, loss of the very right to pursue practice of the profession. While reasonable latitude is to be allowed as to matters of form and procedure in the exercise of such powers by tribunals which are administrative in nature and not courts, there must be no room for doubt that the power to discipline is exercised within the terms and upon the conditions of the statute by which it is conferred. The record in this case falls far short of showing that."[399] [Emphasis added.].

289. In *Volochay v. College of Massage Therapists*, the Divisional Court held that where an administrative body does not have statutory authority to investigate without providing the respondent the opportunity to respond, but proceeds to do so anyway, that such a violation is not only a statutory violation, but also a violation of procedural fairness and natural justice.[400]

290. The Divisional Court in *Volochay* went on to hold, relying on *Baker*, that fundamental to the consideration of a breach of fairness for failing to provide an opportunity to respond to an investigation is that the respondent's right to

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[399] *Kupeyan*, *supra*, at para. 37.
[400] (2011), 30 Admin. L.R. (5th) (S.C.J. (Div. Ct.)), paras. 33, 38-41. ["*Volochay*"]. Although the Divisional Court's decision to quash was overturned in 2012 ONCA 541 (Ont. C.A.), it was largely on the basis of a lack of urgency, and the presence of the administrative body's internal mechanism of appeal, which meant an early review was not appropriate. The present case is distinguishable in that there is no potential for an internal appeal, and the Tribunal is now *functus*, which extinguishes any concern over an early review.

continue his or her profession and employment are at stake, and that the greater the impact on the person, the more stringent the protections that will be mandated.[401]

291. In *Volochay*, it did not matter that the administrative body's next step would consider the respondent's submissions. The Divisional Court ruled that this step "cannot cure the defective and fundamentally unfair process that has already occurred".[402] Most important to the Divisional Court was the fact that the respondent has been "denied the possibility of having the [administrative body] consider, on all the evidence including the applicant's submissions, whether or not the next step is required."[403]

292. Thus, in *Volochay*, the administrative body was required by its governing statute, and indeed the common law, to proceed fairly before going to the next stage; the failure to do so rendered the decision to proceed a nullity.[404]

293. The Ontario Court of Appeal agreed that the College's failure to provide Mr. Volochay notice of, and an opportunity to respond to, the complaint against him

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[401] *Volochay*, *supra*, para. 42.
[402] *Volochay*, *ibid*, para 36.
[403] *Volochay*, *ibid* para 36.
[404] *Ibid*, para. 41. As mentioned, the Ontario Court of Appeal ultimately overruled the Divisional Court's decision to grant *certiorari*, but its decision was predicated on the Applicant's request being for an early review, which is not the present case. In the present case there is no other prospect of appeal, absent judicial review, and the proceedings of the Tribunal are at an end. See paragraph 60 of 2012 ONCA 541 (Ont. C.A.).

before forwarding it to a hearing was a breach of procedural fairness and natural justice.[405]

294. In the context of human rights tribunals, as in the present case, the *Baker* factors must also be considered in determining the content of procedural fairness required in the context of "screening" investigations conducted by the investigative body.[406]

295. Procedural fairness requires the investigative body's investigation to be both neutral and thorough. Thoroughness requires the investigative body to provide the parties an opportunity to make submissions and to have an adequate and sound basis for determining whether or not to refer the complaint to the Tribunal.[407]

296. In *Tessier v. Nova Scotia (Human Rights Commission)*,[408] the Nova Scotia Supreme Court held that thoroughness also requires that the human rights investigator interview the respondents prior to forwarding the investigation report to the Commissioner, to decide whether it should be heard by the Tribunal.

297. In *Tessier*, the court ruled that notwithstanding that the respondents had provided written submissions to the investigator, given the "central importance of their version of events to the outcome of the investigation, actual interviews with the

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[405] 2012 ONCA 541 (Ont. C.A.), *supra*, at paras. 47-48.
[406] *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.), paras. 115-119.
[407] *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (Fed. T.D.), paras. 49-50, 58; affirmed (1996), 205 N.R. 383 (Fed. C.A.). As in *Slattery*, the Applicants had a right, pursuant to s. 36 of the Policy, to be consulted regarding a potential complaint prior to its being forwarded to the Tribunal.
[408] 2014 NSSC 65 (N.S.S.C.) ["*Tessier*"].

respondents were required for a thorough investigation", and that the failure to conduct the interviews amounted to a breach of procedural fairness sufficient to invalidate the investigation and render the Commission unable to make the proper screening determination on the basis of the record before it. Accordingly, the court quashed the Commission's decision.[409]

298. The Applicants submit that the Tribunal's duty to act in accordance with the principles of procedural fairness is substantially similar to that required by the human rights tribunals considered in the jurisprudence. Indeed, the Policy, which supersedes the McMaster University Senate Procedures on Alleged Violations of Human Rights as Defined by the Ontario Human Rights Code, is similar to human rights legislation,[410] is overseen by the Office of Human Rights and Equity Services at the University, and the Tribunal is referred to as the "Human Rights Tribunal".[411] The investigator, being HRES and its Director Mr. Komlen, provides investigation reports to the President. The President is the Tribunal's "gatekeeper" and, like a human rights commission, decides whether or not to forward the complaints to the Tribunal.

299. The Applicants submit that the above significant deficiencies in the HRES investigation process cannot be cured by the Tribunal's subsequent hearing, or

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[409] *Tessier*, *supra*, paras. 63-65, 70.
[410] See for instance, the Komlen Report, at pages 1-2, at Tab 19, pages 1535-1536 of the Application Record, Vol. 5.
[411] The Komlen Report, pages 14-15, at Tab 19, pages 1548-1549 of the Application Record, Vol. 5; Taylor Affidavit, Tab 14, pages 980-981 of the Application Record, Vol. 3, para. 47, and Exhibit "B" thereto.

waived by their participation therein.[412] Accordingly, the Decision of the President, the "gatekeeper", to forward the complaints to the Tribunal should be quashed and the Tribunal's Decisions nullified.

ISSUE H. The Tribunal Lost Jurisdiction by Breaching the Policy on Four Distinct Occasions

i. The Tribunal Failed To Determine Whether the Various Complainants Wished to Pursue "Informal Resolution" Under Section 44 of the Policy

300. The Applicants submit that the plain language of s. 44 of the Policy makes it mandatory for the Anti-Discrimination Officer, in this case Mr. Komlen, to determine whether a complainant wishes to proceed with an Informal Resolution as provided by s. 45 of the Policy.[413]

301. It is the testimony of the Applicants[414] that at no time did Mr. Komlen determine, as required by the Policy, whether any of the Applicants wanted to pursue an Informal Resolution in respect of the Applicants' complaints.[415]

302. To the contrary, Mr. Komlen had always contemplated formal complaints,[416] and commissioned the Milne and Novick investigation reports for the express purpose

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[412] *Kupeyan*, *supra*, at paras. 15-16, 39.
[413] Section 44 of the Policy, at Appendix "B" to this factum, states that: "upon receipt of a written complaint, the Officer, or other University officer where appropriate, shall determine whether the complainant wishes to proceed by way of the 'Informal Resolution With a Written Complaint' procedure or whether the complainant wishes to directly to proceed with the 'Formal Resolution' procedure."
[414] Except for Dr. Ray who was not a complainant in the 002 Complaint.
[415] Bart Affidavit, Tab 8, page 647 of the Application Record, Vol. 2, para. 68; Pujari Affidavit, Tab 9, page 685 of the Application Record, Vol. 2, para. 59; Richardson Affidavit, Tab 10, page 739 of the Application Record, Vol. 3, para. 27; Rose Affidavit, Tab 11, page 752 of the Application Record, Vol. 3, para. 40; Ray Affidavit, Tab 12, page 777 of the Application Record, Vol. 3, para. 53; Steiner Affidavit, Tab 13, pages 887-888, 895 of the Application Record, Vol. 3, paras. 32, 60; and Taylor Affidavit, Tab 14, page 986 of the Application Record, Vol. 3, paras. 70, 72.

of convincing the President of the necessity of pursuing "group complaints" pursuant to ss. 33-36 of the Policy.[417] Accordingly, once the President was so convinced, the "group complaints" were forwarded to, and heard by, the "internal human rights tribunal" pursuant to the "Formal Resolution" procedure of s. 47.

303. It is submitted that the Anti-Discrimination Officer's failure to determine whether the Applicants wished to pursue informal resolution, as is required pursuant to s. 44 of the Policy, and insistence in proceeding with "formal complaints"[418] resulted in the Tribunal never having the jurisdiction to hear the complaints in the first place.

304. Furthermore, the evidence indicates that no meaningful attempt was made to pursue informal resolution of the 003 Complaint, and that the University was not interested in pursuing mediation in a *bona fide* manner.[419]

305. The Tribunal found that the McMaster Office of Human Rights and Equity Services' ("HRES") handling of the pre-hearing investigation, including the length of time it took the Officer to act, the lack of transparency, and the grouping

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[416] Excerpt of the cross-examination of Mile Komlen, dated December 8, 2015, Tab 9(A), pages 321-322 of the Supplementary Application Record, Vol. 2; Exhibit 5 to the cross-examination of Mile Komlen, Tab 9(C), page 328 of the Supplementary Application Record, Vol. 2; and Supplementary Milne Affidavit, Tab 1, page 5 of the Supplementary Application Record, Vol. 1, paras. 18-19.
[417] Richardson Affidavit, Tab 10, pages 737-738 of the Application Record, Vol. 3, paras. 19-20; the Komlen Group Complaint Email, at Tab 25, pages 1624-1626 of the Application Record, Vol. 5; Supplementary Affidavit of Catherine Milne, Tab 1, pages 2, 4-7 of the Supplementary Application Record, Vol. 1, paras. 8, 16-19, 22, 25.
[418] See E-mail between Mile Komlen and Shari Novick dated December 2, 2010 (5:45pm), Tab 9(T), page 368 of the Supplementary Application Record, Vol. 2. Note from the e-mail that it was Mr. Komlen who diverted Ms. Cossa from a mediation stream to the formal complaint stream, and not Ms. Cossa.
[419] Hopkins Affidavit, Tab 5, page 473 of the Application Record, Vol. 1., para. 53; Bart Affidavit, Tab 8, page 648 of the Application Record, Vol. 2, para. 71; Rose Affidavit, Tab 11, page 752 of the Application Record, Vol. 3, para. 40; Steiner Affidavit, Tab 13, page 882 of the Application Record, Vol. 3, paras. 32, 60; Taylor Affidavit, Tab 14 of the Application Record, Vol. 3, para. 72.

of the complaints "were ineffective" and all served to create "barriers to resolution" in the DSB.[420]

ii. The Tribunal Proceeded with "Group Complaints" Pursuant to Sections 33-36 of the Policy Without Complying with the Express Conditions Precedent in the Policy

306. Sections 33 to 36 of the Policy allow the University to act as a complainant in certain prescribed instances. As detailed above, it was pursuant to these sections that the President, acting on the Milne and Novick Reports, forwarded the so-called "group complaints" to the Tribunal.[421]

307. In fact, despite the Anti-Discrimination Officer's repeated characterization of the complaints as "group complaints", the Policy only contemplates a situation where multiple complainants bring allegations against a single respondent, but no one is willing to file a written complaint and appear as a complainant. It does not contemplate the bringing of multi-party complaints with a variety of tangentially related complaints between groups of individuals.[422]

308. Read cumulatively, the relevant sections of the Policy provide that the University may *only* act as a complainant if:

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[420] The Confidential Decision, Tab 2, pages 313, 317-318, at pages 340, 344-345 of the Application Record, Vol. 1.
[421] See for instance the Milne Affidavit, Tab 4, pages 373, 375 of the Application Record, Vol. 2, paras. 18, 28; and Taylor Affidavit, Tab 14, pages 982-984 of the Application Record, Vol. 3, paras. 52-59, and Exhibits "C" and "D" thereto.
[422] See Appendix "B" to this factum, the Policy, ss. 33-36. This very objection was raised to the Tribunal prior to the commencement of the proceedings: see for example the Affidavit of Dr. Steiner, DSB-2293, Tab 11, pages 452-456 of the Supplementary Application Record, Vol. 2, paras. 98-101. The Tribunal considered this objection at page 318 of the Confidential Decision, at Tab 2, page 345 of the Application Record, Vol. 1, and found that grouping "exacerbated" the poisoned workplace by "emphasizing lines of division".

(i) the Officer receives repeated allegations against the same person but each of the persons making allegations is unwilling to file a written complaint and appear as a complainant; and

(ii) the appropriate Vice-President communicates with the alleged complainant(s) and respondent, reviews all of the information and decides to initiate formal proceedings against the respondent.

309. These statutory conditions precedent to the University acting as a complainant under the Policy were not met, namely:

(a) The Anti-Discrimination Officer knew that at least one potential complainant (Dr. Taylor) *was* willing to be named and file an individual complaint *before* representing to the President that it was necessary to proceed with complaints under ss. 33-36 of the Policy;[423]

(b) The evidence shows that the "group complaints" were being organized at the Anti-Discrimination Officer's insistence, and not at the insistence of the proposed complainants;[424]

(c) No notice was received by any of the Applicants in their capacity as respondents to the 003 Complaint in advance of the decision to file written complaints: as stated above the Applicants were not consulted by a Vice-President or any other member of the University regarding a potential

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[423] Taylor Affidavit, Tab 14, pages 982-983 of the Application Record, Vol. 3, paras. 55-56, and Exhibit "C" thereto. Although Dr. Taylor ultimately went along with the suggested group complaint, he expressed his willingness to proceed independently.

[424] Taylor Affidavit, Tab 14, pages 982-983 of the Application Record, Vol. 3, paras. 55-56, and Exhibit "C" thereto; Supplementary Affidavit of Catherine Milne, Tab 1, pages 4-5 of the Supplementary Application Record, Vol. 1, paras. 16-18, 20, and Exhibit "D" thereto; excerpt of the cross-examination of Catherine Milne, dated November 11, 2015, Tab 2(A), page 37 of the Supplementary Application Record, Vol. 1; e-mail of between Mile Komlen and Catherine Milne, dated December 13, 2010, Tab 9(V), page 372 of the Supplementary Application Record, Vol. 2.

complaint against them, and they were never consulted by Ms. Novick during the course of her investigation;

(d) All of the 002 and 003 Complainants did in fact file written complaints, in their own name, alleging harassment against another individual and all did appear before the Tribunal as a complainant; and

(e) Two of the 003 Complainants – Dr. Detlor and Ms. Colwell[425] - never met with the HRES Investigator, consequently their allegations were not included in the Novick Report reviewed by President Deane.[426] As a result, they were never contemplated as Complainants when President Deane forwarded the complaints described in the Novick Report to the Tribunal.[427]

310. During the Tribunal proceedings the Applicants raised objections about the "grouping" of the complaints.[428] The Tribunal was also aware that Dr. Detlor's complaint against Dr. Ray had not been presented to the President in the Novick Report[429], and therefore did not comply with sections 33-36 of the Policy.

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[425] Cumulatively, Dr. Detlor and Ms. Colwell's Affidavits filed in the 003 Complaint (being DSB-2103 and DSB-2101) include evidence and allegations against Drs. Steiner, Ray, Pujari, Rose, and Bart, and resulted in findings of harassment against Dr. Steiner and Dr. Ray, see the Confidential Decision, at Tab 2 of the Application Record, at pages 141-152, and 169, which are pages 168-179, and 196 of the Application Record.
[426] Excerpt of the cross-examination of James Heeney, dated December 1, 2015, Tab 8(A), page 132 of the Supplementary Application Record, Vol.1; Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), pages 101-110 of the Supplementary Application Record, Vol. 1; Exhibit 3 to the cross-examination of Shari Novick, Tab 7(E), page 114-116 of the Supplementary Application Record, Vol. 1.
[427] Excerpt of the cross-examination of Mile Komlen, dated December 8, 2015, Tab 9(B), pages 324-325 of the Supplementary Application Record, Vol. 2. Specifically 61 at lines 1-4.
[428] See the Affidavit of Dr. Steiner filed in Response to the 003 Complaint, DSB-2293, Tab 11, pages 452-456 of the Supplementary Application Record, Vol. 2, paras.98-101. No formal motion was brought to attempt to undo the President's grouping of the complaints because the Tribunal had already communicated to all parties and counsel prior to the commencement of the hearings that it did not have jurisdiction to address issues occurring outside of the hearing process. Since the grouping occurred prior to the Tribunal becoming involved, such a motion would have been outside the jurisdiction of the Tribunal.
[429] Excerpt of the transcript of the April 12, 2012 hearing day, Tab 14(C), page 507 of the Supplementary Application Record, Vol. 2.

311. The Applicants submit that the failure to abide by these conditions precedent meant that the Tribunal did not have jurisdiction to hear the 002 and 003 "group complaints", including those of Dr. Detlor and Ms. Colwell, in the first place and accordingly the Tribunal's Decisions should be quashed.

iii. The Tribunal Permitted the Time-Barred Complaint of Dr. Head Against Dr. Steiner Contrary to Section 43(b) of the Policy

312. The Tribunal erred in permitting a time-barred complaint against one of the Applicants in breach of the Policy.

313. The 003 Complaint of Dr. Milena Head against the Applicant Dr. Steiner was considered one of the "primary" complaints before the Tribunal and resulted in Dr. Steiner receiving the most severe penalty.[430]

314. The most recent event complained of in Dr. Head's harassment complaint against Dr. Steiner occurred on December 11, 2009.[431] However, Dr. Head's complaint was not filed until March 31, 2011, along with the rest of the 003 "group complaint" and it was not provided to Dr. Steiner until late April 2011.[432]

315. Section 43(b) of the Policy has a 12 month limitation period for complaints, with an extension for up to three months where appropriate upon request. It also permits a further extension at the discretion of the Officer or other University

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[430] Steiner Affidavit, Tab 13, page 887 of the Application Record, Vol. 3, para. 30; Head Affidavit, pages 2, 4, as well as Exhibit "E" thereto, which are at Tab 31, pages 1791, 1793, 1814-1819 of the Application Record, Vol. 6.
[431] Steiner Motion to Dismiss, page 2, at Tab 30, page 1731 of the Application Record, Vol. 6.
[432] Steiner Affidavit, Tab 13, page 892 of the Application Record, Vol. 3, para. 49.

officer after hearing submissions from the party seeking the extension and the potential respondent.[433]

316. On July 22, 2011, the Applicant Dr. Steiner brought a motion to dismiss the complaint of Dr. Head on the basis that it was time-barred under the Policy and that the conditions for an extension of time had not been met.[434]

317. Notwithstanding that tribunals are generally provided reasonable deference in construing their own enabling statutes, which may include limitation periods,[435] the Tribunal's decision to allow Dr. Head's complaint to proceed should nevertheless attract a standard of correctness and in any event was unreasonable. The Tribunal's decision engaged principles of procedural fairness and natural justice, and had the potential to, and did, permanently damage Dr. Steiner's reputation and career.

318. Dr. Steiner's evidence is that on December 18, 2009, he specifically asked Mr. Komlen whether complaints were being brought against him and was told this was not the case by Mr. Komlen. Dr. Steiner swears that it was only on the basis

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[433] Section 43(b) provides that "[a] written complaint shall be submitted promptly, but no later than 12 months from the last date of the alleged harassment. An extension of up to 3 months may be granted by the Officer, or other University officer where appropriate, upon written request. Any further extension may be granted at the discretion of the Officer or other University official only after hearing submissions from both the person seeking an extension in order to make a complaint, and from the potential respondent."

[434] Steiner Motion to Dismiss, page 2, Tab 30, page 1731 of the Application Record, Vol. 6. That is, no written requests for the 3 month extension had been made (nor were there submissions for the discretionary further extension).

[435] See for instance *McLean v. British Columbia Securities Commission*, [2013] 3 S.C.R. 895 (S.C.C.).

of these ultimately false representations that he agreed to cooperate with Mr. Komlen in the first place.[436]

319. Ultimately, Dr. Steiner withdrew his 002 complaint on September 16, 2011 by writing to the President and expressing his dismay with the process.[437]

320. Therefore, the Tribunal's reasoning for allowing the Head complaint to proceed is both incorrect and unreasonable. In so deciding the Tribunal stated that:

> (a) " [i]t is only fair and reasonable that with respect to the request that any complaint be struck out as being out of time, that any complaint which arose within the 12 month period before the commencement of the Human Rights and Equity Officer's investigation (culminating in a report) would be necessarily saved by the commencement of such process"; and
>
> (b) "[t]he requirement of a formal written complaint is irrelevant given the direction and control of the Human Rights and Equity Services Officer and the *willingness of all parties* (and in certain cases respondents) whose complaints arose during this period to participate in that process."[438]

321. The evidence demonstrates that Dr. Steiner was far from a willing participant in the entire investigation process, nor a willing complainant and was not even permitted to know that he was a respondent when he was asked to be a complainant. Accordingly, allowing Dr. Head's complaint against him because of his involvement with Mr. Komlen was *neither* "fair" *nor* "reasonable".

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[436] Steiner Affidavit, Tab 13, pages 885-886 of the Application Record, Vol. 3, paras. 25-27.
[437] Steiner Affidavit, Tab 13, pages 897-898 of the Application Record, Vol. 3, para. 69, and Exhibit "E" thereto.
[438] Procedural Order #3, at Tab 28, page 1703 of the Application Record, Vol. 6. Emphasis added.

322. Thus, the Tribunal's decision to allow the time-barred complaint by Dr. Head against the Applicant Dr. Steiner was both incorrect and unreasonable.

iv. The Tribunal Found that Dr. Ray's Counter-Complaint was Frivolous, Vexatious or Retaliatory Without Complying with the Express Conditions Precedent Under Section 70(e) of the Policy

323. Dr. Detlor's harassment complaint against Dr. Ray was dismissed by the Tribunal and the primary basis for Dr. Ray's penalty was the finding that his counter-complaint was frivolous, vexatious and retaliatory. This finding is fundamentally unfair for the following reasons.

324. Dr. Ray only became involved in the proceedings after Dr. Detlor and Ms. Colwell were added to the University's "group complaint" without the President – the Tribunal's gatekeeper – providing his authorization.

325. In order to issue his counter-complaint against Dr. Detlor, Dr. Ray sought leave from the Tribunal.

326. Although counsel to Dr. Detlor, Mr. Heeney, informed Dr. Ray and his counsel that he would ask the Tribunal to find the counter-complaint to be frivolous, vexatious or retaliatory, the Tribunal took no position on his request, and granted Dr. Ray leave to issue the counter-complaint.[439]

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[439] Procedural Order #3, Tab 28, pages 1698-1699 of the Application Record, Vol. 6.

327. As stated by the Divisional Court in *Volochay*:

> "where a tribunal is authorized to proceed in a certain way and does not proceed in that way and thereby violates a person's right to procedural fairness in a situation where his profession is at stake, the decision resulting from that flawed process should not be allowed to stand."[440]

328. It is submitted that the Tribunal exceeded its jurisdiction by failing to give the Applicant Dr. Ray notice and inviting his submissions pursuant to s. 70(e) of the Policy *before* it sanctioned him for making a counter-complaint. The Policy requires the Tribunal to advise a party if it is *considering* making a ruling that a complaint has been fraudulent, malicious, frivolous or vexatious or is entirely without factual basis. [Emphasis added].

329. Section 70(e) acts as a statutory condition precedent to the Tribunal making such a finding, and the failure to comply with that condition renders its decision "nugatory".[441]

330. In addition to being unduly punitive, the nature of the Tribunal's sanction against Dr. Ray was not anchored in findings of liability against Dr. Ray for harassment.

331. It is the evidence of Dr. Ray and Mr. Jeff Hopkins (Dr. Ray's counsel below) that the Tribunal never communicated that it was considering making a vexatious

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[440] *Volochay*, *supra*, at para. 44.
[441] *Kupeyan*, *supra*, at para. 16.

complaint finding against Dr. Ray, much less provided him with the opportunity to make submissions on this issue.[442]

332. Notwithstanding Mr. Heeney's request to the Tribunal, there is no provision in the Policy relieving the Tribunal of its obligations to provide notice that it is considering such a finding and to request submissions from the party on the issue of the Tribunal making that finding.

333. It is the evidence of Dr. Ray and Mr. Hopkins that the only indication they received from the Tribunal about a potential finding of retaliation was a cryptic remark from the Chair during the hearing on April 23, 2012, simply asking Dr. Ray if, having heard the evidence, there was anything he would like to alter about his complaint. It is Dr. Ray's testimony that had the Tribunal made the possibility of a finding of retaliation clearly known to him and invited submissions specifically on this point as required by the Policy, he would have withdrawn the counter-complaint prior to the Tribunal making its liability finding.[443]

334. Notwithstanding Dr. Ray's June 24, 2014 remedy submissions to the contrary, the Tribunal found that the Policy had not been breached by (i) its failure to give Dr. Ray notice and (ii) its failure to invite his submissions before making its adverse finding against him.[444]

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[442] Hopkins Affidavit, Tab 5, page 593 of the Application Record, Vol. 2, para. 119; Ray Affidavit, Tab 12, page 781 of the Application Record, Vol. 3, para. 69.
[443] Ray Affidavit, Tab 12, page 781 of the Application Record, Vol. 3, para. 70.
[444] The Remedies Decision, pages 2-4, at Tab 3, pages 349-351 of the Application Record, Vol. 1.

335. As stated earlier, where "true questions of jurisdiction" or general questions of central importance to the legal system that are outside the specialized expertise of the Tribunal arise, a standard of correctness applies even in the Tribunal's interpretation of its own statute.[445]

336. Notice of an allegation and providing the respondent an opportunity to make full answer and defence to that allegation are fundamental tenets of natural justice and of our legal system. The application of s. 70(e) of the Policy is therefore outside the specialized expertise of the Tribunal and must attract a standard of correctness.

337. The Tribunal's failure to comply with the requirements of s. 70(e) was incorrect and therefore the Tribunal's decision against Dr. Ray must be quashed.

338. In addition, the Tribunal has breached s. 73 of the Policy, which clearly provides for remedial rather than punitive remedies. Even if it is accepted that the filing of Dr. Ray's counter-complaint against Dr. Detlor was fraudulent, malicious, frivolous or vexatious or entirely without factual basis and that this finding did not exceed the Tribunal's jurisdiction, the unduly punitive nature of the sanction (see Appendix "C" hereto) leads to the inevitable conclusion that even if the Tribunal had the jurisdiction to make the finding against Dr. Ray, it nevertheless exceeded this jurisdiction.

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[445] *Dunsmuir*, *supra*, para. 60 and *Mowat*, *supra*, para. 22.

339. This jurisdictional breach is compounded by the fact that Dr. Detlor's complaint should never have proceeded to the Tribunal in the first place[446], all of which warrants this Honourable Court's intervention.

ISSUE I. The Tribunal Erred in Jurisdiction and Violated the Principles of Natural Justice and Procedural Fairness in the Structure and Conduct of the Hearing

i. The Imposition of a Prejudicial and Unreasonable Hearing Schedule

340. The Applicants submit that the Tribunal imposed a prejudicial timetable which seriously compromised the ability of the Applicants and their counsel to adequately respond to the allegations brought against them.

341. Almost all of the Applicants suffered significant prejudice in being ordered to respond to extremely broad disclosure requests on a very tight timeline.[447] These Applicants had difficulty in meeting the deadlines while carrying on their professional duties as faculty members.[448]

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[446] Excerpt of the cross-examination of James Heeney, dated December 1, 2015, Tab 8(A), page 80 of the Supplementary Application Record, Vol. 1; Exhibit 2 to the cross-examination of Shari Novick, Tab 7(D), pages 101-110 of the Supplementary Application Record, Vol. 1; Exhibit 3 to the cross-examination of Shari Novick, Tab 7(E), page 114-116 of the Supplementary Application Record, Vol. 1.

[447] Hopkins Affidavit, Tab 5, page 588 of the Application Record, Vol. 2, para. 108; Bart Affidavit, Tab 8, pages 647-648 of the Application Record, Vol. 2, paras. 69-70; Pujari Affidavit, Tab 9, pages 685-687 of the Application Record, Vol. 2, paras. 60-63; Rose Affidavit, Tab 11, page 755 of the Application Record, Vol. 3, paras. 56-57; Ray Affidavit, Tab 12, pages 777-778 of the Application Record, Vol. 3, paras. 54-57; Steiner Affidavit, Tab 13, pages 899-900 of the Application Record, Vol. 3, paras. 75-78;Taylor Affidavit, Tab 14, pages 986-987 of the Application Record, Vol. 3, paras. 73-74.

[448] Milne Affidavit, Tab 4, page 389 of the Application Record, Vol. 2, para. 77; Hopkins Affidavit, Tab 5, page 581 of the Application Record, Vol. 2, para. 87; Bart Affidavit, Tab 8, page 648 of the Application Record, Vol. 2, para. 70; Pujari Affidavit, Tab 9, pages 686-687 of the Application Record, Vol. 2, paras. 62-63; Rose Affidavit, Tab 11, page 755 of the Application Record, Vol. 3, para. 57; Ray Affidavit, Tab 12, pages 777-778 of the Application Record, Vol. 3, paras. 54-57; Taylor Affidavit, Tab 14, page 987 of the Application Record, Vol. 3, para. 75.

342. As a result of the Tribunal's decision to provide only 21 hearing days as opposed to the 74 days[449] estimated by counsel for the various parties to be necessary, the Applicants were in some cases significantly compromised in responding to the numerous allegations against them.[450] For example, due to the compressed timeline, Applicants' counsel had no choice but to withdraw certain witnesses, having already, in some cases, not called others in the first place because of the requirement to fit their case into the very restrictive hearing schedule.[451]

343. Also, as a result of the Tribunal's need for "full utilization" of the hearing days, the timing of witness testimony was often changed without any or sufficient notice to the Applicants, who were then prejudiced by being unable to attend and assist their counsel when material testimony against them was heard by the Tribunal.[452] To reiterate, the Tribunal had an absolute requirement that the hearings end in June to accommodate a Tribunal member's upcoming sabbatical; even with the addition of two more hearing days to the existing schedule in the midst of the hearing, the absolute end date remained unchanged.[453]

344. This issue is not a matter of the Applicants' ability to freely choose what hearing dates to attend and to suffer the consequences of that choice: it is a matter of the

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[449] See excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(B), pages 56-57 of the Supplementary Application Record, Vol. 1; and the explanation footnote 8, *supra*.
[450] Hopkins Affidavit, Tab 5, pages 590-591 of the Application Record, Vol. 2, para. 114; Steiner Affidavit, Tab 13, pages 900-901 of the Application Record, Vol. 3, para. 79; and Taylor Affidavit, Tab 14, page 988 of the Application Record, Vol. 3, para. 77.
[451] Answer to undertaking of Jeff Hopkins, Tab 3, page 49 of the Supplementary Application Record, Vol. 1, question 2.
[452] See for instance Steiner Affidavit, Tab 13, page 901 of the Application Record, Vol. 3, para. 79(d); and Taylor Affidavit, Tab 14, page 987-988 of the Application Record, Vol. 3, para. 76.
[453] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(C), page 62 of the Supplementary Application Record, Vol. 1.

Applicants being provided proper notice and adequate information in order to fully defend themselves. For instance, as a result of the Tribunal schedule both Drs. Steiner and Taylor were not in attendance for material and damaging evidence against them because the witness's testimony had been re-scheduled without sufficient notice for them to attend and receive it.[454]

345. Furthermore, both Drs. Steiner and Taylor were unable to call material witnesses because of time pressures created by the Tribunal's inability to sit beyond June[455], while counsel to the Applicants as 003 Respondents had no choice but to withdraw other responding witnesses because there were not enough hearing days left before the Tribunal could no longer sit.[456]

ii. The Tribunal Permitted the University to Act in Prosecutorial Role

346. Although the University was a respondent to both the 002 and 003 Complaints, and ultimately liable for its role in allowing the toxic work environment to persist[457], the Tribunal permitted it to act in a prosecutorial role by permitting submissions on remedies against the Applicants.

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[454] See for instance Steiner Affidavit, Tab 13, page 901 of the Application Record, Vol. 3, para. 79(d); Taylor Affidavit, Tab 14, page 987-988 of the Application Record, Vol. 3, para. 76.
[455] See for instance Steiner Affidavit, Tab 13, page 901 of the Application Record, Vol. 3, para. 79(c); Taylor Affidavit, Tab 14, page 987-988 of the Application Record, Vol. 3, para. 77; Exhibit 5 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(E), pages 253 of the Supplementary Application Record, Vol. 1; Exhibit 6 to the cross-examination of James Heeney, dated December 1, 2015, Tab 8(F), page 261 of the Supplementary Application Record, Vol. 1.
[456] Excerpt of the cross-examination of Jeff Hopkins, dated November 11, 2015, Tab 5(E), pages 69-75 of the Supplementary Application Record, Vol. 1; answers to undertakings of Jeff Hopkins, Tab 3, pages 48-49 of the Supplementary Application Record, Vol. 1, questions 1 and 2; and *Heeney* Exhibits 5 & 6, *ibid*.
[457] The Confidential Decision, page 312, at Tab 2, page 339 of the Application Record, Vol. 1.

347. To reiterate, the 002 and 003 proceedings arose out of the University administration's request to Mr. Komlen that the HRES investigate the state of dysfunction within the DSB.[458] As a result, HRES organized an investigation culminating in two reports which were provided to the President. On the basis of those two reports, the President, acting as the gatekeeper, submitted the complaints to the jurisdiction of the Tribunal.[459]

348. The University was named as a respondent in both the 002 Complaint and the 003 Complaint, although the 003 Complainants sought only a review of the Policy, the Tenure and Promotion process, and training on the Policy and the Tenure and Promotion process as remedies from the University.[460]

349. In Procedural Order #6, the Tribunal ordered that the 002 and 003 Complainants submit their proposed remedies to their corresponding respondents by January 6, 2012.[461] As a respondent, the University was neither invited to serve, nor did it in fact serve any remedy request against any of the Applicants by the deadline ordered by the Tribunal.[462]

350. Having not complied with the Tribunal's Procedural Order, and having not provided notice to the Applicants, the Tribunal nevertheless permitted the

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[458] Komlen Report, pages 1-2, at Tab 19, pages 1535-1536 of the Application Record, Vol. 5.
[459] Milne Affidavit, Tab 4, pages 373, 375 of the Application Record, Vol. 2, paras. 18, 21, 28; Taylor Affidavit, Tab 14, pages 980-981, 983-984 of the Application Record, Vol. 3, paras. 47, 59 and Exhibit "B" thereto.
[460] Response of the 003 Complainants to the Demand for Particulars Regarding Remedy, DSB-2097, at page 2, at Tab 33, page 1831 of the Application Record, Vol. 6 ("003 Complainants' Remedy Requests").
[461] Procedural Order #6, dated December 14, 2011, para. 2(b), at Tab 32, page 1829 of the Application Record, Vol. 6.
[462] Milne Affidavit, Tab 4, page 398 of the Application Record, Vol. 2, para. 107; Hopkins Affidavit, Tab 5, page 594 of the Application Record, Vol. 2, para. 123.

University to deliver closing argument and further written remedy submissions demanding that the Tribunal institute sanctions against the Applicants, which the Tribunal would be recommending *back* to the University to carry-out.[463]

351. The Applicants submit that in the circumstances, permitting the University to make penal submissions was procedurally unfair, leads to reasonable apprehension of bias and a violation of the principles of natural justice, and, accordingly, the Decisions should be quashed.

iii. The Tribunal Permitted Significant Evidence to Be Led Without Proper Notice to the Applicants

352. The Applicants submit that the Tribunal exceeded its jurisdiction, committed procedural unfairness and breached the principles of natural justice by permitting counsel for both the University and the 003 Complainants to elicit key evidence from three witnesses during the hearing of the 002 Complaint in the absence of prior notice to the Applicants and contrary to the Tribunal's Procedural Orders.

353. The effect of this lack of notice was that the affected Applicants could not prepare to adequately respond to and challenge this evidence which came out without notice in the 002 Complaint and was used against them in the 003 Complaint. This issue illustrates the prejudice of consolidation.

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[463] Furthermore, the University having waited until its closing submissions to notify the Applicants of its intention to seek penalties against the Applicants, and then being permitted to file several pages of remedy submissions after the hearing was over, seriously prejudiced the Applicants' ability to defend themselves against what was already a procedurally unfair process. The effect and timing of the University's submissions, the party driving the proceedings from the outset, was far more prejudicial than any remedies sought by the individual 003 Complainants – on this point, see the Milne Affidavit, Tab 4, page 399 of the Application Record, Vol. 2, para 112; and Hopkins Affidavit, Tab 5, pages 595-596 of the Application Record, Vol. 2, paras. 126-129.

354. Pursuant to Procedural Order #3, each party was required to file the affidavit evidence of any witness it intended to call prior to the testimony being given.[464] Thus, it was the parties' legitimate expectation that they would receive adequate notice of the identity and anticipated *viva voce* testimony of each witness in order to allow them to prepare and know the case they had to meet.

355. Although the two complaints were consolidated into one hearing, the 002 Complaint was heard first. In the interests of efficiency, pursuant to Procedural Order #8, the Tribunal ordered that if a witness was only called regarding the 002 evidence, counsel for the 003 Complainants, namely Mr. Heeney, had the limited right to cross examine, only to the extent 003 was impacted by the 002 evidence then given.[465]

356. In the first instance of evidence being called without proper notice, on March 3, 2012, the witness Catherine Connelly gave evidence in the 002 hearing on the tenure and promotion process. Dr. Connelly did not file an affidavit in respect of the 003 Complaint, and was not called as an 003 witness.[466]

357. At the end of Dr. Connelly's testimony, Mr. Heeney was permitted to cross-examine her on matters going directly to the issues raised in the 003 Complaint, namely the treatment of Dr. Detlor and Ms. Colwell by some of the Applicants,

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[464] In its reasons for ordering the filing of affidavits, the Tribunal reasoned that it would be "of great assistance to the tribunal, the parties and their counsel to have the precise nature of the evidence for a complaint and a response reduced to a sworn statement at the outset." See Procedural Order #3, at Tab 28, page 1720 of the Application Record, Vol. 6.
[465] Procedural Order # 8, para 2(c), at Tab 29, page 1723 of the Application Record, Vol. 6.
[466] Hopkins Affidavit, Tab 5, page 577 of the Application Record, Vol. 2, paras. 72-73.

notwithstanding that Dr. Detlor and Ms. Colwell, who were Complainants in the 003 Complaint, were never mentioned in Dr. Connelly's 002 *viva voce* testimony or affidavit.[467]

358. The effect of permitting Dr. Connelly's testimony in 002 without notice, over the numerous objections of counsel, on issues raised in the 003 Complaint was that the Applicants were ambushed – here was a witness testifying as expected about the tenure and promotion process, a key issue in the Applicants' 002 Complaint, who was then asked on cross-examination if she had ever witnessed intimidation by the Applicants against 003 Complainants.[468] Dr. Connelly's unexpected and extensive testimony in this regard was highly prejudicial to the Applicants and was heavily relied on by the Tribunal in its Decisions and findings against Drs. Steiner, Ray, Pujari, Taylor, Bart.[469]

359. The second instance of evidence being called without proper notice occurred on April 12, 2012, when counsel for the University and Mr. Bates, respondents in the 002 Complaint, examined Ms. Rita Cossa – a complainant in the 003 Complaint – as a witness with respect to allegations made by Dr. Richardson in the 002

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[467] Hopkins Affidavit, Tab 5, pages 577-578 of the Application Record, Vol. 2, paras. 74-75.
[468] The 003 Complainants were Dr. Detlor and Ms. Colwell. This evidence had no connection to the Affidavit and *viva voce* testimony Connelly provided, nor the complaint for which she was called to provide evidence. Increasing the procedural unfairness is the fact that, as discussed in Issue E, significant portions of Dr. Connelly's March 3, 2012 evidence in respect of the 003 Complaint is not audible in the Tribunal audio, and therefore is incapable of being scrutinized by the Applicants.
[469] Hopkins Affidavit, Tab 5, pages 577-578 of the Application Record, Vol. 2, paras. 74-75; Saccucci Affidavit, Tab 16, page 1049 of the Application Record, Vol. 4, para. 77; the Confidential Decision, pages 153, 167, 169, 174, 180-181, 199, 206, and 220, at Tab 2, pages 180, 194, 196, 201, 207-208, 226, 233, and 247 of the Application Record, Vol. 1.

Complaint.[470] No affidavit of Ms. Cossa was filed in the 002 Complaint.[471] Applicants' counsel objected to this questioning on the basis that it clearly breached the evidentiary requirements under Procedural Order #3.[472] Furthermore, as a result of this breach Dr. Richardson was not present at the hearing on that day to hear Ms. Cossa's *viva voce* evidence against him and assist his counsel.[473]

360. In the third instance of evidence being called without proper notice, on April 13, 2012, counsel for the University and Mr. Bates, respondents in the 002 Complaint, examined Dr. Milena Head – a complainant in the 003 Complaint – as a witness with respect to allegations made by Dr. Richardson and Dr. Pujari in the 002 Complaint.[474] Ms. Milne had received a short synopsis of Dr. Head's expected evidence from Mr. Avraam prior to Dr. Head's testimony; however, no affidavit of Dr. Head in the 002 Complaint was filed prior to her testimony.[475]

361. The examination of Dr. Head went well beyond the scope of the proposed summary of evidence.[476] Again, this was permitted over the strong objection of Applicants' counsel.[477] Without notice of this testimony, Dr. Pujari was not

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[470] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 62.
[471] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 62.
[472] *Ibid*.
[473] Richardson Affidavit, Tab 10, pages 740-741 of the Application Record, Vol. 3, paras. 31-36.
[474] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.
[475] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.
[476] *Ibid*.
[477] *Ibid*.

present for that portion of the hearing day, and was accordingly deprived of the right to receive and make full answer and defence to Dr. Head's testimony.[478]

362. These Applicants submit that their inability to be present for, prepare for and properly defend themselves against the evidence of the witnesses Dr. Connelly, Dr. Head and Ms. Cossa was a direct result of consolidation and the Tribunal's breach of Procedural Order #3 (regarding disclosure of evidence), and the disclosure requirements necessitated by the duty of procedural fairness.

CONCLUSION

363. The Applicants were subjected to several serious and significant breaches of natural justice and procedural unfairness in the pre-hearing and hearing process, which culminated in an unreasonable, discriminatory and draconian remedy decision.

364. Furthermore, as illustrated above, the Tribunal's conduct post-hearing continued to prejudice the Applicants, all of which warrants the Orders requested.[479]

365. The sanctions meted out by the Tribunal have had career-ending consequences for three of the distinguished professors and have seriously jeopardized the career

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[478] Milne Affidavit, Tab 4, page 384 of the Application Record, Vol. 2, para. 63.It is Dr. Pujari's sworn testimony that had he been so advised, he would have been present. See Pujari Affidavit, Tab 9, page 687 of the Application Record, Vol. 2, para. 67.

[479] A university is subject to prerogative remedies, and although courts should ensure that applicants exhaust all procedures internally available before exercising its discretion to grant such a remedy, it is nevertheless open to the court to do so pending such exhaustion. See *Thomas*, *supra*, paras. 30-38, citing *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (Ont. C.A.) leave to appeal refused in (1982) 42 N.R. 270 (S.C.C.).

advancement of the other sanctioned distinguished professors. Since the University's Policy does not provide for an appeal of the Tribunal's Decisions, the Applicants apply to the Divisional Court for the relief sought.

PART IV - ORDER REQUESTED

366. The Applicants respectfully request:

(a) An order in the nature of *certiorari* quashing the Confidential Decision dated May 15, 2013 and the Confidential Remedies Decision dated September 23, 2013 of the Board Senate Hearing Panel for Sexual Harassment/ Anti-Discrimination (the "Tribunal") (collectively the "Tribunal Decisions" or the "Decisions") and the related heavily redacted public version of the Tribunal Decisions dated September 23, 2013 (the "Public Report"), and the President's decision, dated September 26, 2013 to carry-out the Decisions of the Tribunal in respect of each of the sanctioned Applicants, thereby reinstating the Applicants to all of their previous positions at the University and granting them *inter alia* reimbursement for their lost salary, benefits and other privileges lost as a result of the penalties imposed by the Tribunal;

(b) An order in the nature of a Declaration that the Applicants were unduly deprived of the benefits of employment by virtue of the Tribunal Decisions;

(c) An order in the nature of a Declaration that the effect of the Tribunal Decisions was to force the Applicants, Dr. Chris Bart, Dr. George Steiner and Dr. Wayne Taylor into retirement;

(d) An order in the nature of a Declaration that the Applicants, specifically Dr. Chris Bart, Dr. George Steiner, and Dr. Wayne Taylor shall be permitted to resume their careers with McMaster University;

(e) An order granting the Applicants' compensation in the form of damages for lost wages;

(f) Other consequential damages arising out of and resulting from the Tribunal Decisions;

(g) The Applicants' costs of this Application; and

(h) Such further and other relief as counsel may advise and this Honourable Court permit.

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

PETER M. JACOBSEN
TAE MEE PARK
ELLIOT P. SACCUCCI

Bersenas Jacobsen Chouest Thomson Blackburn LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Exeter v. Canada (Attorney General)*, 2014 FCA 251
2. *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12
3. *Scheerer v. Walbillig* (2006), 265 D.L.R. (4th) 749 (Ont. S.C.J. (Div. Ct)
4. *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Ont. Div. Ct.)
5. *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (Ont. C.A.).
6. *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.)
7. *Cape Breton-Victoria Regional School Board v. C.U.P.E., Local 5050* (2011), 18 Admin. L.R. (5th) 75 (N.S.C.A.)
8. *Canada (Attorney General) v Mowat*, [2011] 3 S.C.R. 471
9. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.)
10. *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4
11. *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.)
12. *Doyle v. Canada (Restrictive Trade Practices Commissions)*, [1985] 1 F.C. 362 (F.C.A.) leave to appeal to S.C.C. refused (1985), 7 C.P.R. (3d) 235 (S.C.C.)
13. *Goertz v. College of Physicians & Surgeons*, [1989] 6 W.W.R. 11 (Sask. C.A.)
14. *Essex Incorporated Congregational Church Union v Essex CC*, [1963] 1 All E.R. 326 (H.L)
15. *Gough v. Peel Regional Police Service*, (2009) 248 O.A.C. 105, 309 D.L.R. (4th) 439 (Ont. Div. Ct.)
16. *Piller v. Assn. of Land Surveyors (Ontario)* (2002), 43 Admin. L.R. (3d) 151 (Ont. C.A.)
17. *Mannion v. Avalon East School Board*, 1999 CarswellNfld 260 (N.S.C. [Trial Div.])
18. *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 623 (S.C.C.)

19. *The University of Windsor and University of Windsor Faculty Association* (Manley) unreported award of arbitrator Kenneth P. Swan dated June 28th, 2000

20. *The University of Calgary Faculty Association (Prof. Polzer et. al) v. The University of Calgar*y unreported award of the board of arbitration chaired by Andrew C.L. Sims, Q.C. dated September 21, 1999

21. *University College of the North v. Manitoba* (Thompson Grievance), [2011] M.G.A.D. No. 33 (R.A. Simpson, Chair)

22. *St. Lawrence College v. Ontario Public Service Employees Union (Young Grievance)*, [1998] O.L.A.A. No. 746. (O.L.R.B.)

23. *Okanagan University College and Okanagan University College Faculty Assn. (Craig Grievance)*, [1997] B.C.C.A.A.A. No. 313 (S. Lyon)

24. *The Mount Saint Vincent University Faculty Association and Mount Saint Vincent University* (Stebbins) unreported decision of arbitrator Outhouse dated February 20th, 1995

25. Brown and Beatty Canadian Labour Arbitration, Chapter 7 “Discipline”, 7:4000 “Disciplinary Penalties”, 7:4400 “Mitigating Factors”.

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

27. *Thomas v. Mount Saint Vincent University* (1986), 28 D.L.R. (4th) 230 (N.S.S.C. T.D.)

28. *R v. H. (J.M.)*, 2011 SCC 45

29. *Byblow v. Yukon Territory (Workers’ Compensation Appeal Tribunal)*, 2014 YKSC 38 (Y.T.S.C.)

30. *City of Montreal v. C.U.P.E., Local 301*, [1997] S.C.J. No. 39

31. *Kupeyan v. Royal College of Dental Surgeons Ontario*, [1982] O.J. No. 3376 (Ont. Sup. Ct.)

32. *Volochay v. College of Massage Therapists* (2011), 30 Admin. L.R. (5th) (S.C.J. (Div. Ct.))

33. *Volochay v. College of Massage Therapists*, 2012 ONCA 514 (CanLII)

34. *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.)

35. *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (Fed. T.D.); affirmed (1996), 205 N.R. 383 (Fed. C.A.).

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

37. *McLean v. British Columbia Securities Commission*, [2013] 3 S.C.R. 895 (S.C.C.)

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

39. *Newton v. Tataryn*, [1990] M.J. No. 209 (Man. Ct. Q.B.)

40. *Herrera v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 1724 (F.C.)

41. *Zundel v. Canada (Human Rights Commission)*, [2000] F.C.J. No. 1838 (F.C.A.)

42. *Geza v. Canada (Minister of Citizenship & Immigration)*, [2006] 4 F.C.R. 377 (F.C.A.)

43. *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (Ont. C.A.) leave to appeal refused in (1982) 42 N.R. 270 (S.C.C.)

SCHEDULE "B"
RELEVANT STATUTES

***Judicial Review Procedure Act,* R.S.O. 1990, Chapter J.1**

2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Extension of time for bringing application

5. Despite any limitation of time for the bringing of an application for judicial review fixed by or under any Act, the court may extend the time for making the application, either before or after expiration of the time so limited, on such terms as it considers proper, where it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay. R.S.O. 1990, c. J.1, s. 5.

Application to Divisional Court

6. (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Record to be filed in court

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

***Bill 168, Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009,* S.O. 2009 C. 23.**

Commencement

9. This Act comes into force six months after the day it receives Royal Assent.

***Statutory Powers Procedure Act*, RSO 1990, c S.22**

Hearings to be public; maintenance of order

Hearings to be public, exceptions

9. (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public. R.S.O. 1990, c. S.22, s. 9 (1); 1994, c. 27, s. 56 (16).

Proceedings involving similar questions

9.1(1)If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may,

(a) combine the proceedings or any part of them, with the consent of the parties;

(b) hear the proceedings at the same time, with the consent of the parties;

(c) hear the proceedings one immediately after the other; or

(d) stay one or more of the proceedings until after the determination of another one of them.

Exception

(2)Subsection (1) does not apply to proceedings to which the *Consolidated Hearings Act* applies. 1994, c. 27, s. 56 (19).

Same

(3)Clauses (1) (a) and (b) do not apply to a proceeding if,

(a) any other Act or regulation that applies to the proceeding requires that it be heard in private;

(b) the tribunal is of the opinion that clause 9 (1) (a) or (b) applies to the proceeding. 1994, c. 27, s. 56 (19); 1997, c. 23, s. 13 (15).

APPENDIX "A"

McMaster University DeGroote School of Business: Key Dates

Date	Event
July 1, 2004	Paul Bates assumes Deanship of the DeGroote School of Business (the "DSB") for an initial 5 year term.
June 2007	McMaster University announces that the expansion of the DSB to a campus in Burlington ("Burlington expansion plan") has been approved by the University's Board of Governors.
July 1, 2007	Dr. Ilene Busch-Vishniac is appointed Provost and Vice-President Academic of the University.
October 23, 2007	Five Area Chairs, including one of the Applicants, send a letter to their Areas re: Burlington expansion plan.
October 31, 2007	Provost issues disciplinary letters to each of the Area Chairs. The disciplinary letters are eventually withdrawn after the letters are grieved.
December 17, 2007	Faculty meeting during which Burlington expansion plan is approved.
January 2, 2008	McMaster Human Rights and Equity Services Office ("HRES") declines to investigate the Applicant Dr. Pujari's complaints re bullying and intimidation against senior administrators based on jurisdictional issues.
February 2008	Dean Bates announces intention to seek re-appointment as DSB Dean.
October 2008	Performance Report re: Dean Bates is signed by 21 tenured faculty members of the DSB.
November 2008	Various faculty members, including certain of the Applicants, provide letters to the *Ad Hoc* Dean Selection Committee, opposing the Dean's re-appointment.
December 18, 2008	MUFA Vote on re-appointment of Dean Bates is conducted.
February 25, 2009	Lecturer Linda Stockton posts on MUFAgab (online faculty chat forum) re: divisions within DSB.
February 25, 2009	Provost responds to MUFAgab post stating that HRES would

	investigate.
February 2009	MUFA Vote re: Bates re-appointment. Of 60 MUFA members (of 61 total DSB faculty), 44 voted, with 1 spoiled vote. Results were 36 opposed, 6 for, 1 no opinion.
April 29, 2009	Members of the faculty, including certain of the Applicants, speak with Board of Governors Chair re: Dean Bates re-appointment and faculty vote.
May 26, 2009	Members of the faculty, including certain of the Applicants, appear before the Board of Governors to discuss Performance Report and Dean's re-appointment. They are not called on and the vote for re-appointment passes.
June 2009	Director of HRES Office Milé Komlen begins interviewing parties who eventually become the 003 Complainants.
December 16, 2009	Mr. Komlen contacts the Applicant Dr. Bart, the first of the 002 Complainants to be contacted.
March 25, 2010	Komlen Report is released.
March 26, 2010	Mr. Komlen contacts Dean Bates and asks if he'd like to discuss the "positive spin" he's been hearing about Dean Bates role as discussed in the Komlen Report
March 28, 2010	President's Advisory Committee on the DSB (PACDSB) commences its review of the DSB.
May 13, 2010	The Anti-Discrimination Policy is invoked by the President of the University.
October 18, 2010	Mr. Komlen retains Ms. Shari Novick to act as investigator into what would eventually become 003 Complaint.
November 3, 2010 2010	Mr. Komlen retains Ms. Catherine Milne to act as investigator into what would eventually become 002 Complaint.
November 15, 2010	Ms. Novick informs Mr. Komlen that she does not anticipate being able to complete the investigation in the time required by HRES.
November 23, 2010	Ms. Milne informs Mr. Komlen that she is concerned that she will not have sufficient time to complete the investigation in the time required by HRES.

November 25, 2010	Ms. Novick informs Mr. Komlen, again, that she is concerned about the timing of her investigation, and her ability to complete it as required by HRES.
November 25, 2010	Ms. Novick is informed by Mr. Komlen that she will not be meeting with respondents to the alleged 003 complaints.
November 29, 2010	Ms. Milne is informed that she will not be meeting with the respondent, Dean Bates, to the alleged 002 complaints.
November 29, 2010	Mr. Komlen cancels Ms. Milne's meeting with Dean Bates and suggests he will meet with Dean Bates himself that day
December 15, 2010	PACDSB Report is released.
December 16, 2010	Mr. Bates announces that he will be stepping down as Dean to assume role as "Special Advisor" to the President.
December 21, 2010	Milne and Novick investigation reports are completed and provided to HRES Office and Mr. Komlen, ending their retainers. Ms. Novick's 003 investigation report does not include complaints from Dr. Detlor, Ms. Cossa, Ms. Stockton, or Mr. Vilks, who eventually become complainants, and does include Dr. Bontis who later withdraws.
January 4, 2011	Milne investigation report is provided to the Applicants (excluding Dr. Ray).
January 7, 2011	Mr. Komlen submits 002/003 Complaints summaries to the President.
February 18, 2011	President Deane forwards the 002/003 Complaints – which do not include Dr. Detlor or Ms. Colwell - to the Tribunal
March 1, 2011	Dr. Bob McNutt assumes the role of Interim Dean of the DSB.
March 21, 2011	The President of the University forwards the Milne and Novick investigation reports to the Tribunal triggering the Tribunal process.
March 24, 2011	Final meeting between the Applicants (excluding Dr. Ray), Ms. Milne and Mr. Komlen prior to filing the 002 Complaint pleading.
March 31, 2011	Filing of each group complaint pleading: 002 Complaint (Drs. Rose, Bart, Pujari, Richardson, Steiner, Taylor

	as Complainants against Mr. Bates and the University). 003 Complaint (Drs. Flynn, Head, Longo, Seaman, Detlor, Mr. Vilks, Ms. Stockton, Ms. Cossa, and Ms. Colwell as Complainants against Drs. Rose, Bart, Pujari, Steiner, Taylor, Ray and the University).
April - May 2011	003 Group Complaint received by Applicants.
June 10, 2011	Notice of Joint Pre-Hearing Conference, enclosing 002 and 003 Complaints sent from Tribunal to all parties.
June 24, 2011	Preliminary hearing re: procedural matters held before Tribunal Chair, Dr. Dr. MacDonald.
July 5, 2011	University agrees to cover legal expenses for all respondents.
October 7, 2011	Release of Supplementary Procedural Order # 3 re: motions to strike complaints, consolidation, order of proceedings and other procedural matters.
November 18, 2011	Responses to 002 and 003 Complaints filed.
November 28, 2011	Second day of preliminary hearings re: procedural matters held before Tribunal Chair, Dr. MacDonald.
December 2011	Tribunal orders 003 Respondents to produce all e-mails sent or received that may be relevant to U/SHAD 002 & 003 proceedings.
December 19, 2011	003 Respondents file requested documents in respect of 003 Complaint.
January 6, 2012	Affidavits of 002 & 003 Complainants filed. All Complainants file requested relief against the respondents. 002 Complainants file requested documents in respect of 002 Complaint.
January 31, 2012	Affidavits of 003 Respondents filed.
February 6, 2012	Affidavits of 002 Respondents filed.
March 3, 2012	U/SHAD 002 and 003 proceedings commence. 002 Complaint proceeds first.

	The Tribunal has filed a break-down of the hearing schedule before the Court in this application together with its audio recordings– see "Audio Notes" of Tribunal attached as Exhibit "YY" to the Affidavit of Elliot P. Saccucci, sworn February 19, 2015.
March 4, 2012	Second day of hearings.
March 23, 2012	Third day of hearings.
March 25, 2012	Fourth day of hearings.
March 27, 2012	Fifth day of hearings.
March 30, 2012	Sixth day of hearings.
March 31, 2012	Seventh day of hearings. Opening statements in 003 Complaint.
April 5, 2012	Eight day of hearings.
April 10, 2012	Ninth day of hearings.
April 12, 2012	Tenth day of hearings.
April 13, 2012	Eleventh day of hearings. Dr. Bonny Ibhawoh is absent during portion of the cross-examination of the 003 Complainant Dr. Milena Head. Dr. Bonny Ibhawoh applies for the role of Associate Dean (Humanities), Graduate Studies and Research, he is one of two applicants.
April 19, 2012	Twelfth day of hearings.
April 20, 2012	Dr. Bonny Ibhawoh is interviewed for the role of Associate Dean, Graduate Studies and Research.
April 22, 2012	Thirteenth day of hearings.
April 23, 2012	Fourteenth day of hearings.
April 24, 2012	Fifteenth day of hearings. Dr. Bonny Ibhawoh is absent during the cross-examination of the Applicant Dr. Devashish Pujari.

April 26, 2012	Sixteenth day of hearings.
April 30, 2012	Seventeenth day of hearings.
May 3, 2012	Selection Committee recommends Dr. Ibhawoh as its choice for position of Associate Dean, Graduate and Research Studies.
May 8, 2012	Eighteenth day of hearings.
May 14, 2012	Senate Committee on Appointments meets and approves Dr. Ibhawoh as its recommendation for the role of Associate Dean, Graduate and Research Studies.
May 23, 2012	Nineteenth day of hearings.
May 30, 2012	Dr. Ibhawoh is informed that he is the Senate Committee on Appointments' only recommended candidate for the role of Associate Dean, Graduate and Research Studies.
June 5, 2012	Twentieth day of hearings.
June 6, 2012	Twenty-first and final day of hearings. The Senate formally approves all of the Senate Committee on Appointments' recommended candidates, including Dr. Ibhawoh.
June 7, 2012	The Board of Governors formally approves all of the Senates' recommended candidates, including Dr. Ibhawoh.
July 4, 2012	Dr. Bonny Ibhawoh is named Associate Dean of Research and Graduate Studies for the Faculty of Humanities for a 5 year term.
May 15, 2013	Tribunal releases the Confidential Decision on liability.
June 10, 2013	Tribunal receives submissions on remedies, including submissions from University requesting sanctions against the Applicants (excluding Dr. Richardson) as 003 Respondents.
September 23, 2013	Tribunal releases the Confidential Remedies Decision and redacted public version of the decisions known as the Public Report.
September 26, 2013	The Applicants (excluding Dr. Richardson) are provided notice by the President that the Tribunal's recommended sanctions are being implemented.
October 28, 2013	University requests disclosure of Decisions to MUFA Executive

	and the Senate Committee on Appointments.
November 6, 2013	Applicants file opposing submissions on University's motion for disclosure of the Decisions.
December 12, 2013	Tribunal releases ruling dismissing University's request to distribute Decisions to entire MUFA Executive and the Senate Committee on Appointments.
December 16, 2013	The 003 Respondents request that the Tribunal permit disclosure of the Decisions to Dr. James Turk of the Canadian Association of University Teachers for purposes of potential judicial review application, and a release of all audio by January 6, 2014. University and 003 Complainants advise of their opposition to the request on December 17 and 18, 2013 respectively.
December 17, 2013	Tribunal directs further submissions from the Applicants be delivered by December 20, 2013.
December 19, 2013	Applicants file submissions responding to University and 003 Complainants' opposition to Dr. Turk being provided with the Decisions.
December 24, 2013	Tribunal issues Direction regarding Dr. Turk disclosure motion setting dates for submissions.
January 3, 2014	Applicants file additional materials with Tribunal for disclosure of Decisions to Dr. Turk.
January 7, 2014	Applicants write to Tribunal counsel requesting date when audio recordings will be provided.
January 10, 2014	Counsel for MUFA submits MUFA's submissions consenting to the Applicant's motion re: disclosure to Dr. Turk.
January 14, 2014	Responding submissions of University and Mr. Bates submitted opposing the Applicants' request re: disclosure to Dr. Turk.
January 20, 2014	Applicants file reply submissions re: disclosure to Dr. Turk.
April 22, 2014	Tribunal issues Order denying Applicants' request re: disclosure to Dr. Turk.
May 8, 2014	The Applicants issue the Notice of Application for Judicial Review.

July 16, 2014	Tribunal files its Record of Proceedings with the Divisional Court.
September 3, 2014	The Applicants notify the Tribunal of missing documents from the Record.
September 12, 2014	Tribunal counsel writes to counsel for the parties advising of the University's request for an extension to complete the review of the Anti-Discrimination Policy, as ordered by the Tribunal to be completed by September 23, 2014.
September 25, 2014	Tribunal serves and files Supplementary Record.
October 7, 2014	Tribunal issues a Direction requiring University's submissions re: extension to review the Policy by October 14, with the Applicants' responding submissions due on October 21.
October 14, 2014	University files submissions re: requested extension to review the Policy.
October 21, 2014	The Applicants file submissions re: the University's requested extension to review the Policy.
November 24, 2014	The Applicants advise the Tribunal about further documents missing from the Record.
November 26, 2014	Tribunal serves and files Second Supplementary Record.
December 4, 2014	Tribunal releases Implementation Order and Reasons finding University in breach of its Order regarding the Policy review. Tribunal declines to sanction University and permits the proposed seven month extension.
January 15, 2015	Tribunal serves Applicants with additional documents from the proceedings below but not presently forming part of the Tribunal's Record filed with the Divisional Court.

APPENDIX “B”

Anti-Discrimination Policy

McMaster University

Policies, Procedures and Guidelines

Complete Policy Title:
Anti-Discrimination Policy

Policy Number (if applicable):

Approved by:
Senate
Board of Governors

Date of Most Recent Approval:
October 10, 2001
October 25, 2001

Date of Original Approval(s):
October 11, 1995
December 14, 1995

Supersedes/Amends Policy dated:
May 13, 1996

Responsible Executive :
University Secretary

Enquiries:
University Secretariat

DISCLAIMER: *If there is a Discrepancy between this electronic policy and the written copy held by the policy owner, the written copy prevails.*

TABLE OF CONTENTS

PREAMBLE

McMaster University is dedicated to the pursuit and dissemination of knowledge. In order to enable its diverse members to pursue these twin objectives, McMaster University seeks to provide an atmosphere free of harassment and discrimination.

This policy supersedes the McMaster University Senate Procedures on Alleged Violations of Human Rights as Defined by the Ontario Human Rights Code (March 25, 1982: final revision March 14, 1990).

This policy does not pertain to sexual harassment, which is covered separately in the McMaster University Policy and Procedures on Sexual Harassment.

Where applicable, this policy should be read in conjunction with McMaster University's Statement on Academic Freedom (see Appendix A).

POLICY

STATEMENT OF PRINCIPLES

1. Discrimination and harassment, as defined in this document, (see clause 11) are prohibited at McMaster University and constitute punishable offenses under this policy. Discrimination and harassment are serious human rights issues.

   Inasmuch as discrimination and harassment are demeaning to human dignity and are unacceptable in a healthy work environment and one in which scholarly pursuit may flourish, McMaster University will not tolerate such behaviour against any member of the University community and will strive to create an environment free from such behaviour on its premises.

2. McMaster University affirms the right of every member of its constituencies to live, study and work in an environment that is free from discrimination and harassment. Discrimination and harassment are incompatible with standards of professional ethics and with behaviour appropriate to an institution of higher learning.

3. McMaster University recognises that as an academic and free community it must uphold its fundamental commitments to academic freedom and to freedom of expression and association. It will maintain an environment in which students and teaching and non-teaching staff can engage in free enquiry and open discussion of all issues. The Anti-Discrimination Officer, like all other officers of the University, is obliged to uphold academic freedom, and freedom of expression and association.

4. An academic and free community must also include freedom of movement and freedom of access to facilities and resources without fear of harassment, discrimination or violence.

5. All persons entrusted with authority by the University have a particular obligation to ensure that there is no misuse of that authority in any action or relationship.

6. The University recognizes its legal and moral responsibility to protect all of its members from discrimination and harassment, and to take action if such behaviour does occur. To these ends it has developed a policy on, and procedures for, dealing with complaints arising out of such behaviour including a range of disciplinary measures up to and including removal. It has also established an educational programme to prevent incidents of discrimination.

7. The University prohibits reprisal or threats of reprisal against any member of the University community who makes use of this policy or participates in proceedings held under its jurisdiction. Any individual or body found to be making such reprisals or threats will be subject to disciplinary action.

8. The intention of this policy and its procedures is to prevent discrimination and harassment from taking place, and where necessary, to act upon complaints of such behaviour promptly, fairly, judiciously and with due regard to confidentiality for all parties concerned.

9. All administrators, Faculty deans, managers, department chairs, directors of schools or programmes and others in supervisory or leadership positions have an obligation to be familiar with and to uphold this policy and its procedures and to inform members of their staff about its existence.

10. Notwithstanding this policy, individuals have the right to seek the advice and services of the Ontario Human Rights Commission.

DEFINITIONS

11. Prohibited grounds of discrimination include all of the following, as defined in the Ontario Human Rights Code, taking account of those exceptions listed in the Ontario Human Rights Code.

- age
- ancestry
- citizenship
- colour
- creed
- ethnic origin
- family status
- handicap
- marital status
- place of origin
- race
- receipt of public assistance
- record of offenses (provincial offenses or pardoned federal offenses)
- sex
- sexual orientation

Prohibited grounds of discrimination also include such other types of discrimination as are prohibited in the Ontario Human Rights Code.

Prohibited grounds of discrimination also include language, accent, or dialect, except as language, accent, or dialect may interfere with legitimate requirements of education or employment.

Prohibited grounds of discrimination also include discrimination because of political belief; membership or non-membership in a political organization; or membership or non-membership in a trade union, or employee or employer organization.

11a. Discrimination means differential treatment of an individual or group of individuals which is based, in whole or in part, on one or more than one of the prohibited grounds of discrimination, and which thus has an adverse impact on the individual or group of individuals.

11b. Harassment means engagement in a course of vexatious comments or conduct that is known or ought reasonably to be known, to be unwelcome. "Vexatious" comment or conduct is comment or

conduct made without reasonable cause or excuse.

11c. The Anti-Discrimination Officer is the individual appointed by the University to carry out the functions of the anti-discrimination officer under this Policy, exclusively or in combination with other University employment responsibilities. Hereafter, the Anti-Discrimination Officer shall be referred to as the Officer."

JURISDICTION

12. For the purpose of this policy, members of the University are defined as all administrative, research, teaching and non-teaching employees of the University as well as students (including interns and residents) of the University.

13. This policy applies to all members of the University community and to any person on University property.

14. This policy affects the terms and conditions of employment of faculty of the University. As such, it is subject to discussion and/or approval in accordance with the University policy entitled, *The Joint Administration/Faculty Association Committee to consider University Financial Matters and to Discuss and Negotiate Matters Related to Terms and Conditions of Employment of Faculty*, revised by the Board of Governors on October 20, 1988 (the 'Joint Administration/Faculty Association' policy).

15. Nothing in this policy is meant to supersede the terms and conditions of any collective agreement, or any other contractual agreement, entered into by the University and its employee groups. In the event that the provisions of this policy contradict any such collective or contractual agreement, the collective or contractual agreement governs.

16. The following individuals or bodies may initiate a complaint:

(a) any member of the University, on his or her own behalf;

(b) the University, on behalf of one of its members;

(c) any duly constituted University association or union, on behalf of one of its members or employees, or any employee of such association or union, on his or her own behalf;

(d) persons seeking to become members of the University in circumstances directly affecting their application to become a member;

(e) former members of the University in circumstances directly affecting their removal or withdrawal from the University;

(f) individuals employed by companies holding contracts with the University while fulfilling the terms of the contract; or

(g) invited visitors.

17. The following individuals or bodies may be the subject of a complaint:
(a) any member(s) or employee(s) of the University; or
(b) others on University property.

18. Complaints may be made about any alleged violation of this policy that takes place on University premises, be they rented or owned, or in the course of any activities conducted by or on behalf of the University on other premises.

19. The University will inform all external agencies who do business on the University campus of the existence of this Policy.

20. Students engaged in University-sanctioned academic activities on premises off-campus (co-op placement, internship, practicum) will have access to the provisions of this policy, if applicable, the policies of the hiring or supervisory agencies, where such policies exist, or the policies of the relevant Human Rights Commission. Students at off-campus placements may seek advice from the McMaster Officer.

ASSURANCE OF FAIR TREATMENT

21. The complainant, the respondent, and any other parties to proceedings under this policy are to be treated fairly.

This may involve the making of special arrangements, two examples of which are described below.

(a) Where the complainant at the time of making a complaint is either a student or instructor of the respondent, the University may, in appropriate circumstances, after the respondent has been informed that a complaint has been made, and after receiving recommendations from the Officer, make arrangements with the appropriate administrator for certain work and examinations of the student to be supervised and evaluated by a disinterested party.

(b) Where the complainant is a staff member whose performance is normally evaluated by the respondent, the complainant is to receive fair employment treatment and protection from adverse employment-related consequences during the procedures of this policy. To that end, the University may, after the respondent has been informed that a complaint has been made, and in consultation with the complainant:

i) have the complainant's performance assessed by another administrator, where practicable;

ii) temporarily reassign the complainant until the complaint is resolved; or

iii) delay the complainant's performance appraisal and/or awarding of merit pay until the complaint is resolved, in which case subsequent payment for merit shall be retroactive to the date it would normally have been received and the University banker's savings rate of interest shall be paid on the amount owed.

These assurances shall also be offered to any witnesses in a case.

22. Should any special arrangement of the type described in clause 21 above be required, the Officer shall, after the respondent has been informed that a complaint has been made, make the request for the special arrangement of the appropriate University administrator, and shall provide the administrator with any details of the complaint necessary to enable the administrator to decide what special arrangements are appropriate. The administrator shall treat in confidence all information provided by the Officer.

PROCEDURES

GENERAL PRINCIPLES FOR PROCEDURES

23. (a) All persons who allege discrimination or harassment under the provisions of this policy must be advised to contact the Officer. This provision will ensure that all such complainants will have access to a common source of consistent and expert advice and that reliable data may be gathered on the incidence of discrimination and harassment in the University community. In the event that a complainant is reluctant to contact the Officer, the complainant may contact a

trained or qualified individual (e.g., employment supervisor, manager, Department Chair or Dean). It will be the responsibility of the individual contacted to report the case to the Officer without identifying either the complainant or the alleged offender and to ask for advice on procedure and policy from the Officer to effect a solution, if a solution is necessary.

In the event that the actual case is not referred to the Officer, the individual responsible for the case shall adhere as closely as possible to the policies and procedures of this document. If a complainant chooses not to consult the Officer but wishes a formal hearing, the complainant shall be directed to file a written request with the Secretary of the Board of Governors.

(b) The Officer is an agent of the University and is responsible for the application of this policy as herein defined. To this end, the Officer will mount educational programmes designed to promote awareness of discrimination and to foster an environment free of discrimination and harassment in the university community, and will carry out complaint resolution. The Officer shall act as an impartial counsellor and advisor to any member of the University community and maintain a fair and unbiased attitude to all complaints, and to all parties to complaints, at all times.

24. (a) Confidentiality shall be enjoined on the Officer, and supervisory personnel working in concert with the Officer. This does not preclude the discreet disclosure of information in order to elicit the facts of the case, or to implement and monitor properly the terms of any resolution.

(b) The Officer and supervisory personnel working in concert with the Officer will be subject to administrative disciplinary action for inappropriate breaches of confidentiality on their part.

25. Should the complainant, with respect to the subject matter of a complaint being dealt with under this policy, initiate a complaint under the Human Rights Code, or should the complainant seek redress other than redress under the criminal law in the courts, proceedings under this policy will be permanently discontinued and any new proceedings under this policy in relation to the incident in question will be barred.

26. The complainant and the respondent may at any stage of any of the procedures outlined in this policy be represented and/or accompanied by another person of her/his choice.

27. Failure to comply with a resolution agreed upon or imposed as a result of the procedures within this policy may result in disciplinary action by the University.

28. If, during the informal stages of complaint resolution, the Officer determines that the complaint is frivolous, vexatious or entirely without factual basis, the Officer will advise the complainant and the respondent (if previously informed of the complaint) of this fact, in writing, and will provide reasons for this conclusion. The Officer will advise the complainant that should a tribunal eventually hear the matter, and come to the same conclusion, the complainant could be subject to disciplinary actions under this policy. At this point, the Officer's involvement in the case shall cease.

29. Teaching, research and non-teaching staff who participate in the procedures outlined in this policy shall be given released time to consult with the Officer and attend formal hearings pertaining to their case. Students will be assisted in adjusting schedules as necessary to attend their formal hearings.

30. Should the Officer believe at any time that the health or safety of members of the McMaster community is at risk, the Officer may notify the Director of Security Services and the appropriate administrative officer of the University. Such a situation, and such a situation only, supersedes the prohibition on informing a third party of a complaint prior to the respondent's being notified and having the opportunity to reply to the complaint.

31. No one shall be compelled to proceed with a complaint.

RECORDS

32. (a) All notes pertaining to advice sought by persons wishing merely to consult with the Officer, or arising from procedures of an Informal Resolution Without A Written Complaint (see clause 41), shall be maintained by the Officer in a confidential file for a period of three years from the date of the complainant's initial contact with the Officer.

(b) All records pertaining to procedures involving an Informal Resolution With A Written Complaint (see clauses 45 and 46), or Formal Resolution (see clauses 47 to 74), shall be maintained in a confidential file for a period of 7 years from the date the Written Complaint was signed by the complainant. Any record of a Written Complaint necessitates notification of the respondent. The respondent must be allowed an opportunity to respond to the complaint and to have that response form part of record.

(c) At the end of the prescribed period for keeping notes/records, the Officer will destroy the notes/records. Non-identifying data will continue to be recorded by the Officer for statistical purposes only.

The notes/records in (a), (b) and (c) above shall be maintained by the Officer. No one other than the Officer shall have access to the records in (a) and (b) above, except as otherwise provided for in this policy.

UNIVERSITY AS COMPLAINANT

33. If the Officer receives repeated allegations of offenses against the same person but each of the persons making allegations is unwilling to file a written complaint and appear as complainant, and if circumstances are considered by the Officer to be such that a complaint should be lodged, the Officer shall inform the appropriate Vice-President, or in the case of conflict of interest, the President.

34. The Officer shall communicate with persons drawn from the pertinent notes/records who might provide evidence of discrimination or harassment to determine their willingness to provide testimony if the University were to proceed as a complainant against the alleged offender. The Officer shall not communicate the contents of the notes to such persons in either written or verbal form.

35. The Officer shall provide to the appropriate Vice-President the names of witnesses who agree to testify, the name of the alleged respondent and copies of any written complaints and responses submitted to the Officer relating to alleged offence(s) by the respondent.

36. The appropriate Vice-President shall communicate with witnesses and the alleged respondent, review all information and decide (as soon as possible but no later than six weeks from the date of receiving the information) whether to initiate formal procedures against the respondent (see clause 47). The Officer shall be informed in writing of the Vice-President's decision. If the Vice-President decides to initiate formal proceedings against the respondent, such proceedings normally should be initiated within one month of making the decision.

CONSULTATION WITH ANTI-DISCRIMINATION OFFICER

37. (a) Persons having reason to believe that they have been subjected to anti-discrimination are strongly encouraged to contact the Sexual Harassment Officer as soon as possible. Through consultation, the Sexual Harassment Officer will assist in determining if the reported events constitute discrimination or harassment under the provisions of this policy, and delineate options for action available to that individual. Persons seeking advice at this stage need not reveal their names or the name(s) of the other person(s) concerned. The Officer will keep confidential records of all consultations (see clause 32).

In cases the Officer deems to be appropriate, the Officer, or a suitably trained alternate appointed by the Officer, may investigate allegations made under this policy in order to:
(i) assist in the resolution of the matter in the informal stages;
(ii) decide whether to make a recommendation that the University proceed as complainant; or
(iii) proceed by way of fact-finding investigation.

b) Where provisions for dealing with discrimination or harassment are contained in a collective agreement, the terms of that collective agreement will be applicable. In the event of conflicting jurisdictions between the complainant and the respondent, the procedure governing the respondent shall be followed. The Officer shall remain available to provide counsel and advice.

c) Where complaints fall outside the jurisdiction of this policy (e.g., co-op placement, internship, practicum), the Officer will direct the complainant to the appropriate resolution process and will remain available as an adviser (see clauses 19 and 20).

d) The University prohibits reprisal or threats of reprisal against any member of the University community who makes use of this policy or participates in proceedings held under its jurisdiction. Any individual or body found to make such reprisals or threats of reprisal will be subject to disciplinary action.

RESOLUTION

38. The objective of discrimination or harassment resolution is to secure a settlement that is consistent with the spirit of this policy and its fundamental principles.

39. Resolution may be pursued through three progressive levels, "Informal Resolution Without a Written Complaint", "Informal Resolution With a Written Complaint" and "Formal Resolution With a Written Complaint". The Officer will normally encourage all complainants to seek resolution through informal means instead of, or prior to, proceeding to the process of formal complaint resolution. This does not preclude a complainant's requesting to bypass informal procedures and move directly to formal resolution (see clause 47).

40. Any complainant who requests Informal Resolution With A Written Complaint or Formal Resolution With a Written Complaint, must be prepared to be identified to the respondent. This policy does not, however, prevent anyone from seeking counselling or advice on a confidential basis from the Officer.

INFORMAL RESOLUTION WITHOUT A WRITTEN COMPLAINT (see also clause 28)

41. (a) The primary objective of most people who seek the assistance of the Officer is to stop the offending behaviour. To this end, it is important to provide for the option of Informal Resolution facilitated by the Officer. Each situation is unique and creativity may be necessary in devising options for Informal Resolution.

(b) No third party will be informed of the identity of the respondent unless and until the respondent is informed of the complaint and given an opportunity to respond, except in cases described in Section 30. The Officer will keep confidential records of all Informal Resolutions (see clause 32[a]).

42. (a) After consulting with the Officer or after attempting Informal Resolution Without A Written Complaint, the complainant may decide:
(i) to take no further action; or
(ii) to proceed with the formulation of a written complaint.

WRITTEN COMPLAINTS

43. (a) A complainant may file a signed, written complaint of breach of this policy. The written complaint should be filed with the Officer or, in the event that the complainant chooses to contact another University officer (see clause 23), with that other officer.

(b) A written complaint shall be submitted promptly, but no later than 12 months from the last date of the alleged harassment. An extension of up to 3 months may be granted by the Officer, or other University officer where appropriate, upon written request. Any further extension may be granted at the discretion of the Officer or other University official only after hearing submissions from both the person seeking an extension in order to make a complaint, and from the potential respondent.

(c) The written complaint shall include the dates of the alleged incident(s), the names of the people involved in the incident(s) and a full description of the incident(s).

(d) The respondent shall be provided with a copy of the complaint, disclosure of all material facts relevant to the complaint, and an opportunity to respond orally or in writing to the written complaint. The respondent is to be provided with ongoing disclosure of the particulars of the complaint as they become known.

(e) No information regarding the complaint will be given to any party unless the respondent has been notified of the complaint, as required by sub-section (d) above.

44. Upon receipt of a written complaint, the Officer, or other University 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" procedure.

INFORMAL RESOLUTION WITH A WRITTEN COMPLAINT

45. (a) If the complainant elects to proceed by way of Informal Resolution With a Written Complaint, the Officer shall discuss the written complaint and any response with the complainant and with the respondent with a view to reaching a resolution acceptable to all parties.

(b) It is expected that Informal Procedures shall be conducted at a reasonable pace, but shall not normally extend past 60 days from submission of the written complaint.

(c) Once the procedure of Informal Resolution With A Written Complaint is initiated by the complainant, and once the respondent has been notified of the complaint and has been given a chance to respond to it, the Officer, after consultation with the complainant, may contact persons with authority over the respondent, or with jurisdiction over the place or context in which the alleged harassment occurred, if alternative arrangements as provided for in section 21 are required, or to elicit the facts of the case.

(d) If a resolution is achieved through Informal Procedures, a Resolution Report prepared by the Officer shall be signed by the complainant and the respondent. Should the resolution include an action or remedy by the University, that aspect of the resolution report must also be agreed to, signed and with respect to that aspect enforced by the member of the University Administration with the authority for ensuring that the remedy is imposed or enforced. All parties shall receive a copy of the report and a copy shall be retained in the Officer's confidential files (see clause 32 [b]).

46. (a) Should the Officer determine that the possibility of reaching a resolution through Informal Procedures has been exhausted, both the complainant and the respondent shall be informed in writing within 5 working days of that determination.

(b) Following notification that Informal Procedures have been exhausted, the complainant shall then be advised to:
i) request, in writing, a formal hearing; or
ii) withdraw, in writing, the complaint.

(c) Should the complainant withdraw the complaint, the report noted in clause 46(a) will remain in the Officer's confidential files for a period of 7 years (see clause 32[b]). Both the complainant and the respondent will be notified that the records will remain in the Officer's files for seven years. Should the complainant request a formal hearing, this request will be forwarded to the Secretary of the Board of Governors. Attached to the request will be a copy of the original written complaint and any written response from the respondent.

(d) If the complainant has neither written to the Officer to initiate a formal hearing nor written to withdraw the complaint within 30 working days of being notified in writing that informal resolution has failed, the complaint shall lapse.

FORMAL RESOLUTION WITH A WRITTEN COMPLAINT

General Considerations

47. (a) If a complainant requests a formal hearing, the complainant and any witnesses must be prepared to be identified to the respondent.

(b) If a complaint has reached the stage of a formal hearing, the respondent is entitled to a specific disposition of the issue; or, where the complaint is withdrawn once a formal hearing has begun but before it has concluded, to a dismissal of the complaint.

(c) Where a complainant alleges that an incident raises a breach under both the Sexual Harassment and the Anti-Discrimination Policies, the complaint will be dealt with in a single hearing by the same tribunal appointed under both policies.

Hearing Panel

48. Formal hearings will be conducted before a tribunal selected from the membership of a Hearing Panel. The Hearing Panel shall be the same Panel, with the same members, as that constituted under the McMaster University Policy and Procedures on Sexual Harassment. The Hearing Panel will consist of 6 non-teaching staff members appointed by the Board of Governors and 6 members of the teaching staff, 3 undergraduate students and 3 graduate students appointed by the Senate. The Chair shall be appointed by the Senate from among the members appointed by the Senate and the Vice-Chair shall be appointed by the Board of Governors from among the members appointed by the Board of Governors. Staff serving on the Hearing Panel will be given released time to do so.

49. Members will be appointed to the Hearing Panel for staggered terms to provide for continuity of experience. Student members shall serve two-year terms and teaching and non-teaching staff members shall serve three-year terms. Shorter terms may be required occasionally to provide for staggering and to fill vacancies. No member shall serve for more than two consecutive

terms. Former members will be eligible for reappointment after a lapse of two years.

50. Members of the Hearing Panel will receive generic training by the Anti-Discrimination Officer in the particular sensitivities which surround discrimination and harassment issues, in procedures which effect fair resolutions and in penalties and sanctions which are appropriate to the various breaches of policy and which act as deterrents to further breaches of policy, together with the principles of academic freedom as outlined in Appendix A. This training will not deal with specific cases currently before any tribunal established under this policy and is in no way meant to fetter the independence of any tribunal member to decide any case on the basis of the evidence presented in that case and according to his or her conscience.

51. The Chair or, alternatively, the Vice-Chair, in addition to conducting the business of the Hearing Panel, may chair the tribunals hearing formal complaints, or the Chair may designate Chairs of tribunals from among the membership of the Hearing Panel.

Selection of Tribunal

52. Upon receipt of the request for a formal hearing, the Secretary of the Board of Governors shall forward to the Chair of the Hearing Panel the written request for a formal hearing, together with the identity of the complainant and the respondent.

53. A tribunal will consist of the Chair or Vice-Chair of the Hearing Panel (or designate), as described above in clause 51, who will chair the tribunal, and two members of the Hearing Panel, selected in accordance with the process described below in clause 54.

54. Mindful of the constituencies represented by the parties in a case, the Chair of the Hearing Panel will select a slate of six names of Hearing Panel members, including the Chair or Vice-Chair if either or both has agreed to serve on the tribunal, to be presented to the complainant and the respondent within 15 working days of receipt by the Secretary of the Board of Governors of a request for a formal hearing. The complainant and respondent may object in writing with reasons (i.e., bias, conflict of interest, or other valid reason) to any of the names on the slate within 10 working days of receipt of the slate. After ruling on any objections presented by the complainant and/or respondent, the Chair will select three members from the names remaining on the slate. In the event that fewer than three names remain on the slate after this process, a subsidiary slate of members' names may be presented to the complainant and respondent. If there are any objections whatsoever to the Chair's presence on the slate, the Chair will remove herself or himself from the procedure.

55. The Chair will inform the Secretary of the Board of Governors of the membership of the tribunal. The Secretary of the Board of Governors shall then proceed to arrange for the formal hearing(s) in accordance with the procedures set out below.

Procedural Rules for Formal Hearings

56. The *Statutory Powers Procedure Act*, R.S.O. 1990, c. s 22, as amended by S.O. 1993, c.27, sched.; S.O. 1994, c.27s.56; S.O. 1997, c.23, s 13, and any subsequent amendments , establishes minimum rules by which certain tribunals must proceed, to ensure that the rules of natural justice have been observed. These rules are divided into two separate parts: (1) the duty to give persons affected by the decision a reasonable opportunity for presenting their case, and (2) the duty to listen fairly to both sides and to reach a decision untainted by bias.

57. Tribunals conducting Hearings under this policy shall follow the procedures set out in the *Statutory Powers Procedure Act*, or successor legislation. In addition, all hearings before

tribunals convened under this policy shall follow the procedures detailed below. In the event of a conflict between the Statutory Powers Procedures Act and the procedures detailed below, the procedures detailed below govern in the absence of any judicial determination to the contrary. Where any procedural matter is not dealt with in the *Statutory Powers Procedure Act*, or below, the Tribunal will, after hearing submissions from the parties, and guided by the principles of fairness, establish any appropriate procedure.

58. Members of the tribunal must not hear evidence or receive representations regarding the substance of the case other than through the procedures described in this document.

Parties to the Hearing

59. The signator(s) to the written complaint (the complainant[s]) and the person(s) alleged in the written complaint to have breached this policy (the respondent[s]) shall be parties to the Hearing.

Scheduling

60. An attempt shall be made to schedule the Hearing(s) at a time and place convenient for the tribunal and for the parties to the Hearing. However, any party whose reasons for absence are not considered valid by the Chair of the tribunal or whose absence may cause unreasonable delay, shall be notified that the tribunal will proceed in that party's absence.

Notice

61. The Hearing(s) shall be commenced as soon as possible following the appointment of the tribunal. Each party to the Hearing shall be sent a Notice of Hearing stipulating the time and place of the Hearing, and the parties to the Hearing, and identifying the subject matter of the Hearing.

62. Prior to the Hearing, members of the tribunal shall be provided with:
    (a) the complainant's request for a formal hearing,
    (b) the complainant's original written complaint, and
    (c) the respondent's written response to the original complaint, if any.

Record

63. The Secretary of the Board of Governors will prepare a Hearing Record consisting of documents which the parties wish to submit and on which they intend to rely at the Hearing. Excluded from the record are any `without prejudice' communications made with a view to informally resolving the complaint as well as the report of the Officer, or other University official, on the events which transpired to resolve the complaint informally (see clause 46 [a]). Prior to making the record available to members of the tribunal, the parties to the hearing are to have an opportunity to review the content of the record and may bring a preliminary motion to the tribunal seeking exclusion of part or all of the record on grounds of relevance or other appropriate grounds. The record is to be made available to tribunal members for the purpose of expediting the hearing. The documents contained in the record are not admissible as evidence at the hearing except on consent of all the parties to the hearing or upon being proven as

evidence through witnesses at the hearing.

Duties of the Tribunal Chair

64. The Chair's duties include, but are not limited to:
    (a) maintaining order during hearings;
    (b) answering procedural questions;
    (c) granting or denying adjournments;
    (d) arranging for a permanent audiotape-recording of the proceedings, which shall constitute the official record of those proceedings; and
    (e) reporting decisions of the tribunal to the President.

    The above duties shall be undertaken in consultation with the tribunal members, if appropriate.

Counsel

65. (a) Both the complainant and the respondent have the right to be accompanied by an adviser or to be represented by counsel.

    (b) All parties will bear their own costs related to the proceedings. The tribunal will not order or recommend the payment of costs, including any legal costs, of the proceedings to any party.

Closed Hearings

66. Hearings shall be held *in camera* unless either the complainant or the respondent requests that the hearing, or some part of the hearing, should be held in public. In the event of such an objection, the tribunal shall hear representations from all parties. In making its ruling, the tribunal shall consider whether matters of an intimate financial or personal nature are to be raised, whether there is an issue of public safety involved, the desirability of holding an open hearing and other relevant circumstances.

Order of Proceedings

67. The Order of Proceedings will be as set out below.

    (a) The Chair's opening statement which shall identify the parties, introduce members of the tribunal and other participants in the Hearing, identify the nature of the case, confirm that all parties have had an opportunity to see the record and list any evidence which the parties have agreed can be admitted on consent.

    (b) The complainant's opening statement, which shall contain a brief description of her/his case, including what she/he believes is the offence.

    (c) The complainant's witnesses, each to be examined as follows:
    - examination-in-chief by the complainant,
    - cross-examination by the respondent,
    - questions from the Tribunal for the purpose of clarification and dealing with omissions,
    - re-examination by the complainant, limited to points of clarification and to new issues arising out of the cross-examination by the respondent and questions from the Tribunal, which issues could not reasonably have been anticipated during the examination-in-chief.

    (d) The respondent's opening statement, which shall contain a brief reply to the complainant's case, outlining the main points of her/his defense.

    (e) The respondent's witnesses, each to be examined as above (sub-section c) beginning

with examination-in-chief by the respondent, and so on.

(f) Complainant's reply witnesses, limited to matters which could not reasonably have been considered pertinent at the time that the complainant put in her/his case. The complainant will not be allowed to split her/his case. Witnesses called in reply will be examined as above, beginning with the examination-in-chief by the complainant, etc.

(g) Closing arguments to be made first by the respondent and then by the complainant. Closing arguments should address both the substance of the complaint and the appropriate penalty in the event that the complaint is found to be valid by the tribunal.

Witnesses

68. The following rules govern witnesses:

(a) Only parties to the hearing have the right to call witnesses at the hearing.

(b) The tribunal has discretion to limit testimony and questioning of witnesses to those matters it considers relevant to the disposition of the case.

(c) Parties are responsible for producing their own witnesses and for paying the costs associated with their appearance before the tribunal.

(d) The Chair of the tribunal has the power to compel a witness to attend, and parties may request the Chair's aid in this regard.

(e) The Chair, on his or her own initiative may, or at the request of either party to the hearing shall, issue an Order Excluding Witnesses from the hearing room except during the time their testimony is required. Once such an order has been issued, witnesses are not to confer amongst themselves or with other witnesses who have already testified.

Evidence

69. The following evidentiary rules apply.

(a) Parties to the hearing have the right to present evidence in support of their case to the tribunal and to see any written evidence presented to the tribunal.

(b) The tribunal has the power to require production of written or documentary evidence by the parties or by other sources.

(c) A person appearing before the tribunal may be required to give evidence under affirmation or oath.

(d) The Anti-Discrimination Officer may testify as a witness, if called by one of the parties, but shall not disclose information provided to her or him in confidence by the parties or during 'without prejudice' negotiations, except on consent of the relevant party or parties.

(e) Complainant(s) may be questioned on behaviour related to the incident(s) in question. Apart from this, no complainant is to be questioned on previous behaviour or character for purposes other than those of establishing credibility as a witness.

Deliberations by the Tribunal

70. (a) Following the formal hearing, the tribunal shall deliberate in closed session.

The tribunal will decide, either unanimously or by a majority of the members, the merits of the complaint on the basis of evidence and arguments presented at the hearing. In order to be upheld by the tribunal, complaints under this policy must be proven on the balance of probabilities by clear and cogent evidence. Where the complaint is found to be valid, the tribunal will recommend an appropriate penalty, either unanimously or by a majority.

In the event that the tribunal cannot reach a majority decision with respect to the recommended penalty, the two members of the tribunal who do not occupy the position of Chair shall each submit in writing to the Chair the penalty he or she believes is appropriate. The Chair shall select one of these two proposals as the tribunal decision.

(b) The tribunal shall prepare and submit to the President of the University a written report which shall include the tribunal's decision and the reasons for the decision, together with any recommendation for penalty. If there is a minority report, it shall also be submitted to the President.

(c) Copies of the tribunal's report to the President shall be sent in confidence to the complainant, the respondent and the Officer. Similarly, the President will inform all parties, in writing, of the final decision in the case and course of action to be taken, if any.

(d) The President shall ensure that any penalties recommended are enforced by the authority responsible for implementing or imposing the penalty. If the recommended penalty is suspension or removal, the President shall initiate the appropriate procedure.

(e) If the tribunal decides by a preponderance of reliable evidence that a complaint has been fraudulent, malicious, frivolous or vexatious, or is entirely without factual basis, the Tribunal hearing the original complaint will find that the complainant, as a result of the complaint, is in breach of this policy and will recommend to the President such sanction or remedy against the complainant as it feels is appropriate. Prior to finding that a complaint has been fraudulent, malicious, frivolous or vexatious or is entirely without factual basis, the Tribunal will advise the parties that it is considering making such a ruling and specifically invite submissions on this point.

(f) Decisions of the Tribunal are binding and cannot be appealed within the University.

(g) The Tribunal will prepare a summary of the report for the public. The summary will include an outline of the case and the tribunal's findings and decision, but will be sufficiently general that the parties to the hearing cannot be identified.

(h) The tribunal shall make any other recommendations or comments, as appropriate, to the President, in a document separate from the report containing the Tribunal's decision and recommended penalty.

(i) All records pertaining to tribunal procedures, decisions and recommendations shall be retained by the Secretary of the Board of Governors.

Sanctions and Remedies

71. The following penalties, singly or in combination, may be imposed upon any respondent who is a member of the teaching, research or non-teaching staff in any case where discrimination or harassment is found to have occurred:

    (a) oral or written reprimand;

    (b) inclusion of the decision in a specified personnel file(s) of the respondent, for a specified period of time, not longer than 7 years;

    (c) exclusion of the respondent from a designated portion(s) of the University's buildings or grounds, or from one or more designated University activities, where such penalty is appropriate to the offence and where the penalty does not prevent the respondent from carrying out her/his professional duties;

    (d) imposition of conditions, with or without a deposit not exceeding $200, returnable at a specific date, such deposit to be forfeited should any conditions be violated;

    (e) the imposition of a fine;

    (f) recommendation for suspension of the respondent without pay;

    (g) recommendation that removal proceedings be commenced; and/or

    (h) other, as deemed appropriate.

72. The following penalties, singly or in combination, may be imposed upon a **student** respondent in any case where discrimination or harassment is found to have occurred:

    (a) oral or written reprimand;

    (b) inclusion of the decision in a specified student file(s) of the respondent, for a specified period of time, not longer than 7 years;

    (c) exclusion of the respondent from a designated portion(s) of the University's buildings or grounds, or from one or more designated University activities, where such penalty is appropriate to the offence and where the penalty does not prevent the respondent from pursuing her/his studies;

    (d) imposition of conditions, with or without a deposit not exceeding $200, returnable at a specific date, such deposit to be forfeited should any conditions be violated;

    (e) prohibition of the respondent from attendance in a course(s), a programme, or a teaching division or unit, for a period of not more than 1 year; and/or

    (f) other, as deemed appropriate.

73. The tribunal of the Hearing Panel must recommend any appropriate sanction or remedies it deems necessary to guarantee that the behaviour is not repeated. The tribunal may also make a recommendation to the President that the complainant be accommodated for injury or damage to or loss of property, subject to clause 65.

74. Suspension or removal may only be recommended, and such recommendations shall be dealt with in accordance with the established policies and procedures and by the terms or existing contracts of employment or collective agreements.

REVIEW

75. This policy may be reviewed from time to time, as required, in conjunction with the Sexual Harassment Policy.

APPENDIX A

McMaster University

Policies, Procedures and Guidelines

Complete Policy Title: **Statement on Academic Freedom**	Policy Number (if applicable): **SPS E1**
Approved by: **Senate** **Board of Governors**	Date of Most Recent Approval: **December 14, 2011** **December 15, 2011**
Date of Original Approval(s):	Supersedes/Amends Policy dated: **December 14, 1994 (SPS 25)**
Responsible Executive: **University Secretariat**	Enquiries: University Secretariat

DISCLAIMER: *If there is a Discrepancy between this electronic policy and the written copy held by the policy owner, the written copy prevails*

McMaster University is dedicated to the pursuit and dissemination of knowledge. The University's faculty members[1] enjoy certain rights and privileges essential to these twin objectives. Central among these rights and privileges is the academic freedom, within the terms of their appointment, to pursue multiple avenues of inquiry; to teach and to learn unhindered by non-academic constraints; and to engage in full and unrestricted consideration of any opinion. This freedom extends not only to members of the University faculty, but to all who are invited by faculty to participate in its academic fora. All faculty members of the University must recognize this fundamental principle and must share responsibility for supporting, safeguarding and preserving this central freedom. Behaviour that obstructs free and full academic and scholarly pursuit, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent, vitally threatens the integrity of the University, and cannot be tolerated.

Suppression of academic freedom would prevent the University from carrying out its primary functions. In particular, as an autonomous institution McMaster University will protect its faculty from any efforts, from whatever source, to limit or suppress academic freedom.

Academic freedom carries with it the duty to use that freedom in a responsible and professional manner consistent with the pursuit and dissemination of knowledge.

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[1] University faculty members are defined as those current or retired academic staff who are/were covered by the terms and conditions of the McMaster University Revised Policy And Regulations With Respect To Academic Appointment, Tenure And Promotion

APPENDIX "C"

Individual Remedies & Sanctions Ordered by the Tribunal
Remedy Decision Dated September 23, 2013

Sanction Levied Against Dr. Bart

1. Dr. Bart received a 3 year suspension from McMaster, without pay.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Sanction Levied Against Dr. Pujari

1. Dr. Pujari received a one year academic suspension from McMaster, without pay.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Sanction Levied Against Dr. Rose

1. Dr. Rose was given a formal reprimand and that the Tribunal's decision remains in his file for a period of 5 years.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Sanction Levied Against Dr. Ray

1. Dr. Ray received a one academic term suspension from McMaster, without pay.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Sanction Levied Against Dr. Steiner

1. Dr. Steiner received a 3 year suspension from McMaster, without pay. The suspension took effect Dr. Steiner at the end of March, 2014 when Dr. Steiner exhausted his sick leave and retired.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Sanction Levied Against Dr. Taylor

1. Dr. Taylor received a 3 year suspension from McMaster, without pay.
2. Mandatory sensitivity training.
3. The removal from all positions of authority within McMaster.
4. A prohibition from holding any position of authority for 5 years after the suspension.

Dr. CHRIS 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

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