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 JEFF C. HOPKINS
(sworn December 18, 2014)

I, JEFF C. HOPKINS, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

Background & Involvement

1. I am a partner at Grosman, Grosman and Gale LLP and I, along with my partner R. Mark Fletcher, were counsel to the Applicants Dr. Chris Bart, Dr. Devashish Pujari, Dr. Joe Rose, Dr. Sourav Ray and Dr. George Steiner as Respondents to a complaint brought under the McMaster University Anti-Discrimination Policy against the Applicants and McMaster University ("Complaint "B") in the proceedings below and as such have knowledge of the matters hereinafter deposed. The Applicant Dr. Wayne Taylor had separate counsel in the proceedings below.

2. I have been practicing in the area of employment law since 2003. Mr. Fletcher has been practicing in employment law since 2002.

3. I have shared this affidavit with Mr. Fletcher my partner and co-counsel in the proceedings below and can advise that he agrees with the information and beliefs stated herein.

4. Complaint "B", also known as U/SHAD-003, or the "003 Complaint", was filed on March 31, 2011.

5. Also on March 31, 2011, Complaint "A", also known as U/SHAD-002 or the "002 Complaint", was filed by the Applicants in their capacity as complainants against Dean Bates and the University. The Applicants were represented in the 002 Complaint by Catherine Milne of Turnpenney Milne LLP in the proceedings below.

6. Both the 002 and 003 Complaints led to more than a year of preliminary hearings before the Board Senate Hearing Panel for Sexual Harassment /Anti-Discrimination (the "Tribunal") and culminated in twenty-one days of consolidated, in camera hearings between March 2012 and July 2012.

Background to the Proceedings Below

A. The Investigation Process

7. Prior to my retainer as counsel in the Tribunal proceedings, on March 25, 2011, a report was released by Mile Komlen Director of Human Rights and Equity Services ("HRES") at McMaster University (the "University"). Mr. Komlen was responsible for

overseeing the investigation into various issues at the DeGroote School of Business ("DSB"). His March 25, 2011 report (the "Komlen Report") concluded that there was a divisive atmosphere amongst faculty and teaching staff at the DSB. The Komlen Report can be found at DSB-0785, which is at page 4598 of the Tribunal's Record, filed with the Divisional Court (the "Record").

8. As Director of HRES, Mr. Komlen reported to the Provost of the University, Dr. Ilene Busch-Vishniac.

9. Two investigators were retained by HRES on behalf of the University to investigate the allegations which would ultimately form the basis for what would become the 002 Complaint and the 003 Complaint, namely Ms. Catherine Milne and Ms. Shari Novick respectively.

10. Although Mr. Fletcher and I were not involved until the two group complaints were sent to the Tribunal, many of the Applicants were reluctant to participate in the two investigations at the outset and their reservations about the investigations and the inherent unfairness of the pre-hearing process were put into submissions at the hearing.

B. Notice & Legal Representation

11. I first became involved in the proceedings below in late April/early May 2011 when I was retained by Dr. Bart and Dr. Ray in their personal capacity to act as their counsel as Respondents to the 003 Complaint. At the time of my retainer, the two group complaints had already been formulated, filed and referred to the Tribunal.

12. The Anti-Discrimination and Harassment Policy (the "Policy") and specifically s. 65(b) provides that legal expenses of the parties to Tribunal proceedings will not be covered by the University.

13. However, by structuring the 002 Complaints and 003 Complaints as "Group Complaints", Mr. Komlen's position was that the University would have to pay for the legal fees of the Complainants in each proceeding. See for instance, Affidavit of Dr. Milena Head, sworn August 11, 2011 at page 4, as well as Exhibit 'E' to same, at Tab 20 of Tribunal's Supplementary Record filed September 25, 2014 (the "Supplementary Record").

14. HRES and the University retained Ms. Milne to represent the 002 Applicants and another lawyer Mr. James Heeney to represent the 003 Applicants.

15. Sections 33 to 36 of the Policy contemplate the University acting on behalf of a complainant who is unwilling to file a written complaint and appear as a complainant in front of the Tribunal. In those cases, the University is authorized to act on that person's behalf provided that the appropriate Vice-President communicates with any witnesses and the alleged respondent before deciding whether to initiate formal proceedings against the respondent.

16. However, as is evident on the face of the 003 Complaint, the complainants were named, they did provide written complaints, and they appeared before the Tribunal, contrary to what is contemplated in sections 33-36.

17. None of the Applicants ever received any communication from any Vice-President regarding the allegations against them prior to receiving copies of the written 003 Complaint after the conclusion of the investigation, and after the complaint had already been forwarded to the Tribunal, which is once again contrary to the express requirements of sections 33 to 36 of the Policy, which Mr. Komlen relied on in crafting his "group complaints". The Applicants first received notice of the 003 Complaint on April12, 2011.

18. The University initially refused to cover the legal fees of the professors as 003 Respondents on the basis that only individuals in a management or administrative capacity, which included Dr. Pujari and Dean Bates (and two other originally named 003 Respondents, Dr. Khalid Nainar and Dr. Mohammed Shehata), were entitled to have their legal fees as respondents covered. Dr. Taylor was represented by counsel of his own choosing, Derek Collins, throughout the proceeding. Therefore, Dr. Steiner, Dr. Ray, Dr. Bart and Dr. Rose were left without counsel when the matter was referred to the Tribunal.

19. As I mentioned above, I was subsequently retained by Dr. Bart and Dr. Ray in their personal capacity to act as their counsel as 003 Respondents in late April/early May 2011. That left Dr. Steiner and Dr. Rose without legal representation until after July 5, 2011 when the University finally agreed to cover the legal fees of all the remaining Applicants as 003 Respondents, if and only if, they retained Mr. Fletcher or myself as counsel.

20. The decision by the University to cover the legal fees of all 003 Respondents was made on July 5, 2011 and only after repeated requests submitted by the Applicants and Mr. Fletcher and myself, including calls to University counsel Mr. Avraam, following the June 2011 pre-hearing conference. Only once it became clear to the University's counsel during the first preliminary hearing that not having representation for all parties would lead to a substantially longer and more convoluted proceeding did the University then agree to cover the cost of representation for all respondents.

21. In contrast, Mr. Bates who had already resigned his position as Dean by the time the 002 Complaint was commenced, was nevertheless represented throughout by the University's counsel, Mr. Avraam at the University's expense.

22. The University also retained Mr. Avraam to represent the other originally-named respondent in the 002 Complaint, Elko Kleinschmidt.

23. By the time the University agreed to cover the legal fees of all the 003 respondents, the Tribunal Panel had been struck, conference calls between counsel and Tribunal counsel had occurred, the first of two pre-hearing conferences had been held and a number of procedural issues had been canvassed and set. For example, at the preliminary hearings regarding procedural matters held before the Chair of the Panel on June 24 2011, Dr. Rose and Dr. Steiner were unrepresented. At that hearing, a number of issues were discussed, including:

(a) whether or not the hearing should be held in camera;

(b) consolidation of the 002 and 003 Complaints;

(c) timing and duration of the hearings;

(d) disclosure of the Novick Report; and

(e) timing for the exchange of pleadings and documents.

24. Furthermore, and prior to our attendance at the June 24th preliminary hearing, the Tribunal's first counsel Mr. Randall Bocock had contacted counsel for the parties on a without prejudice basis in order to have discussions regarding the procedure to be followed in conducting the proceedings. As unrepresented parties, Drs. Steiner and Rose could not meaningfully participate in those discussions.

25. The University's delay in providing all of the 003 respondents with counsel caused Mr. Fletcher and me to materially underestimate the amount of time it would take to advance our clients' case as submitted at the June 24 preliminary hearing. This delayed retainer further complicated matters when we were ultimately only provided 21 days for the entire hearing of both the 002 and 003 Complaints. Adding Dr. Rose and Dr. Steiner to our retainer at a later stage, and without modification to the original timetable, increased the time pressures of an already rushed process. This was particularly the case with respect to Dr. Steiner, who had to respond to allegations from virtually all the 003 Complainants, which required obtaining many witness affidavits and then calling those witnesses. I will expand on this point later in this affidavit.

C. The Investigation Reports (Novick Report) & Group Complaints

26. My clients, the 003 Respondents, were not aware of the formulated group complaint against them at the time they were being encouraged by Mr. Komlen to file their 002 Complaint. In fact, the first notice they had of the potential existence of the 003 Complaint was when they were finalizing their own complaint, only days before filing.

They did not officially learn of the existence of the 003 Complaint until receiving their individual copies.

27. Furthermore, and more concerning was that in allowing the time-barred complaint of Dr. Milena Head to proceed against Dr. Steiner, the Tribunal reasoned that doing so was "fair" because Dr. Steiner had availed himself of the same HRES process in order to pursue his complaint against Mr. Bates. I will expand about this further below.

28. My concern about Mr. Komlen's grouping of the complaints first arose when Mark Fletcher and I repeatedly suggested that the parties mediate. We were of the opinion that at the very least those with less interrelated issues, such as Dr. Ray or Dr. Rose, were ideal candidates for mediation, although Mr. Fletcher and I maintained the opinion that all of these matters were suitable for mediation. However, as a result of the mass grouping of the complaints, it became prohibitively difficult to address seemingly isolated issues on their own via mediation, a point about which I will expand further below.

29. Furthermore, as a result of the complaints being grouped en masse, certain parties, Dr. Ray in particular, were in effect forced into a process which had very little or in some respects nothing to do with the allegations against them. Dr. Ray was never a member of the group that the Tribunal prejudicially categorized as the "G 21" and had little, and unrelated involvement in the Tenure and Promotion processes which were at the centre of the 003 Complaint.

30. Rather, Dr. Ray's isolated issues were between himself, another faculty member Dr. Detlor and Ms. Colwell (a staff member). Therefore, absent the grouping conducted by Mr. Komlen, there would have been no reason for Dr. Ray to have been party to either of the 002 or 003 Complaints. In fact, it is my understanding that Ms. Novick did not even interview Dr. Detlor or Mrs. Colwell as part of her investigation, although I have still not seen the Novick Report and based on my review of the Tribunal record, verily believe that it does not form part of the record before the Divisional Court.

31. In fact, the entire history of the Novick Report, from its genesis at the investigation stage to its non-disclosure, caused significant prejudice to my clients at the hearing.

32. Both the Milne Report and the Novick Report were provided to the President of the University. Therefore, counsel for the University, Mr. Avraam, would have had access to and the benefit of both reports in preparing his defences as respondent counsel to the University in both complaints.

33. I understood from counsel for the 003 Complainants, Mr. Heeney, that he was provided a copy of the Novick Report.

34. On the other hand, my clients, Mr. Fletcher and I did not have access to the Novick Report, meaning my clients, who were the subject of, and ultimately respondents to the Novick report, were the only parties without access to it.

35. Therefore, Mr. Fletcher and I brought a motion for production of the Novick Report on the basis that it was clearly relevant as it was an extension of the Komlen

Report, and it contained relevant potential witness information and information necessary to properly and fairly defend the 003 Respondents.

36. On November 25, 2011, and following our initial request at the pre-hearing in June 2011, Mr. Fletcher and I brought a motion for production of the Novick Report. We believed it was imperative to have access to the Novick Report before the hearing began in order to mount our clients' defense because we knew that the complaints were derived from the facts and findings contained therein. We intended to have the motion heard at the November 28, 2011 pre-hearing, and we delivered motion materials; however, the Tribunal determined that in order to hear the motion it would be necessary that Mr. Pinto, counsel for HRES and Mr. Komlen, be present.

37. Due to scheduling conflicts Mr. Pinto was unavailable to attend before the Tribunal until sometime in February 2012 when the hearing would have already been well underway. As a result of Mr. Pinto's lack of availability as well as scheduling pressures caused by the Tribunal's insistence that the hearings commence on the scheduled start date (then February 7, 2012), the motion could not proceed as we had intended on November 28, 2011.

38. I was also advised at that time by Mr. Heeney, counsel for the 003 Complainants, that the 003 pleading largely mirrored the Novick Report, and therefore my clients would already be in possession of the necessary particulars to defend the 003 Complaint.

39. However, I was later informed by Ms. Milne that the Novick Report contained details regarding certain other parties who had made allegations and provided evidence

to Ms Novick, but ultimately decided not to proceed as complainants. Indeed, evidence obtained during the final days of the hearing revealed that Professor Nick Bontis was instrumental to the creation of the 003 Complaint against my clients, and in fact may have initially complained about Dr. Bart. It became evident that Dr. Bontis would have been a relevant witness from whom I would have sought evidence had I been informed earlier. Since I only learned of this evidence in the final days of the hearing, and as a result of the extremely tight hearing timelines, we were unable to elicit this evidence.

40. As a result of denial of access to the Novick Report, my clients were denied the opportunity to lead material relevant evidence, and therefore denied the opportunity to make full answer and reply to the complaint against them.

41. For example, testimony from the witness and complainant Dr. Flynn during Mr. Fletcher's cross-examination in the 003 hearing revealed the existence of another "group", in the context of Dr. Flynn forwarding an email he received from Dr. Pujari to Paul Bates and/or Peter Vilks in which he states "forward this to the group". However, the Tribunal would not allow Mr. Fletcher to explore this line of questioning other than one single question: whether the "group" was larger than the group of 003 Complainants, the answer to which had no value or relevance to the ultimate issue we were trying to address, specifically membership. Indeed, testimony and cross-examination of Dr. Flynn, Mr. Vilks and Glenn Randall revealed the existence of a group of Professors within the DSB who communicated and met in order to discuss in an organized fashion their opposition to and allegations against the Applicants.

42. Throughout the proceedings, counsel for the 003 Complainants and the University made much of the fact that many of the 002 Complainants/003 Respondents and their witnesses were part of or simply were in receipt of e-mail discussions, which the Tribunal seized upon and dubbed as a group called the "G21". This term arose as a result of 21 professors who were signatories to a December 2008 performance report that had been created to oppose the re-appointment of then Dean Paul Bates. However, this term became a pejorative term and was inappropriately applied by the Tribunal to suggest a close-knit group who specifically targeted and harassed those professors who supported the Dean's mandate and re-appointment.

43. As is clear from the Tribunal's Decisions, many parties' and witnesses' credibility was diminished simply by virtue of being in receipt of e-mails from the so-called "G21". The evidence from Dr. Flynn and Mr. Vilks demonstrated the existence of a "group", exchanging e-mails and with apparent animus toward the Applicants, during the relevant time period. In defending the 003 complaint, the existence and membership of this group would have been relevant to addressing issues of credibility pertaining to the 003 Complainants and their witnesses. However, as we were denied access to the Novick Report and the Tribunal would not allow us question the relevant witnesses on this important issue, we were denied the opportunity to lead this evidence.

Limitation Periods

44. In the fall of 2011, Mr. Fletcher and I brought a motion to dismiss a number of complaints against various of our clients, including Dr. Steiner, which were ultimately

ruled upon by the Tribunal in their Supplementary Procedural Order #3, issued October 7, 2011, which begins at page 39 of the Record.

45. In particular we sought to have Dr. Head's complaint against Dr. Steiner struck on the basis that it originated from a single event that allegedly occurred on November 29, 2009 and since it was not filed until March 31st, 2011, it was out of time pursuant to section 43(b) of the Policy.

46. Section 43(b) requires that a written complaint be filed no later than 12 months from the last date of the alleged harassment, with the potential for an extension of up to 3 months if permitted by the Officer, Mr. Komlen, with such extension to occur only upon the Officer's receipt of submissions from the potential respondent.

47. In regard to the Dr. Head complaint, Mr. Komlen had never sought submissions from myself or Dr. Steiner regarding any potential extension, and in any event we argued that even if he had, the complaint was still brought out of time. Nevertheless, the Tribunal ruled in Supplementary Procedural Order #3, at page 48 of the Record, that because all parties, including Dr. Steiner who had already withdrawn his 002 complaint in September 2011, had availed themselves of the HRES processes and willingly participated, "fairness" dictated that any applicable limitation periods were of no effect or were otherwise extended.

48. Dr. Head's affidavit, at pages 518 - 519 of the Supplementary Record indicates that Dr. Head first approached Mr. Komlen to complain about Dr. Steiner's actions during her 2009 tenure and promotion process on November 25, 2009. However, Dr.

Head's tenure and promotion proceedings hadn't even begun until November 29, 2009. Notwithstanding this inconsistency the Chair, Dr. MacDonald, nevertheless allowed the complaint to proceed.

49. The procedural fairness issues arising from Dr. Head's complaint are particularly important because the Tribunal ultimately concluded that it was on the basis of Dr. Head's complaint that Dr. Steiner should be suspended.

Mediation

50. Around the time of the preliminary hearing in November and December of 2011, Mr. Fletcher and I - now retained by all the 003 Respondents - sought to mediate the 003 Complaint.

51. Initially, counsel for the University in the 003 Complaint had expressed some interest in potential mediation. The University, however, preferred to wait for the exchange of affidavits which was scheduled to take place in December and January. We asked the University to strongly consider mediation in November on the basis that it would make sense in terms of the costs of the proceeding (both on an economic and individual level) to engage in mediation prior to the exchange of affidavits given that the documents and pleadings had already been exchanged at the time.

52. I recall that at various points before and during the hearing, most if not all the Applicants expressed interest in mediation but this request was dismissed by counsel for the University and counsel for the 003 Complainants seemingly on the basis of an "all or nothing" approach. Their position appeared to be that all of the parties would have to

participate in any mediation, despite the inherently individualized nature of the complaints, and more troubling, that any mediation would also have to occur contemporaneously with the hearings, which would have been unworkable given the Tribunal's timetable for the hearings and the magnitude of preparing for a mediation with so many parties. In other words, counsel were already fully occupied with the hearings and could not possibly have participated in a mediation at the same time as participating in the hearings. This was particularly unfortunate for Dr. Bart who during the early stages of the proceedings expressed a willingness to stand up publically at a faculty meeting and apologize to the 003 Complainants who had complained against him in a form acceptable to them. Dr. Bart was also prepared to "absent" himself from all tenure and promotion or merit or career decision-making process which involved the 003 Complainants at the Faculty, but was rejected outright by the 003 Complainants.

53. Ultimately, the University and the 003 Complainants were not interested in engaging in mediation or even informal settlement discussion and the Tribunal hearing proceeded.

54. Furthermore, I believe that the extremely fast paced and rigid timeline of the hearing itself may have precluded any potential for mediation over the course of the hearing even if the University or the 003 Complainants had expressed the desire to engage in it.

<u>The Hearing – Panel Members & Evidence Without Notice</u>

55. There are three significant events that occurred prior to and during the Tribunal hearing that I describe below.

A. Improper Appointment of Tribunal Panel Member

56. Section 54 of the Policy permits the parties to object to the appointment of a Tribunal member before the Panel is struck.

57. Shortly after the hearing, but nearly a year before the release of the Tribunal's Report and more than a year before the remedy submissions, one of the Tribunal members, Dr. Bonny Ibhawoh, was appointed Associate Dean, Graduate Research Studies for the Faculty of Humanities, rendering him a member of the University's administration. Although I was not yet retained at the time that the Chair accepted objections to candidates for the Tribunal panel, it is my belief that if my clients and I were made aware about this pending appointment, and had we had the opportunity to do so, we would have objected to Dr. Ibhawoh's Tribunal appointment on the basis that it is improper for a Tribunal member who was or would soon become a member of the University administration to be hearing complaints against the administration, to be receiving remedy submissions against my clients from the administration, and to be ordering and/or recommending any necessary remedies to the administration to carry-out against itself and/or my client.

B. Absences by Tribunal Member

58. Section 58 of the Anti-Discrimination Policy states that, "[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".

59. The Policy provides for the receipt of viva voca witness evidence by examination before the hearing panel, and does not provide for the receipt of evidence by review of audio.

60. I recall that Tribunal member Dr. Bonny Ibhawoh was absent on two occasions during the hearing: April 13 and 24, 2012 for parts of both of those hearing days.

61. On April 13, 2012 Dr. Ibhawoh was absent for a portion of my cross-examination of the 003 Complainant Dr. Milena Head, and all of the re-direct of Dr. Head by her counsel Mr. Heeney.

62. During the portion that Dr. Ibhawoh missed, I 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.

63. Dr. Ibhawoh was not present in order to receive this evidence, or to observe Dr. Head's manner of response.

64. Nevertheless, the Tribunal noted in its Confidential Decision at page 270 of the Record, that "the Tribunal observed each of these witnesses' personal demeanor when testifying" and concluded that the 003 Complainants were "generally credible" and preferred their evidence to that of the 003 Respondents.

65. Furthermore, in its Confidential Decision at page 342 of Record, the Tribunal found that Dr. Head was a credible witness, and preferred her evidence where it contradicted Dr. Steiner's.

66. On April 24, 2012 Dr. Ibhawoh was again absent during a significant portion of the cross-examination of the Applicant Dr. Devashish Pujari, during which Dr. Pujari's credibility was put at issue by counsel for the 003 Complainants, Mr. Heeney.

67. I have reviewed the audio and it would appear that Dr. Ibhawoh missed no less than 43 minutes and 22 seconds of the cross-examination of the Applicant Dr. Pujari on April 24th, 2012.

68. 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.

69. Nevertheless the Tribunal, including Dr. Ibhawoh, concluded in its Confidential Report - at page 320 of the Record - that Dr. Pujari was not a credible witness.

C. The 003 Complainants were Allowed to Lead Evidence of a Witness in the Absence of Proper Notice, and Without an Affidavit

70. Pursuant to Procedural Order #3, the parties were required to file the affidavit evidence of any witness they intended to call at the hearing prior to that testimony being given. Dates were specified for the delivery of those affidavits, which were well prior to the start the hearings.

71. Procedural Order #8, at clause 2 - which is at page 92 of the Record - provided that Mr. Heeney as counsel for the 003 Complainants had a right to cross-examine witnesses led in 002 only to the limited extent that the 003 Complaint was impacted by their testimony.

72. During the first day of hearing of the 002 Complaint, which was the first day of the hearings, Mr. Heeney was permitted to elicit evidence from the witness Catherine Connelly in the absence of any affidavit evidence of that witness being filed prior to eliciting that evidence.

73. Although Dr. Connelly had submitted an affidavit, it was entirely in respect of the 002 Complaint and she was called by Ms. Milne in support of that case. Dr. Connelly provided no testimony regarding the tenure and promotion process, Dr. Detlor, Ms. Colwell or the 003 Complainants allegations generally in either her affidavit or her viva voce evidence during her direct examination by Ms. Milne (or in cross-examination by University counsel, Mr. Avraam).

74. Nevertheless, Mr. Heeney proceeded to cross-examine Dr. Connelly on the issue of bullying and intimidation during her tenure and promotion process, during Area meetings, and generally, to which I immediately objected to the Tribunal on the basis that none of what Mr. Heeney was attempting to cross-examine the witness on had been covered in any of the witness' affidavit evidence or her testimony, and he was therefore not entitled to put these questions to her. Dr. Connelly's testimony in this regard was very negative towards our clients, the Applicants Dr. Ray and Dr. Steiner. In fact, I specifically recall feeling shocked and ambushed when Dr. Connelly gave this testimony

with respect to Dr. Ray and Dr. Steiner, as it was very damaging to our clients and was elicited on the first day of the 002 Complaint, without any advance warning.

75. Mr. Heeney also put questions to Dr. Connelly about the 003 Complainants, Ms. Colwell and Dr. Detlor, neither of whom were discussed nor even referenced in any way by Dr. Connelly's affidavit or viva voce evidence. During this line of questioning, we again objected on the basis that Mr. Heeney was exceeding the bounds of permissible cross-examination, given his standing as well as Procedural Order #8. Our objection was once again overruled. Dr. Connelly's testimony in this regard was very positive towards Ms. Colwell and Dr. Detlor, and therefore very prejudicial to Dr. Ray and Dr. Steiner whose evidence contradicted Ms. Colwell and Dr. Detlor's.

76. Although I have reviewed the transcript and the audio for this portion of the hearing, it is largely deficient due to the Tribunal's faulty audio recording, but it is nevertheless possible to decipher that Mr. Fletcher and I were overruled and that Mr. Heeney was allowed to proceed with his questioning on the basis that the line of inquiry fit broadly under the heading of "poisoned work environment".

Unfair Procedural Framework of Hearing

A. Consolidation into a Single Hearing

77. Ultimately, the Tribunal consolidated the 002 and 003 group Complaints into one single hearing, with the 002 Complaint in theory being heard first, although in practice the 002 and 003 hearings had significant overlap in their presentation.

78. Mr. Collins, Mr. Fletcher, Ms. Milne and I had initially opposed consolidation on behalf of our clients, and only agreed to the consolidation when it became clear that there was no other option for proceeding, as will be further discussed in a later part of this affidavit.

79. Furthermore, the fact that the individualized complaints in the 003 Complaint were brought together by Mr. Komlen from the outset of the investigation was problematic itself as all of these complaints were particular to each individual complainant and respondent, with very little overlap.

80. At the time that I was retained Ms. Milne advised me that she strongly opposed the sharing of the 002 and 003 complaints between the various parties due to her concerns about confidentiality and evidence tailoring by 003 Complainant witnesses.

81. I was therefore surprised when the Tribunal served a Notice of Joint Pre-Hearing Conference on all parties to both complaints on June 10, 2011, which can be found at Tab 1 of the Tribunal's Second Supplementary Record, filed November 26, 2014 (the "Second Supplementary Record"). The Notice enclosed the two complaints and it was the first time that the two complaints were shared amongst the various parties. The Notice set the Joint Pre-Hearing Conference date to June 24, 2011 and advised that various procedural issues would be discussed at the pre-hearing conference including the length and dates of the hearing, deadlines for submissions and "the appropriate consolidation, hearing together or simultaneous hearing of the relating Complaints."

82. In my opinion, Mr. Komlen's idea to draft the complaints as two "group complaints" and the Tribunal's subsequent and surprising sharing of the two complaints without any advance notice to the parties, effectively set the two sides against each other at the very beginning – despite the actual disconnect between the 002 and 003 Complaints - in a proceeding in which the two complaints would ultimately be consolidated.

83. By Procedural Order dated June 30, 2011, the Tribunal ordered that any party seeking to make responding submissions regarding consolidation of the complaints, sequence or format of the hearing(s) serve and file such submissions. Mr. Fletcher, Mr. Collins, Ms. Milne and I submitted joint submissions on behalf of our clients dated August 5, 2011 submitting our opposition to consolidation on the basis that consolidation would make the proceeding more complex both procedurally and substantively including resulting in the inevitable mingling of evidence, where the factual overlap between the Complaints was in actuality very limited, with the exception of the common charge of a generally hostile environment. The Tribunal agreed with our submission and in Procedural Order # 3, dated October 7th, 2011, determined that the matters would not be consolidated and that the 003 Complaint would proceed first.

84. Although we as counsel for the Applicants eventually agreed to the consolidation, it was done with immense reluctance and reservation. Personally, I felt compelled to agree to consolidation because both the Tribunal and the University sought to impose certain unacceptable and prejudicial timelines if we did not agree to

consolidation. Specifically, the University refused to grant an extension on certain production deadlines unless the Applicants agreed to consolidation.

85. My clients, the 003 Respondents, were required to file all relevant documents by December 13, 2011, and pursuant to Procedural Order #4, all their affidavit responses to the 003 Complaint by January 31, 2012. Affidavits in respect of the 002 Complaint were due on December 23, 2011.

86. However, given the sheer volume of material that was requested of the Applicants (in both their position as 003 Respondents and 002 Complainants), including a request from Mr. Avraam on behalf of the University for all e-mails or written documents involving the respondent Paul Bates, as well as a request for "all documents in the power, possession, or control of the Respondents that are relevant to the matters in issue in Complaint 003" from Mr. Heeney on behalf of the 003 Complainants, it became clear that meeting these timelines would be impossible in the circumstances.

87. The above production deadlines coincided with marking final exams from the fall semester, and the 002 Complainants /003 Respondents were under significant strain to balance their teaching duties to the University with their disclosure obligation to the Tribunal. In fact, anticipating this exact situation, both Dr. Steiner and Dr, Ray had already requested released time from their respective course loads in order to allow them to meet their ongoing obligations to the Tribunal and this request was denied by the Tribunal in Procedural Order #3 at pages 54 and 55 of the Record.

88. In Procedural Order #6, issued on December 14, 2011, the Tribunal set a production deadline for December 19, 2011, and required the 002 Complainants' affidavits to be filed on January 6, 2012. As most of the Applicants were both Complainants and Respondents, these timelines made it practically impossible to begin preparing their responding 003 affidavits until after January 6th, 2012 because Ms. Milne was still working with them on their 002 complainant affidavits up until the January 6 deadline.

89. It was not until January 6, 2012 that we first learned that the 003 Complainants' requested remedies included removal proceedings against the Applicants (save only Dr. Rose). This significantly increased what was at stake for our clients.

90. On January 18, 2011 Mr. Zega, counsel to the Tribunal, wrote to counsel for all parties advocating reconsideration of the consolidation issue, in light of the pleadings and evidentiary record then before counsel, as well as the time-pressure facing all parties given the commencement of the hearings, then due to begin on February 7, 2012 with subsequent hearing days on February 10th and 12th, and 18th.

91. Although the Applicants were previously successful in resisting the University's attempt to have the Complaints consolidated in Procedural Order #3 and were still opposed to it, circumstances out of our control dictated a need to re-consider consolidation. Specifically, given the tremendous amount of time required to prepare fully responsive affidavits with exhibits for the Applicants and their approximately twenty six witnesses, some of which were approximately thirty pages in length (such as Dr. Steiner and Dr. Pujari), given the seven day time crunch between delivering and

filing all affidavits, it would have been impossible to prepare proper cross-examinations for the 003 Complainants and their witnesses who would have testified at the outset of the hearing (as 003 was originally scheduled to proceed first).

92. Moreover, the seven day time crunch was far more of a disadvantage to the Applicants given that the 002 Complainants' and witnesses' evidence in chief was already outlined in detail in their affidavits, and their examination-in-chief was limited to one hour in any event. Accordingly, Mr. Fletcher and I were not able to commence our 003 cross-examination preparation until after our clients and witness affidavits were delivered and filed on January 31, 2011, again leaving us with only seven days before the commencement of the hearing.

93. Facing the impossibility of both meeting the deadline for serving approximately twenty-six affidavits by January 31, 2012, and being prepared for the pending start to the hearing on February 7th, 2012 and the potential sanction that would result for the failure to do so on time, the Applicants felt that they had no choice but to consent to the Tribunal's request that they reconsider consolidation of the complaints.

94. Because the request to reconsider consolidation came from the Tribunal and was strongly supported by Mr. Heeney and Mr. Avraam, and in light of the practical impossibility of starting on February 7, 2012, the Applicants ultimately agreed to consolidation and reversal of the complaint presentation in exchange for the commencement of the hearings being pushed back to March 3, 2012.

95. It is my view that the consolidation had several major effects causing significant prejudice to the Applicants:

(a) it essentially allowed the two very distinct set of complaints to be conflated, resulting in improper and overlapping questioning and the mingling of evidence throughout the conduct of the entire hearing;

(b) it permitted the University, a Respondent in both 002 and 003, and the individual 003 Complainants, to make their case against the Applicants twice and for the University to seek severe penalties against the Applicants despite having no standing to do so, and being only 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 with an opportunity to tailor their own evidence during the 003 Complaint;

(d) it permitted counsel for the University in the 002 Complaint to make use of the documents contained in the complex, voluminous, single unified global evidentiary record, which were only relevant to 003, to discredit the Applicants and their witnesses in 002 by virtue of their membership in the so-called "G21"; and

(e) it allowed counsel for the 003 Complainants to elicit evidence from Dr. Connelly in 002 despite the fact that he had submitted no affidavit for Dr. Connelly, and despite the fact that her affidavit and *viva voce* evidence led in support of the 002 complaint did not address the 003 complaint.

96. The end result of these prejudicial effects was the construction of a very complex narrative, involving individualized disputes, which were artificially woven into a single dispute with two opposing sides pitted against one another from the outset, namely the Applicants as tenured professors on one side and the former Dean, his supporters and non-tenured staff on the other side. This further prejudiced the Applicants. For example, there were certain emails and other communications in which the Applicants, in their capacity as 002 Complainants represented by Ms. Milne, sought to exercise their right to academic freedom by expressing opposition to the Dean's re-appointment. These communications were then used out of context in the 003 Complaint as evidence of the Applicants' having a supposed animus against the 003 Complainants solely by virtue of the 003 Complainants' support for the Dean.

97. The Applicants were unfairly prejudiced from the outset and throughout the hearing by the grouping of the inherently individualized allegations into two group complaints, by having the Tribunal unilaterally order the compilation of a single document brief, then permitting consolidation of the hearings, and then having been repeatedly categorized and stigmatized by virtue of being in receipt of e-mails from the so-called "G21".

98. The stigma associated with being nothing more than a recipient of a so-called "G21" e-mail was a direct result of the creation of a global evidentiary record which was used to unfairly stigmatize and undermine the credibility and the evidence of all so-called G21 witnesses in both the 002 and 003 Complaints.

99. Furthermore, the discussion above regarding the evidence adduced by Mr. Heeney from the 002 witness, Dr. Connelly, despite the lack of an affidavit submitted in support of the 003 Complaint by Mr. Heeney, and despite the fact that she had not testified to the matters raised in Mr. Heeney's cross-examination is yet another example of the prejudice caused by having been subject to the consolidated proceedings. Without consolidation, Mr. Heeney would not have been able to solicit that evidence, which was highly prejudicial to my clients.

B. Prejudice Caused by Unreasonable Time Pressure During Hearing

100. Despite the large volume of evidence and witnesses to be called, the Tribunal maintained an extremely rushed pace that was prejudicial, and resulted in unreasonable timelines being imposed on my clients who were the only respondents in the consolidated process facing potentially career-ending sanctions, and the only parties who were both respondents and complainants.

101. The Tribunal had set itself a firm deadline to conclude the hearing on April 30, 2012 in order to accommodate the Tribunal's insistence on a spring completion date. As a result, there was a firm termination date after which no further evidence would be received by the Tribunal regardless of any scheduling complications which might arise throughout the hearing

102. Further complicating the matter was the need to accommodate three Tribunal members' teaching schedules in order that they may all sit concurrently, meaning even fewer days were available in an already limited timeframe, and even greater scheduling demands were placed on counsel and the Applicants.

103. The firm termination date, although eventually extended to early June by the Tribunal, resulted in an unreasonable timetable and no accommodation for adjournments or re-scheduling. This caused immense prejudice to the Applicants in their ability to participate in the proceedings and fulfill their professional duties. It also caused significant pressure on counsel's ability to conduct their case throughout the hearing.

104. During the preliminary hearing on June 24, 2011 which was far too early in the process to be able to provide an informed or realistic estimate and at a time where Dr. Steiner and Dr. Rose did not even have counsel, the Chair asked counsel to estimate the amount of time that would be required to lead each of their respective cases. Ms. Milne indicated to the Chair that the 002 Complaint would take 12 days to present, while Mr. Avraam stated that he would require 13 days to respond. Mr. Heeney indicated that the 003 Complaint would take 15 to 18 days to present. Mr. Fletcher indicated that his response to 003 would likely take a month, but could be longer; I indicated that I would likely need an additional 3 days to respond to 003 as I was not yet representing Dr. Steiner or Dr. Rose at that point. Mr. Collins expressed the need for an additional day or two to present Dr. Taylor's response. Therefore, and leaving aside Mr. Avraam's response to 003 on which he did not provide a time estimate, at a minimum counsel had estimated that the 002 and 003 Proceedings would require 74 days in order to effectively argue their respective cases. In contrast, the total number of actual hearing days was less than half that number.

105. Notwithstanding the timing estimates provided by counsel for the various parties, by Procedural Order #5, dated December 5, 2011 – at page 70 of the Record - the Chair

assigned only 19 hearing days corresponding with the Panel's various schedules. This shortened timeframe required counsel to be available until at least 8 p.m. each evening, and necessitated that counsel and the parties be available for hearing days held on weekends.

106. Ultimately, the totality of the hearings occurred over a period of 21 days, less than what Mr. Fletcher, Mr. Collins, and I had estimated would be necessary to effectively respond to the 003 Complaint, being the complaint posing the most severe consequences for the Applicants, let alone to conduct the 002 Complaint and response, and lead 003 Complaint.

107. Mr. Komlen's investigation and report took him a year to complete, but once the matter was referred to the Tribunal on March 31, 2011 with the filing of the 002 and 003 Complaints, the Applicants were under continuous and intense pressure to acquiesce to the University's sudden urgency in rectifying a "situation" that had existed in some cases since 2005.

108. For instance, although documentary disclosure was to be completed on December 19, 2011, and amounted to nearly 15,000 pages of documents, all of the Complainant affidavits were to be filed by January 6, 2011, with 003 Responding affidavits due on January 31, 2012 and 002 Responding affidavits due on February 6, 2012.

109. As already particularized above, throughout the history of the Tribunal proceeding, the Applicants were faced with significant productions orders under a severe

time constraint, and without regard to their academic duties to the University which they were not receiving any relief for.

110. Furthermore, the fact that once the hearing commenced no adjournments to the hearing schedule were granted impacted the presentation of the evidence. In fact, at least five of the Applicants' witnesses - Dr. Prakash Abad, Dr. Mahmut Parlar, Dr. Richard Stubbs, Dr. Neil McLaughlin and Ms. Kelly McCaughey - whom we had intended to call in the 003 Complaint, were never able to give their viva voce testimony simply because we ran out of time and the Tribunal was unable or unwilling to sit any longer to receive that evidence, and so we as counsel to the 003 respondents had no choice but to withdraw those witnesses.

111. The fact that there was immense pressure from the Tribunal to adhere to what the Tribunal and the University often referred to as "the full utilization of the hearing schedule", from the very first day, meant that the Applicants were under constant and significant pressure to continue with the hearing with a view to urgent completion. This urgent schedule seriously prejudiced my ability to conduct the case on behalf of my clients. For example, despite the fact that we'd completed the entire witness list for the third hearing day, March 23, 2012, and that no further witnesses were present or could be reasonably notified to attend at the end of the day, the Chair nevertheless demanded that we call another witness and became displeased when we advised that it was impossible for us to do so. In fact, I specifically recall the Chair stating with a very agitated look on her face, at approximately 8:00 pm, after having started at approximately 8:30 am, "I am very disappointed that you don't have another witness

available." Similarly, near the end of the 21 days of hearings when it appeared we may run out of hearing days, the Chair stated we would simply "go well into", or "through the night" if necessary to finish the proceedings.

112. I have reviewed the audio and transcript for March 23, 2012 and unfortunately due to the Tribunal's faulty recording, the audio is indecipherable after 3 hours and 49 minutes, despite the recording spanning for 5 hours. This is reflected in the transcript, where the transcriber was unable to transcribe the final 1 hour and 11 minutes.

113. Another example of the very strict time pressures negatively impacting our ability to properly represent the Applicants occurred when one of the 003 Complainant witnesses raised an entirely new issue during Mr. Fletcher's cross-examination. In response to Mr. Fletcher's request for an adjournment in order to consult with our applicable client before proceeding, the Chair quickly denied the request. It was only after the Tribunal counsel advised the Chair that it was standard practice to allow an adjournment in such a situation, that the Chair responded by only allowing us approximately five or ten minutes.

114. Due to the Tribunal's self-imposed rapid pace of the hearings, I was constrained in particular in presenting Dr. Steiner's response to the 003 Complaint. For example:

(a) The testimony of several witnesses, namely George Wesolowsky, John Miltenburg, Elkafi Hassini and Martin Dooley was re-scheduled to a time when Dr. Steiner was unable to be present. Dr. Steiner had already informed the Tribunal of a pre-existing conference in Chicago that he was organizing, but these witnesses ultimately were scheduled during that

time anyway. As a result, I was not able to confer with Dr. Steiner in order to conduct my examination and re-examination of these witnesses;

(b) Despite responding to allegations from nearly every 003 Complainant, Dr. Steiner's testimony was limited to one hour with two 15 minute extensions, which was still insufficient to address all of the allegations against him;

(c) As previously mentioned, Dr. Abad, Dr. Parlar, Dr. Stubbs and Dr. McCaughey were denied the opportunity to testify on Dr. Steiner's behalf because Mr. Fletcher and I felt that there was clearly insufficient hearing time allotted to receive their testimony; and

(d) Dr. Steiner was also unable to be present to hear and assist me in dealing with harmful testimony provided by Dr. Harnish, Dr. Hackett, Dr. Hassanein and Dr. Connelly, because they had either been scheduled to testify at another date but were moved without sufficient notice to allow Dr. Steiner to attend due to the Tribunal's insistence on utilizing all available time, or provided evidence without an affidavit or notice.

115. The issue of unreasonable time constraints continued with the scheduling of the remedy submissions hearing, after the main hearings had concluded. The dates to provide remedy submissions to the Tribunal were set before the Decision itself was released under the Tribunal's continued mandate that the proceedings come to a conclusion as quickly as possible, and despite the fact that the Tribunal took a year to render its Decision. Both Mr. Fletcher and I opposed setting dates for the remedy

submissions without giving the Applicants the opportunity to consider the pending Decision with legal counsel. However, by Supplementary Procedural Order No. 9 dated February 12, 2013 – at page 96 of the Record - the Tribunal unilaterally set April 21 and April 28, 2013 as dates for the remedy submissions. Ultimately, the Tribunal decided to receive remedy submissions in writing, but I believe only because based on numerous email exchanges between counsel it was proving almost impossible for all counsel and parties to attend on the same dates. At one point, the Tribunal was considering having the remedy submissions delivered on dates when at least one of the Applicants, (Dr. Steiner who was in Australia at the time), the very parties whose livelihoods were at stake – could not be present.

116. Although my co-counsel and I submitted that the time constraints were unreasonable and unfair throughout the proceedings, our objections were overlooked by the Tribunal. In the end, we continued with the Tribunal proceeding through to completion as it appeared there was nothing further we could do on behalf of our clients, other than continue with the proceeding. Any further requests for relief from the extreme time pressure would have prejudiced the Applicants even further.

Tribunal's Findings Regarding Dr. Ray's Counter Complaint

117. At the conclusion of Dr. Ray's cross-examination on April 23^{r}, 2012, and at the conclusion of questions from the Tribunal, the Chair suddenly and without warning asked Dr. Ray whether he wanted to re-consider his counter-complaint against Dr. Detlor, stating:

"In light of the extent to which you've been able to participate in the hearings this far, and all of the points of view that have been expressed and all of evidence that 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 that you have right now, alter about your complaint?"

118. No further elaboration, explanation or basis was given for the Chair's question, and no comment or warning was provided about what the consequences of his answer might be. This question came as a complete surprise, and Mr. Fletcher and I were both stunned. Dr. Ray's facial expression indicated that he was equally shocked, but before we could object, Dr. Ray answered "no".

119. We were not informed at the time that the Tribunal was considering finding Dr. Ray's counter-complaint to be retaliation for the purposes of the Policy, nor were we asked to provide submissions specifically addressing this issue, as is required by the Policy.

120. In its Decision, the Tribunal found that Dr. Ray's counter-complaint was fraudulent, malicious and frivolous. In the remedy submissions, the Applicants argued that the Policy expressly states that the Tribunal shall advise or give notice that it is considering making such a finding, and the Tribunal failed to do so. It was largely, if not entirely, the Tribunal's finding in this regard which it believed justified its remedy of an unpaid suspension of Dr. Ray. The purpose of the notice is to provide the individual with a reasonable opportunity to properly respond or even withdraw the complaint.

121. Had Mr. Fletcher and I been put on notice of the Tribunal's considering finding Dr. Ray's counter-complaint to be vexatious, as is required by the Policy, we would have objected at that time, and recommended to Dr. Ray that he withdraw his counter complaint. Despite our remedy submissions on this point, the Tribunal found that it did not breach the Policy when the Chair posed the question to Dr. Ray and made the finding it did.

Penalties Sought by University

122. All Complainants were ordered by Procedural Order # 6 to submit their remedy demands early in the hearing by January 6, 2012.

123. As it was solely a Respondent in each of the 002 and 003 Complaints, the University was not invited to, nor did it ever advise that it would be seeking any remedies against the Applicants in accordance with the Order until the close of proceedings. Thus, the University did not have a procedural right to raise remedy submissions pursuant to the Tribunal's own procedural orders.

124. As a Respondent, the University also lacked standing to make those submissions.

125. It was not until his oral closing submissions in the 002 Complaint on June 5, 2012, that Mr. Avraam submited that the University's position was that removal of some of the Applicants was appropriate. The University also filed written submissions on June 10, 2013, submitting that some of the Applicants should receive termination and others should receive suspensions.

126. Mr. Fletcher, Mr. Collins and Ms. Milne and I as counsel for the various Applicants objected to the University's ability to adopt such a position and its submissions on remedy during the oral closing submissions and in written remedy submissions. We maintained that it was entirely inappropriate for the University, as a Respondent in both complaints, to seek any remedies at all and furthermore, to seek such remedies at the close of the hearing after failing to comply with the Procedural Order. This was particularly troubling given the extreme position on remedy the University was adopting, and the fact that it was the Tribunal's employer, as well as the fact that Mr. Avraam, as the University's counsel would likely be called on to advise the President on ultimately carrying out the remedy.

127. The Complainants and Respondents in 003 were limited to 40 pages of written submissions on remedy. By allowing the University to file its own remedy submissions, the Tribunal in effect considered 80 pages of penal submissions while still limiting the Respondents to 40 pages to respond.

128. It was the position of counsel for the Applicants that the fact that the University was recommending penalties to the Tribunal so that the Tribunal may recommend those same penalties back to the University to carry out amounted to an abuse of process. Had we been alerted to the University's intention to make such a request from the outset we would have been able to address these issues of abuse of process, natural justice and procedural fairness prior to the close of proceedings and before the Tribunal rendered its merits decision. Rather, we as counsel for the Applicants were forced to expend what were already limited pages in our remedy submissions to also address the University's

sudden, unreasonable and unfair position after the release of the Tribunal's merits decision, and when it was too late to prevent the University from filing their remedy request.

129. Therefore, the effect of the University's remedy submissions (both in substance and in timing) was much more prejudicial than any remedies sought by the individual 003 Complainants.

130. I make this affidavit in support of the Applicants' Notice of Application for Judicial Review and for no other or improper purpose.

SWORN BEFORE ME at the City of TORONTO, in the Province of Ontario, on December, 18 2014.

Commissioner for Taking Affidavits

JEFF C. HOPKINS

0597

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

AFFIDAVIT OF JEFF C. HOPKINS
(SWORN DECEMBER », 2014)

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