THE McMASTER UNIVERSITY ACT, 1976

BOARD-SENATE HEARING PANEL FOR
SEXUAL HARASSMENT/ANTI-DISCRIMINATION
McMASTER UNIVERSITY ANTI-DISCRIMINATION POLICY

PUBLIC REPORT

I. THE HEARING

A consolidated hearing was commenced to address two separate, but linked, complaints, and one counter-complaint under the McMaster University Anti-Discrimination Policy (“the Policy”). In the first complaint (Complaint “A”), five faculty members alleged harassment against a senior university administrator (the Senior Administrator) and the University. In the second complaint (Complaint “B”), seven different faculty members and one staff member alleged harassment against six faculty members (four of whom were Complainants in Complaint “A”) and the University. In the Counter-Complaint, one Respondent in Complaint “B” alleged harassment by one of the Complaint “B” Complainants.

The complaints were consolidated and heard by the Tribunal after various pre-hearing motions were addressed. Agreed upon procedures were followed and a hearing was held under the Policy and the Statutory Powers Procedure Act. Pre-hearing motions established the procedures and extensive affidavit evidence was filed by the parties and their witnesses prior to the commencement of the hearing. The hearing proceeded over the course of three months involving 21 extended hearing days (225.5 hours), in-camera, as per the Policy. Fulsome pleadings and arguably relevant documents were exchanged and filed as a result of various orders in advance of the hearing.

The Tribunal (comprised of three duly appointed tenured McMaster University faculty members) accepted 2694 documents, consisting of 14,891 pages, into evidence as exhibits during the hearing. The Tribunal heard testimony from 65 witnesses during the hearing. Witnesses, who had mostly provided affidavit evidence in writing in advance of appearance before the Tribunal, supplemented their evidence with up to 60 minutes of oral testimony each, with the opportunity for additional evidence-in-chief where requested. Counsel for all Complainants and Respondents had full opportunity to call witnesses in-chief. There was no time limit imposed on cross-examination and re-examination.

The Tribunal released our findings (320 pages plus appendices) to the parties on May 15, 2013, which identified the Policy breaches (“the Breach Decision”). While the complaint against the Senior Administrator in Complaint “A” was dismissed, the Tribunal’s decision identified
various Policy breaches by the individual Respondents in Complaint “B”, by the Counter-
Complainant in Complaint “B” and by the University as the employer Respondent in both
Complaints.

The hearing dates scheduled for the Tribunal to address remedy issues and to consider the
parties’ submissions on remedy were subsequently adjourned. Instead, a consent procedure and
schedule for written submissions was requested and implemented. After further deliberations by
the Tribunal, the remedy decision (“the Remedy Decision”) was released to the parties on
September 23, 2013. In the Remedy Decision, the Tribunal recommended suspensions for some
individuals, ordered additional sanctions and made numerous remedial orders.

The Tribunal has prepared this summary of our findings and decision for the public, as
contemplated by Section 70(g) of the Policy which states:

“The Tribunal will prepare a summary of the report for the public. The summary
will include an outline of the case and the tribunal's findings and decision, but
will be sufficiently general that the parties to the hearing cannot be identified.”

II. THE CONSOLIDATED COMPLAINTS

In both Complaints “A” and “B”, the individual Respondents and the University were
alleged to be responsible for an unacceptable poisoned academic/working environment and
accused of harassment. In Complaint “A”, the persons allegedly responsible for an unacceptable
academic/work environment were, at the time, persons in positions of authority including the
Senior Administrator, and another senior university administrator who was not personally named
as a Respondent. In Complaint “A”, the Senior Administrator was alleged to have harassed each
Complainant. In Complaint “B”, the individual Respondents were tenured faculty (except for
one individual Respondent at the relevant time) who were alleged to have harassed and
discriminated against the individual Complainants and were alleged to be responsible for a
poisoned academic/work environment. The Complaint “B” Complainants alleged the individual
Respondents used their positions to adversely affect career aspirations and/or negatively
influence the workplace environment of the Complainants as staff and as faculty without
tenure/permanence. In both Complaints “A” and “B” the University, as the employer, was
alleged to be ultimately responsible.

Generally, all Complainants alleged harassment including being subjected to an
academic/work environment that was unwelcoming, intimidating and hostile in breach of the
Policy. Numerous incidents were raised in the Complaints however, only an overview will be
provided in this public report in order to prevent the identification of the parties involved.
Complainants identified various comment or conduct that they relied upon as evidence of direct
harassment or claimed adverse effects. Complainants alleged that they were harassed through
vexatious comment and/or conduct. Harassment identified by Complainants included both
isolated comment or conduct and multiple incidents over a number of years and directed at
multiple individuals. The harassment alleged was direct, such as comments which belittled a
targeted individual, or indirect, such as the display of inappropriate posters in a workplace which
targeted groups of individuals. The conduct or comment, whether isolated or a pattern, were alleged to be a prohibited condition of employment because it created a negative working environment in contravention of the Policy. The legal principles relied upon by the parties were not generally in dispute. Rather, the application of the legal principles to the evidence and whether the Policy was breached were vigorously contested. The Complainants in Complaint “A” and “B” (including the Counter-Complaint) bore the onus to establish the Policy was breached.

The focus of Complaint “A” was that the Senior Administrator was alleged to have abused the powers of the position to adversely affect the careers and negatively impact the Complainants’ workplace environment. Furthermore, it was alleged that the University was complicit in the alleged workplace harassment and permitted the behavior of the Senior Administrator through its mismanagement and ineffective attempts to remedy the poisoned work/academic environment. In Complaint “A”, the Tribunal was satisfied that the reliable and admissible evidence did not establish that the Senior Administrator harassed any of the Complainants or breached the Policy. However, decisions by other officials within the University’s Administration and the ineffective and untimely implementation of processes were found to have contributed to the poisoned work/academic environment, though they were not considered the primary cause. As a result, the University, as the employer, was found to be in breach of the Policy.

Complaint “B” focused upon allegations that the careers and workplace environment for seven faculty and one staff member had been negatively affected by virtue of harassment and discrimination by individual faculty members. These Complainants were judged to be relatively vulnerable due to their staff appointment status or as candidates under the tenure/permanence and promotion and/or conversion processes, and were generally perceived to be supporters of the Senior Administrator, who was a Respondent in Complaint “A”. Many of the individual Respondents in Complaint “B” were also Complainants in Complaint “A”. The Tribunal considered evidence of written and verbal harassment and discrimination on the part of the individual Respondents in Complaint “B”. The Tribunal also considered evidence that focused upon the alleged abuse of established University policies and procedures for tenure/permanence and promotion, reappointment and/or conversion of appointment. The individual Respondents in Complaint “B” generally denied the allegations, asserted that their actions followed University policy and procedures, and/or were protected by principles of academic freedom and freedom of speech.

All parties generally agreed that the academic/work environment was poisoned, albeit for different reasons. The Tribunal determined the causes for the poisoned work/academic environment were not readily apparent or easily understood in many situations. The Tribunal must emphasize that it had the benefit of over 200 hours of testimony in the consolidated hearing, in addition to the affidavits and a very extensive documentary record, which assisted the Tribunal in understanding the scope, context and source of the problems. The consolidated hearing permitted the full weight of the evidence for these complaints to be addressed in an efficient and comprehensive manner. Without such a fulsome hearing process and the required documentary disclosure, it is unlikely that any other process could have effectively and comprehensively addressed the issues or fully identified the cause of the problems.
Power imbalances were identified in both Complaints. However, it was only in Complaint “B” that the reliable and admissible evidence supported findings that the Policy was breached by the individual Respondents. The Tribunal found the individual Complainants in Complaint “A” (with the exception of one Complainant) and/or the individual Respondents in Complaint “B” were, to varying degrees, primarily responsible for the poisoned work/academic environment. The Tribunal, however, was also satisfied that the University must accept some responsibility for the working environment that had become increasingly poisoned.

III. POLICIES AND JURISPRUDENCE FRAMEWORK

The Tribunal relied upon the submitted jurisprudence, applicable statutes and the University’s Policy to determine whether harassment and discrimination had been established.

A) University Policy

The Tribunal considered the Policy’s definitions of harassment and discrimination and the Statement of Principles in conjunction with the University’s Statement on Academic Freedom that was in effect at the time.

 Discrimination is defined in Section 11 as:

“differential treatment of an individual or group of individuals which is based, in whole or in part, on one or more than one of the prohibited grounds of discrimination, and which thus has an adverse impact on the individual or group of individuals.”

The University’s Policy defines “harassment” in Clause 11b. as follows:

“Harassment means engagement in a course of vexatious comments or conduct that is known or ought reasonably to be known, to be unwelcome. ‘Vexatious’ comment or conduct is comment or conduct made without reasonable cause or excuse.”

Relevant extracts from the Policy’s Statement of Principles include:

1. Discrimination and harassment, as defined in this document (see clause 11) are prohibited at McMaster University and constitute punishable offenses under this Policy. Discrimination and harassment are serious human rights issues.

Inasmuch as discrimination and harassment are demeaning to human dignity and are unacceptable in a healthy work environment and one in which scholarly pursuit may flourish, McMaster University will not tolerate such behaviour against any member of the University community and will strive to create an environment free from such behaviour on its premises.
2. McMaster University affirms the right of every member of its constituencies to live, study and work in an environment that is free from discrimination and harassment. Discrimination and harassment are incompatible with standards of professional ethics and with behaviour appropriate to an institution of higher learning.

3. McMaster University recognises that as an academic and free community it must uphold its fundamental commitments to academic freedom and to freedom of expression and association. It will maintain an environment in which students and teaching and non-teaching staff can engage in free enquiry and open discussion of all issues.

5. All persons entrusted with authority by the University have a particular obligation to ensure that there is no misuse of that authority in any action or relationship.

6. The University recognizes its legal and moral responsibility to protect all of its members from discrimination and harassment, and to take action if such behaviour does occur. To these ends it has developed a Policy on, and procedures for, dealing with complaints arising out of such behaviour including a range of disciplinary measures up to and including removal. It has also established an educational programme to prevent incidents of discrimination.

7. The University prohibits reprisal or threats of reprisal against any member of the University community who makes use of this Policy or participates in proceedings held under its jurisdiction. Any individual or body found to be making such reprisals or threats will be subject to disciplinary action.

8. The intention of this Policy and its procedures is to prevent discrimination and harassment from taking place, and where necessary, to act upon complaints of such behaviour promptly, fairly, judiciously and with due regard to confidentiality for all parties concerned.

The Code of Conduct for Faculty and Procedures for Taking Disciplinary Action was also considered and the following sections informed the Tribunal:

“DUTIES AND RESPONSIBILITIES OF FACULTY MEMBERS

1. Unless stated otherwise in the letter of appointment (and/or the annual contract, if applicable), faculty members have obligations to McMaster University in three areas: (a) teaching; (b) research, scholarly, or creative activities; and (c) university service….

d. Each faculty member is responsible for conducting himself or herself in a professional and ethical manner towards colleagues, students, staff, and other
members of the University community. Without limiting the generality of the foregoing, faculty members at McMaster University

- will not infringe the academic freedom of their colleagues;
- will not discriminate against any member of the University community on grounds prohibited by Ontario Human Rights Code;
- will disclose conflicts of interest or other circumstances which may reasonably introduce or appear to introduce bias into any academic or administrative decision to which they may be a party….

B) Harassment Jurisprudence And Statutory Considerations

The following jurisprudence addressing harassment was particularly helpful when the Tribunal considered the parties’ submissions.

The definition of harassment utilized in the case of Sobeys Inc. v. CAW-Canada, Local 1090, 2008 CarswellOnt 7687, [2008] L.V.I. 3808-1 (OAB), at paragraph 19 was instructive:

“Harassment has been defined in many ways. But the accepted components of personal harassment include the objectionable or hostile maltreatment or abuse of power that creates a risk, affects a person's dignity or amounts to an actual or attempted exercise of physical or psychological duress. This is not a subjective test. Just because someone perceives an action to be hostile or vexatious does not mean that harassment has occurred. There has to be an objective basis for the conclusion.”

Paragraph 29 in Sobeys Inc. v. CAW-Canada, Local 1090 was also relied upon to illustrate the difference between harassment and the proper exercise of management rights:

“… It is true that the materials show that management has responded to his actions. But even this recognizes that there is a real difference between harassment and managements' legitimate supervisory functions: Article 13.02; ‘Harassment is not: Properly discharged supervisory responsibilities, including but not limited to disciplinary action, or conduct that does not interfere with the climate of understanding and respect for the dignity of work or Sobey's employees.’ The materials reveal only that he has been dealt with by management each time he does something that would trigger a proper exercise of supervisory diligence over any employee. There has always been a rational basis to support management's intervention. Whether those initial reactions would satisfy the standards of just cause, Management has the right and duty to respond to issues concerning discipline, order and safety in the workplace. If management fails to exercise its supervisory responsibilities, an unsafe and unhealthy environment can develop. If it was concluded from these allegations that management's decisions to investigate problems in the workplace raised a prima facie case of harassment, then
management rights would be effectively frozen and it would be rendered incapable of fulfilling its duties.” (emphasis added)

The decision in *U.F.C.W. of B.C., Local 1518 v. 55369 BC Ltd., [2007] BCCA No. 130, 90 CLAS 94. (Harassment Grievance) (Larson)* provided the Tribunal with further guidance on what constituted harassment, at paragraph 32:

“Even severe criticism of an employee by a supervisor who is genuinely attempting to deal with a perceived performance problem is not harassment: *Re Religious Hospitaliers of St. Joseph* (1995), 50 L.A.C. (4th) 225 (Simmons). Nor is it necessarily harassment where an employee is demonstrated to have been improperly disciplined by a supervisor or other supervisory action is shown to be unjustified. *Supervisors have a right to be wrong provided they act in good faith and not for an improper purpose. Poor judgment or wrong action is not discriminatory per se. It only becomes harassment when it [is] done in a seriously hostile or intimidating manner or in bad faith.*” (emphasis added)

Arbitrator Starkman, in *Ottawa (City) v. Amalgamated Transit Union, Local 279, [2011] OLAA No. 154 (Starkman)* at paragraph 29, found that “[n]ot every inappropriate action meets the test of harassment,” relying on the following passage from *Re Government of Province of British Columbia (S. Complainant) and British Columbia Government Employees’ Union (M. G & Z Respondents)* (1995) 49 L.A.C. (4th) 193 (H.J. Liang) at p. 242-43:

“In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods adrenaline through the psyche. It can be used [casually], in righteous accusation, or in a vindictive fashion. Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous, fairness given both to the person raising the allegation of harassment and those against whom it is made.

The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.

For example, every act by which a person causes some form of anxiety to another could be labeled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question is then, when are we guilty of harassment?

I do not think that every act of workplace foolishness was intended to be captured by the word ‘harassment’. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened, or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting. Nor
should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said ‘you should have known better’.

Arbitrator Starkman further defined harassment, citing the decision in Toronto Transit Commission and A.T.U. (Slina), (2004) 132 L.A.C. (4th) 225 (O.B. Shime) at paragraph 30:

“Abusive conduct includes physical or mental maltreatment and the improper use of power. It also includes a departure from reasonable conduct. Harassment includes words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands, or other unpleasantness. A single act, which has a harmful effect may also constitute harassment.”

The Tribunal was also asked to consider Ontario’s Occupational Health and Safety Act, R.S.O. 1990, c. O.1, recently amended by Bill 168. It provides, in part:

“1. (1) ‘workplace harassment’ means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.…

25. (2) Without limiting the strict duty imposed by subsection (1), an employer shall.…
(h) take every precaution reasonable in the circumstances for the protection of a worker.…

27. (2) Without limiting the duty imposed by subsection (1), a supervisor shall.…
(c) take every precaution reasonable in the circumstances for the protection of a worker.…

28. (1) A worker shall,
(a) work in compliance with the provisions of this Act and the regulations.…
(d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.”

In Kingston (City) v. C.U.P.E., Local 109, 2011 CanLII 50313 (ONLA) (Newman), Arbitrator Newman provides a thorough review of the impact of the amendments in the Occupational Health and Safety Act:

236 … I interpret the legislation to mean that an employer must protect a worker from a hazardous person in the workplace. The failure to comply with these requirements will attract penalties under that Act, and subject the employer to the enforcement mechanisms administered by the Ministry of Labour.…

248 Second, the Bill 168 amendments have changed the manner in which the employer and a worker must react to an allegation of a threat. An employer may not hide its head in the sand, or take a passive stand, hoping that things will sort themselves out. It must not trivialize the allegation. The utterance of a threat is
workplace violence, and must be reported, investigated, and addressed. A worker who becomes aware of a danger is required to report the incident, as Hale was required to do here.…

251 Of course, this is not to say that an employer will be justified in acting without facts, or in precipitous over-reaction. It must investigate allegations of workplace violence with a full and fair approach, assessing objectively verifiable fact, and ensuring that decision-making in responding to the incident is informed, reasonable and proportionate. The seriousness of the allegation does not minimize the requirement for thorough and appropriate investigation and decision-making.…

253 An employer can fulfill its obligations and responsibilities to provide a safe workplace, and to take reasonable precautions to protect an intended victim of violence, in a variety of ways. In fact, it may be wise for an employer to maintain contact with the offending employee, to contemplate providing a lengthy leave of absence during incarceration, or while some form of therapy or counselling is undertaken. There may be safety in maintaining some ability to observe and control the trajectory of anger that has been demonstrated. But this is for the employer to determine, at the end of an appropriate investigation and consideration of options.…

255 The critical point is that it will not do for an employer to disregard, to minimize, or to turn a blind eye to a report of workplace violence in the form of a threat. An employer may not be passive or indifferent to any report of workplace violence. That option no longer exists in Ontario. It would constitute an abrogation of the employer's obligations under the Occupational Health and Safety Act, and would expose that employer to the penalties and offences set out in that Act.

256 Here, the Employer reacted with the appropriate deliberateness required by the allegation of workplace violence. It did not over-react, but addressed the allegation with appropriate care and attention. It investigated, and involved the most senior level of management, in order that decision making could occur with effective and timely action. It did not jump to precipitous termination, but undertook investigation of the facts. It deliberated upon its decision, taking into account the relevant data, including the grievor's history of discipline, the level of her seniority, the seriousness of the misconduct, the impact of the misconduct upon the others affected by the misconduct, and most importantly, the likelihood of improvement of the grievor's behaviour, and the likelihood of restoration of the employment relationship.
IV. ACADEMIC FREEDOM AND FREEDOM OF SPEECH

Academic freedom and freedom of speech principles were recognized as important and stressed by all parties in these proceedings. Principles of academic freedom and freedom of speech or association were addressed in the legal submissions and were often generally relied upon by some individuals to justify offensive statements. The Tribunal recognized that these principles are valued both by the University and McMaster faculty. The democratic governance model of the University is premised on principles of free expression and association. The Tribunal remained mindful of academic freedom and freedom of speech principles when it reviewed the evidence, especially when assessing the numerous oral and written statements alleged to be evidence of harassment. The Tribunal was comprised of a panel of tenured faculty members from McMaster University, and as peers, the Tribunal members were able to assess what constituted acceptable language in this workplace. The Tribunal agreed that longstanding values of academic freedom, including freedom of speech and association, must be protected in universities.

The Tribunal also considered the University’s Statement on Academic Freedom (dated December 14, 1994; a new statement was approved in 2012) and also considered the McMaster University Faculty Association (MUFA) Newsletter (September 2008) and the testimony of some non-party faculty to help inform its views. The MUFA article addressed the issue of academic freedom in the context of academic administration, explored its limitations and acknowledged the challenges when balancing rights. The Tribunal has specifically relied upon the following excerpt when considering and assessing certain allegations especially in Complaint “A”:

“The issue is not black and white. MUFA and CAUT [Canadian Association of University Teachers] have a mandate to protect academic freedom. On the other hand, a smoothly functioning administration needs some constraint on public opposition to agreed administration initiatives by those who lost out in the internal debate...”

Therefore, the Tribunal was well aware of the importance of academic freedom and considered many different perspectives. Importantly, the Tribunal’s decision does not inhibit or dictate terms of normal social contact between individuals within the University. Similarly, the decision does not preclude difficult performance, managerial and philosophical discussions between administration and faculty/staff. The Tribunal did not accept allegations that it found, when viewed objectively, to be trivial or not reflective of behaviours intended to be prohibited by the Policy or in the jurisprudence. The decision also importantly does not preclude even severe criticism by faculty of individuals being assessed under tenure/permanence and promotion and/or conversion processes unless unlawful conduct corrupts, taints, interferes or compromises these valued processes. However, rights are not absolute and competing rights needed to be balanced by the Tribunal. In the Tribunal’s decision, the wrongdoing that was unacceptable was coercion, intimidation or academic interactions adversely affecting faculty or staff contrary to the Policy or the law without lawful justification.
As such, the Tribunal recognized that comment or conduct which was crude or in bad
taste is not necessarily sufficient to constitute harassment or discrimination. Community
standards vary and we live in a democratic society which permits free speech. Context was often
important. Language that was previously regarded as obscene and vulgar is today often accepted
as common or even normal social interaction. A general prohibition of statements or crude
conduct is dangerous. Censorship was a concern. What constitutes unacceptable language in
contemporary society, never mind a university setting, was challenging to define. What is
subjectively offensive to one person may be acceptable to others.

In a civilized society, and especially at a university which leads and upholds the virtues
of freedom of expression, there can be vigorous debate and high standards without unlawful
intimidation, belittling, bullying, and insults. As a result, the Tribunal was satisfied that the
Policy does not inhibit free speech and accommodates academic freedom and freedom of speech
values. However, free speech does not include the right to slander or harass others contrary to
the law generally and/or University Policy without consequence. For example, language which
is in common usage is no longer acceptable when it results in discrimination or harassment
proscribed by statutes such as the *Occupational Health and Safety Act* and the *Human Rights Code*. If someone chooses to engage in vexatious conduct or comment, they do so at the risk of
being held accountable if it meets the legal test for harassment and discrimination. University
members must abide by the law including human rights principles. Furthermore, academic
freedom cannot and should not be used as a shield for inappropriate, unprofessional and/or
harassing behavior whether by individuals or groups.

The Tribunal identified breaches of the Policy by individual Respondents in Complaint
“B”. To reach these various conclusions, the Tribunal had to address the propriety of comment
or conduct in different settings. The Tribunal required objective and reliable evidence
establishing intimidation, harassment and/or reprisal, given its concern for academic freedom
and freedom of speech. Where and how the disputed conduct or comment arose was often
critical to the Tribunal’s findings when balancing Policy requirements, while protecting the
principles of freedom of speech and academic freedom. For example, comment or conduct
during open Faculty or other meetings was more easily assessed and principles of academic
freedom provided faculty with wide latitude to engage in vigorous debate. Absent a power
imbalance or objective vulnerability, the Tribunal did not consider harsh or critical debate and
dialogue as warranting any consideration of whether it was harassment unless objectively
egregious and offensive. It is generally accepted, that if the victim could reasonably have
expressed that the conduct or comment was unwelcome, they should have done so in a timely
manner absent vulnerability or reasonable justification. However, if the vexatious conduct or
comment persisted, was unwelcome, was made without reasonable cause or excuse and/or
expressed covertly, it could be identified as a breach of the Policy where it created a negative and
hostile working environment for a Complainant.

The Tribunal had especially difficult challenges determining whether University
tenure/permanence and promotion processes were being utilized in good faith or whether
otherwise legitimate questions were raised or conduct undertaken to harass tenure/permanence
and promotion candidates. As academic colleagues, the Tribunal values the rigorous nature of
the multi-staged evaluation, decision and appeal process afforded by the *McMaster University*
Revised Policy And Regulations With Respect to Academic Appointment, Tenure And Promotion (Tenure and Promotion Policy). The University’s processes serve important objectives, including ensuring the quality, quantity and impact of contributions of faculty members; permitting evaluation of faculty by those most familiar with research disciplines, maintaining Faculty and University-wide equity in expectations, and monitoring; and adjusting to changing demands with respect to workload, expectations and academic success. However, faculty member behaviours, especially with respect to the conversion process and the tenure/permanence and promotion process at the University, must be transparent and bona fide. Processes must be principled, not tainted by vindictive considerations and must be transparent if their integrity are to be maintained.

In Complaint “B”, the evidence established the existence of a group of tenured faculty (the Group), which included individual Respondents in Complaint “B” and non-party faculty members. The Group’s email communications were circulated to select faculty perceived to be likeminded and trustworthy. The Group’s communications with each other on McMaster University’s email system did not include any member of the University’s senior administration. Individual Respondents in Complaint “B” were found in some cases to have engaged in conduct which corrupted, tainted, interfered with, and compromised the integrity of the tenure/permanence and promotion and conversion processes in the Faculty. For the reasons identified in the decision, some of the overt and covert activities of some of the individual Respondents in Complaint “B” and the conduct of other members of the Group who were not parties in this hearing resulted in the poisonous and hostile work environment. Poisoned workplace behaviours affecting tenure/permanence and promotion are a grave assault on the basic foundation of academic freedom at McMaster University, in the Tribunal’s view. In the Tribunal’s view, the concerns identified are properly prohibited by the Policy and are contrary to the University’s fundamental values and policies.

The Tribunal’s findings against the individual Respondents in Complaint “B” in no way diminished the importance of academic freedom and freedom of speech and do not indicate a systemic problem or weakness in the policies governing tenure/permanence and promotion at McMaster University. The Tribunal’s concern regarding some of these Complaints was not whether an individual was ultimately denied tenure/permanence, conversion, promotion and/or renewal; rather, the Tribunal’s focus was whether participants in the process were harassed or otherwise treated contrary to the Policy. The Tribunal did not have any concerns about vigorous debate and close scrutiny concerning standards of performance for teaching, service and research. However, the Tribunal found academic freedom was not an appropriate defence where the conduct or comment was covert and biased, and was found to have harassed individuals. We are confident the Tribunal’s decision has drawn the line appropriately and was based upon reliable evidence.

V. THE TRIBUNAL’S ANALYTICAL FRAMEWORK

As stated, the Tribunal remained mindful of the purposes of the Policy, the definition of harassment and the principles of academic freedom and freedom of speech. As summarized earlier, harassment is broadly defined in the jurisprudence. However, harassment is a concept
often dependent upon the individual facts. The alleged breaches took place over a significant period of time. Issues overlapped and context was important to understanding and assessing the conduct and motivations of the parties. Ultimately, the Tribunal had to be satisfied that harassment was established by viewing the reliable evidence objectively and in a manner consistent with the Policy’s definition, its Statement of Principles and as defined in the jurisprudence.

The Tribunal found direct harassment where the reliable evidence established engagement in a course of vexatious comment or conduct that was known, or ought reasonably to be known, to be unwelcome and which cannot be tolerated at the University. Isolated comment or conduct, which was not repeated, if sufficiently egregious, could also be evidence of harassment. In addition, adverse effect harassment or a poisoned work/academic environment was also alleged by the Complainants. A poisoned work/academic environment may or may not be more subtle than outright harassment but it is equally offensive. Adverse effect harassment is unacceptable under the Policy, its Statement of Principles and under the jurisprudence. An academic/work environment that was hostile, offensive or intimidating was not acceptable where the evidence established harassing conduct.

The three general scenarios identified below guided the Tribunal when we assessed the evidence to determine if it supported harassment findings. Under this analytical framework, the Tribunal respected the principles of academic freedom and freedom of speech when identifying conduct which crossed the line and breached the Policy, especially in Complaint “B”. As a result, the Tribunal, in some circumstances, concluded that processes were tainted by harassment or manipulated to further personal vendettas and the Group’s interests rather than to serve the interests of the University community. However, in many cases we have also judged that the behavior of the individual Respondents in both Complaints did not constitute direct harassment or reprisal contrary to the Policy. Therefore, while conduct and comment, in some cases, were found to constitute direct harassment and reprisal, the Tribunal recognized that similar comment or conduct in other contexts or between individuals in another situation (i.e. no power imbalance, no vulnerable situation) may be permitted and not breach the Policy.

First, the Tribunal focused upon whether the evidence confirmed the necessary power imbalance between the individuals. When the preconditions for harassment under the Policy and jurisprudence were supported by reliable evidence, a breach was identified if the isolated or repeated vexatious conduct or comment rose to the level where a reasonable person would objectively conclude that a vulnerable individual had been harassed, subjected to an unwelcome hostile work environment, or otherwise dealt with contrary to the Policy. In this scenario, the Tribunal was not likely convinced that academic freedom and freedom of speech provided reasonable cause or excuse for the vexatious conduct or comment.

Second, where the conduct or comment in question occurred between faculty members, the threshold required to constitute harassment or breach of the Policy was elevated if there was no objective or apparent vulnerability or power imbalance. In these situations, the Tribunal accepted that principles of academic freedom and freedom of speech could be relied upon to establish reasonable cause or excuse even if the conduct was considered vexatious. In that regard, vigorous debate and disagreement is valued in a university setting. As such, the conduct
or comment may perhaps even be vexatious in some circumstances without breaching the Policy. The Tribunal balanced these various factors, recognizing that these rights and considerations are not absolute. Furthermore, the Tribunal required the Complainants to have identified or indicated that the behaviour was unwelcome, unless it was unreasonable to do so in the circumstances. Without this requirement, even vexatious conduct or comment may not have crossed the line if it were an isolated incident. However, said conduct could rise to the level of direct harassment if it was persistent, repetitive or if it resulted in a poisoned academic/work environment for a Complainant which could not be accepted under the Policy.

Third, the Tribunal also addressed conduct between faculty members where the evidence established that a Complainant was vulnerable, particularly while being reviewed under established University tenure/permanence and promotion or conversion processes. The Policy affirms that all “persons entrusted with authority by the University have a particular obligation to ensure that there is no misuse of that authority in any action or relationship”. The Policy and the _Faculty Code of Conduct_ confirm the expectations for faculty. Tenured faculty should reasonably be expected to act in good faith, reflecting the privileges acquired with, and the importance of tenure in an academic setting. The Tribunal considered the Policy’s Statement of Principles to determine whether it was more likely than not that certain decisions were undertaken in a manner which was vexatious and without reasonable cause or excuse, even if, on the surface, the conduct may appear to be legitimate. If the conduct was persistent, even if it was not obviously vexatious, whether in isolation or cumulatively, then a breach of the Policy could be found.

Furthermore, if conduct could negatively impact employment, including job security and promotion, or if it created a hostile work environment, it could result in the Policy being breached especially if the Tribunal found processes were manipulated to serve personal agendas or where there was a failure to act in good faith. A high level of deference to the principles of academic freedom and freedom of speech was determined not to be appropriate if the comment or conduct did not reflect or even contradicted University values as confirmed by the Policy. In that regard, extensive evidence of private remarks within a secretive group or individual and/or group vindictive strategies or retribution were relied upon. Reasonable direct or adverse inferences which established motive or explained decisions were also relied upon if supported by reliable evidence. Therefore, principles of academic freedom and freedom of speech were given less weight if the vexatious comment or conduct was not open and it affected a complainant’s reasonable expectations in employment and if University processes for tenure/permanence and promotion or conversion processes were tainted.

The Tribunal was requested by all of the Complainants to make findings that they were subjected to a poisoned work/academic environment. The Tribunal concluded that a poisonous work/academic environment did indeed exist. The challenge for the Tribunal was to identify which parties had breached the Policy and to determine the conduct for which specific individuals, the University, or both should be held accountable, especially if harassment was found to be indirect rather than direct. The Tribunal found breaches of the Policy in instances where comment or conduct “resulted in” a poisoned work/academic environment whether or not a poisoned environment already existed. This is distinct from the Tribunal’s findings where conduct was found to have “contributed to” or “resulted from” a poisoned work/academic
environment which did not necessarily lead the Tribunal to find that the Policy was breached by an individual.

VI. SUMMARY OF FINDINGS

A) Breaches Of The Tribunal’s Orders

The Policy and the Statutory Powers Procedure Act established the procedures governing this hearing. A number of Procedural Orders were issued before and during the hearing. Furthermore, prior to the commencement of the hearing the parties agreed to the procedural rules for conducting the hearing. The in-camera proceedings recognized that the work environment continued to be unacceptable to the parties. The Confidentiality Notice issued by the Chair and the Tribunal’s subsequent directions and Orders imposed strict confidentiality expectations on the parties. The confidentiality directives were issued to protect personal and confidential information for all parties, to ensure the integrity of the hearing and to respond to concerns that were raised about intimidation and reprisal.

Section 7 of the Policy provides:

“The University prohibits reprisal or threats of reprisal against any member of the University community who makes use of this policy or participates in proceedings held under its jurisdiction. Any individual or body found to be making such reprisals or threats will be subject to disciplinary action.

A breach of the Confidentiality Notice was identified as a breach of the Policy. Any witness, potential or otherwise, was to be provided with the Confidentiality Notice before the commencement of any interview or questioning by a party or his/her representative. All witnesses were directed to maintain the confidentiality of the Complaints. Furthermore, all information, documents or proceedings related to the Complaints and their contents or any details relating to the Complaints were not to be disclosed to any person except to a party (or his/her advisor) or to a witness’ own advisor provided he/she was made aware of the Confidentiality Notice.

The Confidentiality Notice expressly provided that “all parties and witnesses are required to refrain from engaging in any negative behaviour, reprisal or retaliation against or towards any other individual who may have participated, has participated or may participate in such proceeding. Engaging in any reprisal or retaliation against any individual(s) involved in the process is a breach of the University’s applicable policies and in violation of the rules under which the hearing shall proceed and may be subject to disciplinary action.” (emphasis added)

The integrity of the adjudicative process depended on the honest participation of both party and non-party witnesses, many of whom expressed considerable anxiety and reluctance about participating and raised fears of reprisal. The Tribunal found certain individuals breached
the Confidentiality Notice and/or the Tribunal’s Orders in addition to having been found to have breached the Policy for certain allegations raised in Complaint “B”.

For example, the Tribunal found one individual Respondent’s email (who was a Complainant in Complaint “A” and a Respondent in Complaint “B”) breached the Tribunal’s Order because it was negative behaviour, reprisal and retaliation against a non-party who provided a document entered as an exhibit at the hearing.

Furthermore, the Tribunal found that another individual Respondent in Complaint “B” breached the Confidentiality Notice and engaged in negative behaviour, reprisal and retaliation against a non-party witness who had filed an affidavit. This individual Respondent asked a witness to remove truthful portions of his affidavit and attempted to dissuade the witness and tamper with the evidence. The Tribunal accepted the witness’ evidence that he felt the request to alter his affidavit and the subsequent email exchange had “an intonation of intimidation” and contributed to his own feelings of being isolated, ridiculed, mocked and ostracized. The individual Respondent’s subsequent email reply, after the witness refused to comply, amounted to a reprisal prohibited by the Policy. The email alienated and intimidated a fellow faculty member, and further contributed to the poisoned work environment. The individual Respondent also disclosed the evidence to a witness after the hearings commenced. This discussion with the witness breached the Exclusion of Witness Order and also breached the Confidentiality Notice.

B) The Complaints

The Tribunal received evidence in support of numerous allegations of direct, individual and adverse effect harassment. The Tribunal found that the evidence established harassment in multiple instances and a continuing poisoned work/academic environment for a number of years, which breached the Policy. The dispute at its core related to who was responsible for, and who were the victims of, this poisoned work/academic environment. The academic/work environment had become increasingly toxic. Within the Group opposing the Senior Administrator, there generally appears to have been both active and passive participants. The Tribunal had no concerns with faculty having issues with a senior administrator. However, some of the Complainants in Complaint “A” sought vindication or revenge for perceived slights and/or initiated active strategies to take control away from the Senior Administrator and perceived supporters. The Tribunal determined that some comment and/or conduct crossed the line and thereby violated the Policy for the reasons generally outlined in the public report but which is only addressed in detail in the Tribunal’s Breach Decision.

It is also important to note, that after the commencement of the hearings, it was revealed that many relevant documents had not been disclosed by the Complainants in Complaint “A” and/or individual Respondents in Complaint “B”, despite the pre-hearing production orders. Much of the late disclosure was related to the formation and subsequent actions of the Group, which provided context for, and led to, some of the breaches of Policy being established. Furthermore, the Tribunal found it troubling that no member of the Group who testified appeared to have raised concerns about the serious allegations and disparaging remarks being communicated within the Group or asked to be removed from the Group email list. Even with the advantage of hindsight and access to documents through disclosure, many Group members...
were reluctant to indicate that the communications and conduct by members of the Group had been inappropriate. Rather, the Tribunal observed a repeated indifference by many of the witnesses from the Group (both party and non-party) concerning the impact that strategies and comments shared privately had, or might have had, on the University, the integrity of the University’s tenure/permanence and promotion processes, or on an individual’s conditions of employment.

C) Complaint “A” (Individual Liability)

Briefly, no Policy breaches on the part of the Senior Administrator were identified by the Tribunal. As such, the complaints against the Senior Administrator were dismissed. The Tribunal determined that the actions of the Complainants, as well as some ineffective actions on the part of the University contributed to the poisoned workplace.

The Tribunal was generally satisfied that the Senior Administrator attempted to carry out the position’s responsibility in good faith during a time in which substantial change to the academic unit was being advanced by the central administration. There was substantial resistance on the part of many faculty members, who came to form the Group, including some of the Complainants. The Tribunal accepted that the Group, or at least some members of the Group, were generally participating in a valid exercise of academic freedom and freedom of speech through their associations, publicly expressed intentions and actions. The Tribunal accepted that vigorous opposition and extensive consultation are encouraged and permitted in the University structure. However, the subsequent abuse of certain processes, conduct and comment disparaging or negatively affecting the security of other faculty members in vulnerable positions, and undermining tenure/permanence and promotion processes, are unacceptable and went beyond the scope of free speech and protected association in a university environment for the reasons specifically addressed in Complaint “B”.

D) Complaint “B” (Individual Liability)

The Tribunal found that each individual Respondent, albeit with varying levels of responsibility, engaged in comment and/or conduct which led to findings that the Policy was breached. The most serious violations of the Policy involved multiple victims and were committed by four senior tenured faculty members (one of whom held an administrative position at the time). These faculty members engaged in repeated breaches of the Policy made possible by the imbalance of power in their favour and which compromised the important responsibilities entrusted to them. The actions of two other individual Respondents were found to be less serious in nature, were narrower in scope and impact and were not linked to the same covert and pre-meditated conduct established on the evidence for the other individuals.

The Tribunal determined the primary responsibility for the poisoned work/academic environment lay with the individual Respondents in Complaint “B” and with other senior, tenured faculty in the Faculty who, as members of the Group, individually or collectively engaged in the unacceptable conduct identified in the decision. The Tribunal also determined that policies and procedures were being misused by the individual Respondents in Complaint “B” to hide and engage in inappropriate conduct. These individuals were trusted to assess and determine
the career progression and employment conditions of the Complainants. The Group emails provided context and were relied upon by the Tribunal when assessing intent and whether the conduct of some of the individual Respondents who participated in Tenure and Promotion decisions were bona fide or tainted by intent to harass. The evidence indicated that the Complaint “B” individual Respondents, within the Group, had expressed and received without contradiction or correction, negative and often grossly inaccurate assessments and characterizations of the Complainants, and subsequently failed to declare their bias prior to participating in meetings to determine the career progress of those same individuals.

As a result, the many instances of inappropriate conduct the Tribunal considered were not always overt or communicated verbally, or in writing, nor was it always known by the Complainants. Although the Complainants often felt they were being treated inappropriately, their lack of specific knowledge or proof of ulterior motives meant that their concerns were not easily articulated and/or would not be reasonably apparent to a third party. When a candidate raised concerns with a third party about difficult questions posed, objectively within the ambit of a committee’s scholarly mandate, it was reasonable for third parties to presume good faith on the part of faculty and not suspect malicious intent or ulterior motives. For example, aggressive questions and scrutiny during tenure/permanence and promotion committee processes may be proper and can result in a candidate feeling uncomfortable or subjectively harassed without the Policy being breached. Therefore, such treatment was not always clearly or easily identified as being the result of harassing conduct or comment, rather than critical peer review.

The Tribunal would not have been concerned if accused faculty had only, in good faith, engaged in pointed criticism to protect high standards for renewal, promotion and ultimately tenure/permanence. Legitimate academic and professional questions and concerns can be critical and were raised under the tenure/permanence and promotion processes. The Tribunal accepts there were legitimate concerns with the dossiers presented by certain candidates. Certain cases could objectively be considered marginal and of course denied. However, the Policy and its objectives required the Tribunal to also ensure University processes are not tainted by personal and group vendettas or vindictiveness and by ulterior motives in breach of the Policy. The Tribunal concluded that in the “unique” circumstances of the evidence before it, in fact, the line was crossed where it has been determined that an individual Respondent breached the Policy. Therefore, even legitimate questions or concerns, in the exceptional circumstances of this case, can be found to constitute harassment if the manner in which those concerns and questions are presented breaches the Policy or the law.

The Tribunal found that the tenured faculty, who were individual Respondents in Complaint “B”, engaged in conduct tainted by bias with respect to their interactions with perceived supporters of the Senior Administrator. Individuals had a right to be assessed and judged on the merits of their work. Conduct in accordance with the highest standards reflecting the Policy’s values is not an unreasonable expectation. Faculties are meant to be collegial and respectful of dissenting views. However, the Policy was breached when individuals were harassed, intimidated or retaliated against because of their perceived association with the Senior Administrator or, for example, because they were not perceived as “Mac guys” as described by one of the individual Respondent’s testimony. Faculty should be respectful of disparate views and perspectives, and not permit their personal biases to taint or undermine important
employment conditions. It is unacceptable for individuals to engage in comment or conduct which is harassing, intimidating and retaliatory against individual(s) because they are not like minded, or are perceived thus, or as a method of retaliating against another person with whom they are thought to be allied.

Tenure offers significant protections to our colleagues to express vigorous dissent. A dispute with a Senior Administrator in which opposition is expressed through the exercise of academic freedom is not a concern for the Tribunal. However, comments or conduct which harass, intimidate and retaliate against perceived supporters of a Senior Administrator who are themselves in much more vulnerable positions with respect to employment, tenure/permanence and promotion are unacceptable. As a result, the Tribunal concluded that, on balance, processes undertaken in some instances were motivated by improper considerations, which breached the Policy. The Tribunal concluded that it was more likely than not that conduct was motivated in certain instances by intentions to harass, intimidate or commit reprisals. Certain Respondents violated the trust placed in them as faculty members to protect the sanctity of the tenure/permanence and promotion process. These sacrosanct processes integral in a University must not be tainted by improper motives or irrelevant personal agendas or be used as vehicles for harassment and reprisal. In fact, it is most important in cases that are marginal or less definitive in terms of the decision to grant or deny tenure, permanence and/or promotion, that the tenure/permanence and promotion processes involve no reasonable apprehension of bias.

Processes rely upon the good faith of the participants. Processes integral to the University and affecting others were misused or tainted by individuals who sought to further their own agendas and/or to seek retribution for what they perceived to be injustices. The resultant conduct and collateral damage to colleagues in vulnerable positions poisoned the academic/work environment. A respectful academic/work environment could not be achieved when behaviour identified in the decision persisted unbeknownst to the University. Such conduct was covert and insidious and would not be reasonably known by the University. The Tribunal, the University and the individual Complainants in Complaint “B” did not know about the scope of the activities of the Group. The scope of these activities was not revealed in the pre-hearing disclosure of documents. A non-party’s inadvertent email to a faculty member who was not a member of the Group led to additional documents being identified after the hearing had commenced.

The Tribunal was particularly concerned by the “ends justify the means” mentality exhibited and confirmed by the testimony of persons who were part of the Group. The indifference to, and at times reckless disregard for, facts was generally acceptable to the Group if the goals and objectives of the Group and its agenda were strengthened. Information was shared with apparently little concern about accuracy or personal impact. The Tribunal was satisfied the individual Respondents all had a common goal of “taking back” their Faculty from persons they did not view to be “Mac guys”. The Group effectively declared “war” as evidenced by the communications and behaviours of certain members of the Group. Ensuring that perceived supporters of the Senior Administrator would not feel welcomed or progress in their careers at the University became an acceptable strategy without any evidence of dissent from members of the Group, who remained silent or appeared to acquiescence to the Group. The Complainants
became victims of harassment because of the individual Respondents’ dissatisfaction with the Senior Administrator.

Discrimination allegations were also raised by the Complainants in Complaint “B”. The Tribunal was not satisfied that any discrimination allegations met the Policy or statutory definition. In any event, if the evidence established a breach of the Policy, it was because the Tribunal was satisfied that harassment and reprisal principles as defined by the Policy applied.

E) The Counter-Complaint (Individual Liability)

A Counter-Complaint against one of the Complainants in Complaint “B” by an individual Respondent was dismissed. The Tribunal further found that the Counter-Complaint breached the policy because it was determined to be retaliatory and vexatious.

F) University Responsibility

The Tribunal did not find any specific conduct supported a claim of direct harassment or malicious behaviour by the University or on the part of any person within the “directing mind” of the University’s Administration. In the Tribunal’s view, the University reacted to the alleged harassment as issues reasonably became known and understood. Significant steps were taken on the part of the University to address isolated events as they came to light. The Tribunal was satisfied that the University did not know nor could it reasonably have known the full extent or intent of the activities of the Group or specific individual participants of the Group, nor the full scope of the effect on some of the Complainants in Complaint “B”. As stated, it was only through the disclosure of the Group’s email, inadvertently sent to a non-Group faculty member, that the Group’s activities were discovered well after the hearing commenced.

For the reasons outlined, the Tribunal found the University must accept some responsibility for the continuation of the unacceptable workplace environment despite the University’s lack of specific knowledge concerning the full nature and extent of the harassing conduct by the individual Respondents in Complaint “B”. Furthermore, the Tribunal found that some of the University’s policies were not effectively mobilized in a timely fashion and, as a result, issues festered. Manageable issues and differences among faculty became insidious and destructive. Faculty divided into two distinct camps thereby aggravating and needlessly extending the poisoned work/academic environment. Regrettably, the formation of these camps fuelled mistrust. In that regard, the Tribunal identified conduct by the non-party senior university administrator towards one of the individual Complainants in Complaint “A” which contributed to the poisoned work/academic environment and breached the Policy.

Appropriate processes existed and were available. However, implementation proved to be challenging for the reasons identified in the Breach Decision and certain actions and decisions made under the Policy may have exacerbated problems. The Tribunal identified issues during the process which were evident with the benefit of hindsight. In the Tribunal’s view, the decision to group Complainants in Complaint “A” exacerbated the poisoned workplace by emphasizing divisions and created unnecessary barriers to resolution. Small and manageable issues became subsumed within larger agendas and certain processes utilized to respond to
complaints were ineffective. There are clearly areas for improvement, including training and awareness of the relevant policies, mentoring of managers and timely action on complaints, transparent and equitable access to advice, effective mediation and enforcement against reprisals in the workplace. These concerns were addressed by the Tribunal in our Remedy Decision.

VII. REMEDY: RECOMMENDATIONS, SANCTIONS AND REMEDIAL ORDERS

The Tribunal exercised its remedial obligations to address the serious and multiple breach findings in our Breach Decision. The Tribunal considered the Policy and the remedy principles established in the jurisprudence and the parties’ written submissions. The Tribunal assessed the sanctions for each individual after considering the applicable evidence and relying upon the findings in the Breach Decision. The remedies identified by the Tribunal needed to reflect the serious misconduct, be corrective and were also imposed for purposes of reasonable deterrence. Section 73 of the Policy is clear that the Tribunal was required to provide remedies “necessary to guarantee that behaviour is not repeated.” Furthermore, the Tribunal needed to be satisfied that the sanctions would allow the poisonous academic and work environment to be remedied. In the Tribunal’s view, this could only be achieved if certain individuals are required to be absent from the University for significant periods of time.

In the submissions, a reference was made to the Mount Saint Vincent University v. Mount Saint Vincent University case that references a University of Saskatchewan case (unreported) which the Tribunal felt was an appropriate starting point when assessing removal. The Court addressed an appropriate threshold for dismissal at paragraph 91:

“To justify the dismissal of a tenured academic, the university must prove gross misconduct which shows a person to be unsustainable for his or her academic role or it must be proven that he or she is manifestly no longer pursuing the goals of the university as demonstrated by gross misconduct, incompetence, or persistent failure to discharge academic responsibilities.”

The serious and multiple findings of misconduct against four of the six individual Respondents in Complaint “B” met the threshold identified as grounds for dismissal as defined in the excerpt from the University of Saskatchewan case and the threshold for the Tribunal to consider a removal recommendation under the McMaster University Revised Policy And Regulations With Respect to Academic Appointment, Tenure And Promotion (Tenure and Promotion Policy).

The impact of the Occupational Health and Safety Act amendments under Bill 168 and the University’s duty to protect employees from workplace harassment and the objectives of the Policy were amongst the primary remedial considerations. Acceptable workplace conditions and behaviours are now statutorily established with the passage of Bill 168. These statutory requirements when considered in conjunction with the Policy supported significant sanctions as well as termination in appropriate circumstances. Attempts to bully, intimidate and to harass other employees have no place at work, for all the reasons set out in the Breach Decision which made detailed findings. Harassment is demeaning to human dignity and is unacceptable in a
healthy work environment where scholarly pursuits may flourish. Harassment is incompatible with standards of professional ethics and with behaviour appropriate to an institution of higher learning. The Policy confirms proscribed behaviour is unacceptable against any member of the University community and strives to create an environment free from such behaviour.

As stated, the serious and multiple findings of misconduct met the threshold in the jurisprudence identified as grounds for dismissal of an employee or in the case of a faculty member, permanent removal. The most egregious misconduct involved the unlawful and self-serving interference with tenure/permanence and promotion and conversion processes and various breaches of the Tribunal’s orders. Established processes integral to the University community were corrupted, which has had serious negative impacts upon the Faculty and the University. The seriousness of the breaches and their impact upon colleagues and the integrity of the University’s processes cannot be overstated. Some individual Respondents in Complaint “B”, who were tenured faculty, engaged in serious misconduct which tainted, interfered with, and compromised the integrity of tenure/permanence and promotion and conversion processes. As such, certain tenured faculty abused fundamental privileges and the responsibilities enjoyed by and entrusted to them.

The Tribunal’s findings supported the conclusion that the employment relationship had been seriously undermined. The more difficult issue was whether the employment relationship had been irreparably damaged. The individual Respondents’ conduct could not generally be characterized as a momentary flare-up given the multiple incidents and the chosen course of conduct. Although not always premeditated, their conduct was often deliberate and willful. 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) did not weigh favourably. The evidence and submissions indicated that some individuals had not come to grips with the seriousness, impact and effect of their misconduct, which did not bode well for the potential to rehabilitate their unacceptable behaviour. The Tribunal’s challenge was whether permanent removal of some individual Respondents was the only remedy which would be reasonable and necessary to address the poisoned work/academic environment.

The Tribunal was also concerned that the presence of certain individuals in the workplace precluded true reconciliation and an environment where all faculty and staff including the Complainants can reasonably function in a workplace as required under the Policy. Permanent removal was a remedy seriously considered for some of the individuals. In the end, it was not determined to be necessary. Delays in the processes which were the responsibility of the University, in hindsight also contributed to the unacceptable working environment along with certain decisions by the non-party senior administrator affecting one of the Complainants in Complaint “A” who was also an individual Respondent in Complaint “B”. The Tribunal stresses, however, that these mitigating considerations were neither the cause of, nor an excuse for, the misconduct by the individuals who the Tribunal determined should be sanctioned. In these circumstances, while removal may have otherwise been appropriate for the Tribunal to recommend for certain individuals, it decided not to do so. Instead, the Tribunal identified various lengthy suspensions and other sanctions to address the serious misconduct by the
individual Respondents in Complaint “B”, which allowed the Tribunal to fulfill its obligations under the Policy.

Therefore, to summarize, the Tribunal decided against permanent removal, believing the recommended remedies and the individual sanctions ordered addressed the serious misconduct and will remedy behaviour in the future. Furthermore, the Tribunal’s recommended remedies responded to the legitimate and reasonable academic expectations and employment conditions of the Complainants in Complaint “B”. Suspensions were required to permit the Complainants to progress in their careers without risk of further adverse influence. The remedies were also required to protect the integrity of the University’s policies and procedures and deter conduct which had corrupted and tainted the integrity of fundamental processes valued by faculty.

The Tribunal, *inter alia* recommended and/or ordered the following:

**A) Individual Sanctions**

(a) Recommended lengthy suspensions without pay, benefits, privileges or access to the University’s premises during the period of their suspension for three Respondents;

(b) Recommended reduced, yet still lengthy suspensions for two other Respondents without pay, benefits, privileges or access to the University’s premises during the suspension;

The Tribunal, *inter alia* ordered the following:

(c) The sixth Respondent received a formal written reprimand and the Tribunal’s decisions will be maintained on the individual’s discipline record for five years;

(d) For all of the above Respondents, mandatory Sensitivity, Harassment and Conflict Resolution Training within the next 90 days or upon a suspended faculty member’s return;

(e) Immediate removal from positions of authority where the individuals could potentially affect terms and conditions of the employment of anyone in the Faculty; individuals were also prohibited from holding any such position for a minimum of five years;

(f) That the Tribunal’s breach and Remedy Decisions in their entirety, as well as exhibits, can be released to a subsequent tribunal (internal or external) or Court, should an individual attempt to re-litigate or challenge the Tribunal’s decision in another forum.

These individual sanctions were required to achieve general deterrence, correct behaviours and most importantly, guarantee a reasonable prospect for the Faculty to achieve a safe, respectful and professional work/academic environment. The absence of these faculty members through suspensions from the University and the restricted participation in the University community was required because of the continued vulnerability of certain Complainants and due to the poisoned work/academic environment. As a result of these sanctions, persons who have breached the Policy will not be able to directly or, perhaps as importantly, indirectly influence the employment and career aspirations of individuals for a reasonable timeframe necessary for persons to progress in their career. If behaviours are not
corrected, the Tribunal would anticipate that any future Tribunal would likely find that removal proceedings would be the only sanction which reasonably addresses and is required to correct the serious misconduct and deter others from engaging in similar misconduct.

B) Additional Recommendation And Other Required Orders

Additional recommendations and orders were identified by the Tribunal as required to address the remaining issues identified in the parties’ submissions. The Tribunal remained concerned that compliance with the Policy was not attainable without sufficient knowledge and understanding of the complex series of events which have unfolded, despite the individual sanctions. The Tribunal had to balance various competing rights and expectations. For example, the Tribunal determined that public apologies were not a remedy which would be ordered for a number of reasons including the in-camera nature of the proceedings and the restrictions imposed by the Policy on the public report. However, additional recommendations and orders were determined by the Tribunal as necessary to guarantee that the behaviour was not repeated.

Individuals within the poisoned work/academic environment who were affected by the breaches of the Policy must fully understand the complex issues which arose. Individuals affected by the poisoned work/academic environment must fully understand what transpired and the cause. Remedy the poisoned work/academic environment necessarily relies upon the good faith of the various stakeholders who can facilitate solutions. The Breach Decision is an important remedial and learning tool which can be used for training and should also be used for other remedial purposes as addressed below. The Tribunal recognized that remedial success is dependent upon the good faith participation of stakeholders within the University community. Persons in positions of authority, faculty and staff, as well as MUFA and the employee union representatives all have important roles and responsibilities if the misconduct is to be properly understood, corrected and not repeated.

Therefore, the Tribunal determined that the scope and seriousness of the individual conduct would be communicated privately in confidence and with conditions to persons responsible for and affected by the poisoned work/academic environment. The public report will address certain expectations but it will not address the remedial needs required in the Tribunal’s view. As a result, the Tribunal has concluded that the decisions, or parts thereof, are required to be privately released, in confidence, with the Tribunal retaining jurisdiction if we are to guarantee that the behaviour is not repeated and if the poisoned work/academic environment is to be remedied. The Tribunal’s decisions, or parts thereof, can be made available for training and remedial purposes if an undertaking to maintain confidentiality is obtained from individuals on the terms ordered. Faculty and staff, University Administration, Human Rights and Equity Services, MUFA and other employee representatives have an interest and are stakeholders who can facilitate compliance with the Policy and the law if the issues are fully understood.

The Tribunal was obligated to recommend any remedy it deemed necessary or appropriate to guarantee the behaviour is not repeated and to remedy the poisoned workplace. In the Tribunal’s view, reliance upon the decisions as a counselling and learning tool and for the purpose of remedying the poisoned work/academic environment was necessary to “guarantee the behaviour is not repeated” and to ensure the public report was not misinterpreted. As such, the
Tribunal, in addition to the aforementioned recommendations and individual sanctions, also made a number of general orders (not all of which are identified in this public report) which were intended to facilitate the private exchange of information in confidence, which the Tribunal found was necessary, appropriate and required to address the Policy breaches and remedy the poisoned work/academic environment:

(a) The Tribunal’s Confidentiality Notice dated June 30, 2011, will continue in full force except as may be amended by the Tribunal.

(b) The University will provide mandatory training of the Policy to affected faculty and staff. Mandatory counselling will be provided for certain individuals with a MUFA representative present.

(c) The decisions, or parts thereof, can be provided to affected faculty members and staff, University Administration, HRES, MUFA or legal representatives for purposes of implementing training, education and remedial processes in the Faculty. Before being provided with the Tribunal’s decision(s), an individual will be:

(i) Made aware of the Tribunal’s Confidentiality Notice which remains in effect including the prohibition against reprisals;

(ii) Required to sign a Confidentiality Agreement;

(iii) Advised of the remedial purpose for which the decision(s) are being privately disclosed and that they are being utilized for training, education or counselling purposes;

(iv) Asked to undertake in writing that the private information in either decision, not otherwise available publicly, will not be shared or disclosed to persons not authorized to receive the decision(s);

(v) Advised the Tribunal has remained seized of issues arising from the implementation of the decision(s) or the Confidentiality Notice and that the Tribunal has the authority to remedy breaches of the Confidentiality Notice for anyone receiving the decision.

C) Remedies For The University Breaches

The University, as the employer, bears responsibility for the poisoned work/academic environment for the reasons set out in the Breach Decision. The University’s submissions identified remedies which appropriately recognized the University’s obligations under the Occupational Health and Safety Act and the Policy. Some of the orders issued by the Tribunal included:
(a) The University will commence a review of the Anti-Discrimination Policy (the “Policy”). The University Secretariat will support the University’s review process and will ensure that the resulting recommendations are presented to the University’s Senate and Board of Governors for approval. The mandate of any individual(s) retained to assist would be to provide recommendations, advice and assistance in support of the review. Any review will specifically consider the particular concerns identified in the Remedy Decision.

(b) The University will complete the review of the Policy within 12 months. The University will communicate the revised Policy to all faculty and staff after it has been reviewed and any revisions approved by the University’s governing bodies.

(c) The University and/or its Environmental & Occupational Health Support Services (EOHSS) will update existing training and continue to offer and promote violence and harassment prevention training to the entire University community.

(d) The University will ascertain if other relevant policies need to be reviewed given the Tribunal’s findings.

The Tribunal remains seized concerning any issues arising from the implementation of their decisions, recommendations, orders and sanctions as well as the disposition of outstanding motions.

Dated at Hamilton this 23rd day of September, 2013

Dr. Maureen MacDonald (Chair)
on behalf of the Tribunal comprised
of herself, Dr. Bonny Ibhawoh
and Dr. Lorraine York