Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

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

Applicants

-and-

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

Respondents

AFFIDAVIT OF DONALD CARTER
(sworn August 18, 2014)

I, **DONALD CARTER**, of the City of Kingston, in the Province of Ontario MAKE OATH AND SAY:

Professional Background

1) I am Professor Emeritus at the Queen's University Faculty of Law and currently teach the Faculty's course on labour arbitration and mediation. My area of expertise is labour law.

2) I have mediated and arbitrated collective agreement disputes since 1972, and have done so on a full-time basis since 2002. I am currently an editor of Labour Arbitration Xpress Case Summaries, an electronic digest of labour arbitration awards of precedential value available on Quicklaw. I

have written extensively on labour law and labour relations in Canada during my career of 34 years as a full-time academic.

3) I have served as Chair of the Ontario Labour Relations Board (1976-79), as Director of the Queen's University Industrial Relations Centre/School of Industrial Relations (1985-90), as President of the Canadian Industrial Relations Association (1991-92), as Dean of the Queen's University Faculty of Law (1993-98), and as Chair of Ontario's Public Service Grievance Board (2002-13).

4) In 2013, I received the Bora Laksin award for distinguished contributions to Canadian labour law. A copy of my most recent curriculum vitae is attached as Exhibit "A".

Instructions Provided, Nature of Opinion Being Sought, and Relationship to Issues in Proceeding

5) I have been asked to give my professional opinion on the following question: In your experience as an arbitrator, what range of remedies would you reasonably expect an arbitrator to make based on the finding of facts made by the Board Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy (the Tribunal).

Expert's Opinion

6) I have reviewed and considered the decision and full reasons of the Tribunal and the Tribunal's Remedy Decision. My professional opinion, based on my knowledge of arbitration jurisprudence formed over the last

45 years, is that Canadian labour arbitrators would conclude that the sanctions recommended by the Tribunal in respect Dr. Pujari, Dr. Bart, Dr. Taylor, Dr. Steiner, Dr. Ray, and Dr. Rose are all excessively harsh and would not meet the standard of just cause applied when arbitrating discharge and discipline cases arising under a collective agreement.

Reasons for Opinion

7) A labour arbitrator's jurisdiction to deal with these issues would arise under a just cause provision set out in the collective agreement between the employer and the union representing the bargaining unit of employees. Just cause provisions are now a standard feature of Canadian collective agreements.

8) The approach that arbitrators take in interpreting such provisions has been best articulated by the British Columbia Labour Relations Board in the *William Scott* case [1977] 1 Can. LRBR 1, an authority that is now universally followed by Canadian arbitrators. In that case, the British Columbia Board made the following observation on the effect of such provisions on the employment relationship:

> In this, the first Section 108 application in which the Board has analyzed this legislative language, we wish to emphasize the significance of the legal change from discharge as a pure matter of contract law, under the individual contract of employment, to discharge as the subject of legislative policy governing the collective agreement between employer and trade-union. Without reviewing the common law of master and servant in any detail, suffice it to say that the contract of employment allowed the employer to dismiss an employee without notice for cause (some relatively serious forms of misconduct which, in the eyes of the law, made the continuance of the employment relationship undesirable). But that particular doctrine of the common law can be appreciated only in light of two other features of the master-servant relationship. First of all, even in the absence of cause on the

part of the employee, the employer could unilaterally dismiss an employee with reasonable notice, or with pay in lieu of notice. This meant that employees had no legal expectation of continuity of employment even if their performance was satisfactory and work was available. Secondly, if an employee was guilty of some misconduct at work, the employer had no other form of discipline available. The contract of employment did not entitle the employer to suspend the employee, for example. The presence of these two subsidiary doctrines naturally coloured the common law analysis of what constituted "cause" for discharge, in two respects: first, the law concentrated on the immediate incident which triggered the discharge, rather than the situation of the individual employee; secondly, gradually the law took the view that certain serious forms of misconduct automatically justified discharge (e.g. insubordination, dishonesty, or disloyalty) on the grounds that these amounted to a fundamental breach of the contract of employment.

The nature of the legal right to discharge an employee has taken on a very different hue in the world of collective bargaining. A classic depiction of that new reality is contained in the award of the arbitrator in the crucial case of Port Arthur Shipbuilding:

> Without exploring the common law rules of the master-servant relationship, it must be said that this board of arbitration is charged only with the administration of the collective agreement, and was not intended to provide a forum for the enforcement of common law rights. A basic difficulty in this argument advanced by the company was its failure to allege, let alone prove, the existence of a common law contract of employment. Indeed, today the ordinary employee almost inevitably enjoys only an at-will relationship with his employer, which at common law could be terminated for any reason virtually without notice. However, the collective agreement does create an entirely new dimension in the employment relationship: it is the immunity of an employee from discharge except for just cause, rather than the former common law rule of virtually unlimited exposure to termination. Whatever may have been the early views of labour arbitrators, it is common knowledge that over the years a distinctive body of arbitral jurisprudence has developed to give meaning to the concept of 'just cause for discharge' in the context of modern industrial employment. Although the common law may provide guidance, useful analogies, even general principles, the umbilical cord has been severed and the new doctrines of labour arbitrators have begun to lead a life of their own. Thus we turn to the question of whether or not just cause for discharge existed, and to

> the company's alternate submissions to this effect. (1967) 17 LAC 109 at 112.

No doubt this legal shift is ultimately attributable to such socioeconomic factors as the transformation of the personal relationship of "master and servant" in a small firm into the impersonal administration of a large industrial establishment by a personnel department. But within the collective agreement itself, there were specific, contractual features which required from arbitrators a different conception of discharge.

First of all, under the standard seniority clause an employer no longer retains the unilateral right to terminate a person's employment simply with notice or pay in lieu of notice. Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions (e.g. absence without leave for five days; layoff without recall for one year, and so on). As a result, an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits: seniority claim to jobs in case of layoff or promotion; service-based entitlement to extended vacation or sick leave; accumulated credits in a pension plan funded by the employer. The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law. At the same time, the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser sanctions are available: verbal or written warnings, brief or lengthy suspensions, even demotion on occasion (see Cominco Ltd. (1974) 6 LAC (2d) 225). Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off from all of the benefits associated with the job and stemming from the collective agreement.

Recognizing the cumulative impact of these contractual developments flowing from the modern industrial environment, Canadian labour arbitrators did gradually evolve quite a different analysis of discharge grievances. The essence of that approach was nicely conveyed by Mr. Justice Laskin, speaking for the Ontario Court of Appeal in upholding the arbitrator in Port Arthur Shipbuilding:

> The collective agreement leaves the extent of discipline

> (be it as light as a warning or as heavy as discharge) at large under the formula of "proper cause". By this I mean that there are no fixed consequences for specified types of misconduct. This is so even in respect of a violation of such a specific prohibition as is involved in article 11.03. The reason is simple; experience has shown that there must be a pragmatic and not a cut and dried, Medes and Persians approach to discipline. Employers and unions are, in my opinion, wise to leave room in collective agreement administration (which includes arbitration) for consideration of the worker as an individual, and not as simply part of an indistinguishable mass. The formulae of 'just cause' or 'proper cause' or 'reasonable cause' or 'just and proper cause' which are found in collective agreements join to the pragmatic case by case approach a sensible individualization in the assessment of punishment for misconduct. Whether the qualifying word be proper' or 'just', it expresses the duty to act according to the circumstances of the case in which an issue of discipline, reaching perhaps to discharge, arises. (1967) 67 CLLC 14,024 (at p.116)

In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action' (at p.117). The following is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.

9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider. Steel Equipment Co. Ltd. (1964) 14 LAC 356, at pp.40-41.

Unfortunately, this indigenous arbitral solution was abruptly aborted by the Supreme Court of Canada, when it reversed the Ontario Court of Appeal and the arbitrator in Port Arthur Shipbuilding:

> The task of the Board of Arbitration in this case was to determine whether there was proper cause. The findings of fact actually made and the only findings of fact that the Board could possible make establish that there was proper cause. Then there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The Board, however, did not limit its task in this way. It assumed the function of management. In this case it determined, not whether there had been proper cause, but whether company, having proper cause, should have exercised the power of dismissal. The Board substituted its judgment for the judgment of management and found in favour of suspension.
>
> The sole issue in this case was whether the three employees left their jobs to work for someone else and whether this fact was a proper cause for discipline. Once the Board had found that there were facts justifying discipline. the particular form chosen was not subject to review on arbitration.
> (1968) 68 CLLC 14,136 at 587 .

On its face, that passage seemed to suggest that if an arbitrator found some employee misconduct, no matter how trivial, then management had a totally unreviewable discretion to select any form of discipline, no matter how heavy, up to and including the dismissal of a long-service employee. Although some

arbitrators attempted to mitigate the impact of such a draconian doctrine (e.g. S.K.D. Manufacturing (1969) 20 LAC 231), Canadian legislatures uniformly considered it necessary to overturn Port Arthur Shipbuilding by statutory reform. Section 98 (d) of the Labour Code, the provision under analysis in this case, is the vehicle through which the B.C. Legislature has sought to place on a contemporary, industrial relations footing the law of discharge under a collective agreement.

We have reviewed this historical background to Section 98 (d) to emphasize strongly its central thrust. The B.C. Legislature, in common with all other Canadian legislatures, wished to eradicate once and for all the residual traces of the common law of master and servant which had surfaced in Port Arthur Shipbuilding and which would prevent an arbitrator coming to grips with the "real substance" and "respective merits" of a discharge grievance (Section 92 (3)) and thus impair the ability of arbitration to provide a satisfactory resolution of such disputes "without resort to stoppages of work" (section 92 (2)). For that reason, it is not legally correct for an arbitrator in a discharge case to assume that the common law definition of "cause" remains unchanged under the Code, subject only to the possibility that an arbitrator might exercise an ill-defined discretion to rescue an employee from the "normal" legal consequences of discharge and substitute a lesser penalty on "equitable" grounds. An arbitrator who approaches a discharge grievance with that reluctant set of mind simply is not proceeding in accordance with the principles of the Labour Code.

Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employer's authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline. (See for example Douglas Aircraft (1973) 2 L.A.C.(2d) 56.) However, usually it is in connection with the second question -- is the misconduct of the employee serious enough to justify the heavy penalty of discharge? -- that the arbitrator's evaluation of management's decision must be especially searching:

(i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?

(ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
(iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
(iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. (That attitude may be seen in such recent cases as Phillips Cables (1974) 6 L.A.C. (2d) 35 (falsification of payment records); Toronto East General Hospital (1975) 9 L.A.C. (2d) 311 (theft); Galco Food Products (1974) 7 L.A.C. (2d) 350 (assault on a supervisor).) Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free simply because the employer overreacted in the first instance. It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement (e.g. see Phillips Cables, cited above, in which the arbitration board decided to remove the accumulated seniority of the employee)."

These considerations are discussed further in Canadian Labour Arbitration (4th ed.), Brown & Beatty, Canada Law Book, at para 7:440:

"An assessment by an arbitrator of the fairness of a disciplinary penalty will of course depend on the facts of the case. Consideration is invariably given to the nature of the misconduct, the personal circumstances of the employee, the way in which the employer has managed the situation, or a combination of all

three. The employment context and the employee's occupational and professional status often play important roles as well.

In an effort to give employers and employees a better sense of the analytic framework they employ, arbitrators have provided checklists of the most important factors that typically organize their deliberations. In an early and often-quoted award, one arbitrator summarized in the following terms those factors that, other things being equal, can offset the gravity of the misconduct: It has been held, however, that where an arbitration board has the power to mitigate the penalty imposed on a grievor, the board should take into consideration in arriving at its decision the following factors:

1. The previous good record of the grievor -- *Re United Steelworkers of America, Local 5297, and Frontenac Floor & Wall Tile Ltd.* (1957), 8 L.A.C. 105 [Little].
2. The long service of the grievor -- *Re U.A.W., Local 28, and C.C.M. Co.* (1954), 5 L.A.C. 1883 [Anderson].
3. Whether or not the offence was an isolated incident in the employment history of the grievor -- *Re Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America and Sandwich, Windsor & Amherstburg Railway Co.* (1951), 2 L.A.C. 684 [Hanrahan].
4. Provocation -- *Re United Brotherhood of Carpenters, Local 2537, and KVP Co. Ltd.* (1962), 12 L.A.C. 386 [Cross].
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated -- *Re U.A.W., Local 112, and DeHavilland Aircraft of Canada Ltd.* , being an award of Professor Bora Laskin dated March 13, 1959 (unreported).
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances -- *Re U.A.W., Local 127, and Ontario Steel Products Ltd.* (1962), 13 L.A.C. 197 [Beardall].
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination -- *Re Retail, Wholesale & Department Store Union, Local 414, and Dominion Stores Ltd.* (1961), 12 L.A.C. 164 [Reville].
8. Circumstances negativing intent, *e.g.* , likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it -- *Re United Electrical Workers, Local 524, and Canadian General Electric Co.* (1957), 8 L.A.C. 132 [Fuller].
9. The seriousness of the offence in terms of company policy and company obligations -- *Re Mine, Mill and Smelter Workers, Local 598, and Falconbridge Nickel Mines Ltd.* (1956), 7 L.A.C. 130 [Little].
10. Any other circumstances which the board should properly take into consideration, *e.g.* , (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so -- *Re U.A.W., Local 456, and Mueller Ltd.* (1958), 8 L.A.C. 144 [Fuller]; (b) where a grievor was discharged for improper driving of company equipment and the company, for

the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance -- *Re Int'l Brotherhood of Teamsters and Riverside Construction Co.* (1961), 12 L.A.C. 145 [Hanrahan]; (c) failure of the company to permit the grievor to explain or deny the alleged offence -- *Re Int'l Brotherhood of Teamsters, Local 979, and Leamington Transport (Western) Ltd.* (1961), 12 L.A.C. 147 [Hanrahan]. "

9) Canadian arbitrators universally follow the approach set out in the above citations. They deal first with the issue of whether there is cause for any discipline. This first step requires an analysis of the particular facts of each case to determine if the employer has a good employment related reason for imposing sanctions on an employee. In many cases, the employer justification is rooted in an employment code of conduct that can be either written or unwritten. Matters such as theft, dishonesty, participation in illegal strikes, assault in the workplace, sexual harassment and insubordination are usually regarded as the more serious offences. However, cause can also include non-culpable grounds such as inadequate work performance or innocent but excessive absenteeism.

10) Once cause is established, the second step in the just cause analysis universally employed by Canadian arbitrators is to determine whether the disciplinary sanction chosen by the employer was excessive. If this is the case, the arbitrator will then determine what penalty would be just and equitable in the circumstances. It is at that point that an arbitrator would apply the considerations that have been well articulated in the extensive arbitral jurisprudence dealing with this issue. Considerations would include: the previous good record of the grievor; the long service of the

grievor; whether or not the offence was an isolated incident in the employment history of the grievor; provocation; whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated; whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances; evidence that the employer rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination; circumstances negativing intent (such as the likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it); the seriousness of the offence in terms of employer policy and employer obligations; and any other circumstances which an arbitrator should properly take into consideration. Such considerations could include whether a sanction was a measured and proportionate managerial response; whether there had been equality of treatment in the sense that other employees have been treated less harshly for the same employment offence; the desirability of a corrective approach rather than a punitive approach; and the rehabilitative potential of an employee.

11) All of these factors have been taken into account in forming my opinion as to the range of remedies that I would reasonably expect an arbitrator to make based on the finding of facts made by the Tribunal in

respect of Dr. Pujari, Dr. Bart, Dr. Taylor, Dr. Steiner, Dr. Ray, and Dr. Rose.

12) I have based this opinion on the following findings of fact made by the Tribunal:

i) "the Tribunal finds a poisoned workplace/academic environment for which the University is responsible under the Policy, having considered the evidence in this consolidated hearing. In that regard, the Tribunal has also earlier identified conduct by the Provost against Dr. Pujari which contributed to the poisoned work/academic environment in breach of the Policy". [p. 312 of Decision]

ii) "the challenges at DSB were systemic and cultural." [p. 312 of Decision]

iii) "the 002 Complainants with the exception of Dr. Richardson and/or the individual 003 Respondents were to varying degrees primarily responsible for the poisoned work/academic environment at the DSB during Mr. Bates' tenure as Dean and thereafter." [p. 313 of Decision]

iv) "the Tribunal's findings in the 003 Complaint identifies conduct by the individual 003 Respondents and other faculty who were not parties in these proceedings which the Tribunal finds is the primary reason for the increasingly unacceptable and poisoned academic/work environment at the DSB." [p. 313 of Decision]

v) "a lack of transparency in decisions or timely and direct communications by Mr. Bates and the Provost to individual faculty members directly impacted by those decisions also contributed to the escalation of the poisoned work environment at the DSB and in the case of the Provost's conduct caused the Policy to be breached by the University. On the other hand, the Tribunal is satisfied that as a group, the 002 complainants and the individual 003 respondents in some cases utilized what we hope is unprecedented and improper means to achieve individual and G21 objectives in bad faith, albeit with varying levels of responsibility, participation, and knowledge. We have determined that Dr. Taylor, Dr. Bart, Dr. Steiner, Dr. Pujari and Dr. Ray's conduct in the 003 Complaint has violated the Policy. Such conduct necessarily was a primary cause of a poisoned work environment at the DSB." [p. 314 of Decision]

vi) "The serious and multiple findings of misconduct against Dr. Taylor, Dr. Steiner, Dr. Bart and Dr. Pujari in the breach decision meet the threshold identified as grounds for dismissal as defined in the excerpt from the *University of Saskatchewan* decision and the threshold for removal as defined by The McMaster Revised Policy and Regulations with Respect to Academic Appointment, Tenure and Promotion (2007) [Tenure and Promotion Policy]. The most egregious misconduct involved unlawful interference with tenure/permanence and promotion and teaching track conversion

processes and various breaches by Dr. Taylor and Dr. Steiner of the Tribunal's orders. As such, a continued academic role for Dr. Taylor, Dr. Steiner, and Dr. Pujari may also be characterized as unsustainable based on the findings in the breach decision. In the Tribunal's view, however, the threshold for removal was not met by our findings against Dr. Rose and Dr. Ray and therefore removal was not considered a reasonable sanction for them. Importantly, Dr. Ray's misconduct never jeopardized a complainant's employment with the University and the breach findings against Dr. Rose were comparatively few and less concerning." [p. 5 of Remedy Decision]

vii) "The seriousness of the breaches and their impact upon colleagues and on the integrity of the University's processes cannot be overstated (despite the University's processes having ultimately protected the long-term employment interests of the 003 Complainants). In this regard, with the exception of Dr. Ray, the tenured individual 003 Respondents engaged in conduct which corrupted, tainted, interfered with, and compromised the integrity of tenure/permanence and promotion and teaching-track conversion processes." [p. 6 of Remedy Decision]

viii) "Belatedly, on some level, each of the individual 003 Respondents in their closing submissions have attempted to express remorse, often conditionally, but generally continue to appear either

incapable of, or unwilling to, own up to the fact that the Tribunal has found that it was their misconduct which was primarily responsible for the poisoned academic/work environment at the DSB. The serious and multiple breaches of the Policy identified by the Tribunal cannot be ignored. Dr. Bart, Dr. Steiner, Dr. Taylor's conduct as well as Dr. Pujari's conduct cannot be characterized as a momentary flare-up. Although not always premeditated, their conduct was often deliberate and willful. The totality of the evidence and the traditional mitigating factors considered in the jurisprudence (such as whether there was provocation or if this was a momentary flare-up where an individual accepts responsibility for what happened do not, as stated earlier, weigh in Dr. Taylor, Dr. Steiner, and Dr. Bart's favour." [p. 7 of Remedy Decision]

ix) "The Tribunal is less concerned about the future behaviour of Dr. Pujari, Dr. Ray, and Dr. Rose, trusting they will acknowledge the breach findings against them and respond constructively to the recommendations set forth in this decision. The Tribunal believes that the evidence confirmed that Dr. Pujari was not particularly well suited for a leadership role and displayed repeated poor judgment. Moreover, he assumed Area Chair responsibilities for the first time in a poisoned workplace. Dr. Pujari, given his dispute with the then Provost and the intense peer pressure associated with membership in the G21, likely mistakenly felt that

he needed to choose a side. Dr. Pujari was particularly unsuited to deal with overbearing and domineering individuals such as Dr. Steiner, Dr. Bart and Dr. Taylor. The Tribunal believes Dr. Pujari was a conflicted and reluctant participant whose behaviour is easier to correct and we have less concern that he will be an obstacle to returning to the DSB to an appropriate work environment. Similarly, the Tribunal finds Dr. Ray was likely unduly and negatively influenced by the senior tenured professors with whom he increasingly became aligned in the G21+. Dr. Ray breached the Policy and exercised extremely poor judgment but the Tribunal believes that the remedies that we have identified will correct his unacceptable behaviours.

"With respect to Dr. Rose, the evidence against him does not support removal or suspension because of the Tribunal's limited breach findings against him." [p. 8 of Remedy Decision]

13) Given these findings of fact, I have reached the conclusion that Canadian labour arbitrators would conclude that the sanctions recommended by the Tribunal in respect Dr. Pujari, Dr. Bart, Dr. Taylor, Dr. Steiner, Dr. Ray, and Dr. Rose are all excessively harsh and would not meet the standard of just cause applied when arbitrating discharge and discipline cases arising under a collective agreement.

14) Dr. Taylor, Dr. Steiner, and Dr. Bart each received a three-year suspension without pay, benefits, privileges or access to the University's

premises during this period. In addition, the Tribunal ordered that each of them be immediately removed from his positions of authority (including if applicable, Area Chair, as a member of an Area or Faculty Level Committee, or as a member of the Senate, Board of Governors or any other governance committee) where he would have authority to potentially affect terms and conditions of the employment of anyone at the DSB and that they be prohibited from holding any such position of authority for a minimum of five years after his return to the University from his suspension and, thereafter, only once the President determines it is appropriate for him to be eligible to be considered for holding such position. The Tribunal further ordered mandatory sensitivity, harassment and conflict resolution training for each of them after their return form serving their suspensions.

15) It is my opinion that arbitrators, given the facts as found by the Tribunal, would find the sanctions against these three individual to be excessive. Arbitrators would consider the fact that, for each of these individuals, the three-year suspensions carry with them a very severe and extraordinary financial penalty when one calculates the total loss of salary and benefits for a senior academic over a three-year period. They would also consider that the three-year suspensions would also seriously, and perhaps fatally, curtail any career development during that period, which could lead to a further loss of income following the expiry of their suspensions. Arbitrators would also consider that the further five-year suspension from governance activities would prevent these three

individuals from fully integrating back into the university community upon their return from their suspensions. Given these very serious consequences, it is my opinion that a labour arbitrator would view the effect of the suspensions to be career ending and tantamount to discharge. Arbitrators would also take into account the fact that the Tribunal gave no weight to these individuals' previous record of long service to the university. There was no evidence that these three individuals were other than respected academics who in the past had served the University well. The offence they had committed was to have gone too far in the exercise of their right to participate in the governance of the University and to participate in the proceedings of the Tribunal. The findings of fact indicate that in doing so they had breached the norms of the University, but it is very unlikely that arbitrators would brand such conduct as "illegal", as did the Tribunal. As well, they would consider that other faculty members who had also contributed to the poisoned workplace received no discipline at all just because they had not involved themselves in the formal harassment proceedings. It is my opinion that these sanctions would be considered to be far too draconian and discriminatory, especially for a workplace where latitude is allowed for different views and in a situation where the employer has to share some responsibility for the poisoned work environment that to some extent led these three individuals to cross the line and breach the University's norms.

16) It is also my opinion that the determination of the appropriate penalty could vary depending on the arbitrator. The maximum penalty, however, would be unlikely to exceed a three-month suspension given the considerations of past good service, economic hardship, effect on career development and equality of treatment, and the employer's own contribution to the poisoned work environment. A suspension as lengthy as three months is very unusual in the context of the arbitration case law and regarded as a very severe penalty by arbitrators so that it is likely that an arbitrator would consider a suspension of this length to be a very effective deterrent against any future misconduct. Given this deterrent effect, it is unlikely that an arbitrator would impose any greater suspension, given considerations of economic hardship and the crippling effect that it might have on the academic careers of these individuals.

17) The suspension of these individuals from governance activity for an indefinite period, possibly the duration of their careers, would also be troubling to arbitrators. The effect of this suspension would be to continue to ostracize these individuals from the rest of the University community even after they had served their sentence. It is my opinion that arbitrators would consider the value of rehabilitation and would not continue the suspension from governance activities beyond the period of the suspension, since its effect would prevent the full integration of these three individuals back into the university community. However, they

would sustain the mandatory sensitivity, harassment and conflict resolution training since it could facilitate this integration.

18) Dr. Pujari received a one-year suspension without pay, benefits, privileges or access to the University's premises during this period, and Dr. Ray received a one academic term suspension without pay, benefits, privileges or access to the University's premises during this period. In addition, the Tribunal ordered that each of them be immediately removed from his positions of authority (including if applicable, Area Chair, as a member of an Area or Faculty Level Committee, or as a member of the Senate, Board of Governors or any other governance committee) where he would have authority to potentially affect terms and conditions of the employment of anyone at the DSB and that they be prohibited from holding any such position of authority for a minimum of five years after his return to the University from his suspension and, thereafter, only once the President determines it is appropriate for him to be eligible to be considered for holding such position. The Tribunal further ordered mandatory sensitivity, harassment and conflict resolution training for each of them after their return from serving their suspensions.

19) In my opinion, arbitrators would also find these sanctions to be excessive in light of the following considerations: the lesser role of these two individuals in contributing to the poisoned work environment; their past good service; economic hardship and disruption to career development; and equality of treatment. In light of the sanctions that

would be considered appropriate for Dr. Taylor, Dr. Steiner, and Dr. Bart (a three-month suspension with mandatory sensitivity, harassment and conflict resolution training), it is my opinion that the maximum penalty considered appropriate by a labour arbitrator for Dr. Pujari would be a one-month suspension with mandatory sensitivity, harassment and conflict resolution training, and the indefinite suspension from governance activity would not be sustained for the reasons set out in para. 17 of this affidavit. As for Dr. Ray, the maximum penalty would likely be no more than a ten-day suspension with mandatory sensitivity, harassment and conflict resolution training, and the indefinite suspension from governance activity would not be sustained for the reasons set out in para. 17 of this affidavit.

20) Dr. Rose received a formal written reprimand that was to be maintained on his record for five years and ordered to take mandatory sensitivity, harassment and conflict resolution training. In addition, the Tribunal ordered that he be immediately removed from his positions of authority (including if applicable, Area Chair, as a member of an Area or Faculty Level Committee, or as a member of the Senate, Board of Governors or any other governance committee) where he would have authority to potentially affect terms and conditions of the employment of anyone at the DSB and that he be prohibited from holding any such position of authority for a minimum of five years after his return to the University from his suspension and, thereafter, only once the President determines it is appropriate for him to be eligible to be considered for holding such position.

21) In my opinion, many arbitrators would consider this sanction to be inappropriate given that the finding of facts do not expressly state that he had violated the Policy. The Tribunal did fault Dr. Rose for failing to identify a bias and voting against Dr. Flynn's renewal but in their findings section did not appear to expressly state that Dr. Rose had violated the Policy. As a result, it is not at all clear from the Tribunal's findings that Dr. Rose committed any serious breach of the University's norms, and it is my opinion that an arbitrator would not be likely to impose any discipline in the absence of a finding of a violation of the Policy. At the very most, an arbitrator might impose a written reprimand. However, the arbitrator would view the indefinite restriction on participating in university governance to be inappropriate for the reasons set out in para. 17 of this affidavit. It also quite possible that an arbitrator would consider the requirement to take mandatory sensitivity, harassment and conflict resolution training to be an inappropriate response for what, at the very most, could be characterized as a minor transgression.

22) I swear this Affidavit in support of the Applicants' application for judicial review of the decision of the Board Senate Hearing Panel for Sexual Harassment/Anti-Discrimination under the McMaster University Anti-Discrimination Policy.

SWORN BEFORE ME at the City of Kingston, in the Province of Ontario, this 18th day of August, 2004.

Commissioner for Taking Affidavits

JUDITH ANN BUTTLE, a Commissioner, etc., Province of Ontario, for G.R. Tepper Professional Corporation, Barrister and Solicitor. Expires July 29, 2016.

DONALD CARTER

This is Exhibit "A" to the

Affidavit of Donald Carter

sworn before me on August 18,

2014

Commissioner for Taking Affidavits

JUDITH ANN BUTTLE, a Commissioner, etc.,
Province of Ontario, for G.R. Tepper
Professional Corporation, Barrister and Solicitor.
Expires July 29, 2016.

Curriculum Vitae

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PERSONAL DATA

Date of Birth: October 10, 1942
Place of Birth: Picton, Ontario

EDUCATION

Picton Public School
Prince Edward Collegiate Institute
Queen's University, B.A., LL.B. (Honours)
Oxford University, B.C.L.

EMPLOYMENT

Queen's University
(1968 to 2002 full-time)
Currently Professor Emeritus and Adjunct Faculty Member

RELATED EXPERIENCE

Labour Arbitrator (1972 to present)
Member, Ontario Labour-Management Arbitrators Association

Ontario Ministry of Labour List of Approved Arbitrators

Arbitration Panel, Canada Post and PSAC
Arbitration Panel, Canada Post and APOC
Arbitration Panel, Dalhousie University and DUFA
Chair, Ontario Public Service Grievance Board (2002 - 2013)
Member, Ontario Public Service Labour Relations Tribunal (1973-1975)
Vice-Chair, Ontario Labour Relations Board (1974-1976)
Chair, Ontario Labour Relations Board (1976-1979)
Vice-Chair, Ontario Grievance Settlement Board (1979-1984)
Consultant, Ontario Ministry of Labour
Arbitrator Training Program (1979-1999)
Policy Advisor, Ontario Ministry of Labour (1979-1990)
Visitor, Monash University, Australia (1984-1985)
Director, Industrial Relations Centre/School of Industrial Relations, Queen's University (1985-1990)
President, Canadian Industrial Relations Association (1991-92) Dean, Faculty of Law, Queen's University (1993- 1998)

AWARDS

Bora Laskin Award, 2013, in recognition of distinguished contributions to Canadian labour law

PUBLICATIONS

Associate Editor, (2004 to present), Labour Arbitration Xpress (LexisNexis Canada)

Associate Editor, (1971-1976, 1979 to 2003), Labour Arbitration Cases, (Canada Law Book Co. Ltd.)

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"Unions and Universities - Can There be a Happy Marriage?" at Leo Roback Conference on Trade Union Research, Quebec, May 1987 (now published in conference proceedings)

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