The Labour Relations Board
Saskatchewan

DR. LUCINDA VANDERVORT, Applicant v. UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION and UNIVERSITY OF SASKATCHEWAN, Respondents

LRB File No. 102-95 & 047-99; April 1, 2003
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Leo Lancaster

For the Applicant:	Simon Renouf, Q.C.
For the Respondent Faculty Association:	Brian Scherman, Q.C.
For the Respondent Employer:	Catherine Sloan

Duty of fair representation – Arbitrary conduct – Board finds that union insufficiently thorough in assessing quantum of potential damages should defamation grievance be successful – Board determines that insufficiency not constituting serious negligence or arbitrariness.

Duty of fair representation – Arbitrary conduct – Multiple grievances settled against employee's wishes – Board measures union's conduct against criteria established by courts and labour boards for fair representation – Board finds that union thoroughly investigated matters, obtained and acted on legal advice, made informed assessment of likelihood of success at arbitration, made serious efforts to obtain positive result for grievor and was not duplicitous in its treatment of grievances – Board dismisses application.

Duty of fair representation – Scope of duty – Board confirms that union may refuse to pursue grievance if position required to advance grievance at variance with preferred interpretation of collective agreement.

Duty of fair representation – Scope of duty – Board reviews approaches to extent of authority vested in unions to negotiate grievance settlements – Board confirms that authority significant but not unfettered – Board finds that union did not exceed authority to negotiate settlements.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Part A – Background:

[1] These duty of fair representation applications involve the handling and settlement of several grievances by the University of Saskatchewan Faculty Association (the "Faculty Association") relating to Professor Lucinda Vandervort (the "Applicant").

The Applicant is employed as a professor at the College of Law at the University of Saskatchewan (the "University"). The issues under review span a period of time from May 1992 to August 1998.

[2] In LRB File No. 102-95, the Applicant claimed that the Faculty Association was unduly delaying referring two outstanding grievances to arbitration. The outstanding grievances included (1) the faculty rights grievance; and (2) the discrimination and academic freedom grievance. The Applicant also alleged that the Faculty Association's grievance committee acted in bad faith by not being candid in its communications with the Faculty Association executive and with her. She asserted that members of the grievance committee have interests conflicting with hers that rendered them unwilling to process her grievances. She also complained that Prof. Hamilton, a member of the grievance committee, treated her in an arrogant, rude and dismissive manner.

[3] In providing further particulars to her application, the Applicant amended it to include three other matters: (1) a grievance relating to overload pay; (2) a grievance relating to the denial of her promotion to full professor; and (3) a potential grievance relating to on-going incidents of alleged harassment against her in her workplace.

[4] In LRB File No. 047-99, the Applicant asserted that the Faculty Association had unilaterally resolved or withdrawn the grievances and potential grievances referred to in LRB File No. 102-95 (as amended) to her detriment and in violation of the duty of fair representation.

Part B – Facts:

[5] The applications cover a long period of time and involve many grievances. In this section, we will begin by describing the Applicant's employment history to give some background to the current applications. We will then review the details of each grievance or potential grievance and describe the manner in which the Faculty Association handled them.

[6] The factual matters pertaining to each grievance are not discrete and the description of all of the main events related to the grievance handling is complex

because of the number of grievances, the length of time they were outstanding, and the intervening proceedings that were brought to this Board early in the life of the grievances. Some duplication of facts is necessary to fully explain the circumstances of the case.

(i) The Applicant's employment history at the University of Saskatchewan

[7] The Applicant was appointed to the Faculty of Law at the Assistant Professor rank in July, 1982. She was refused promotion to the rank of Associate Professor in the 1984-85 term, and again in the 1985-86 term.

[8] In the 1986-87 term, the Applicant applied for promotion and tenure. Her applications were refused at the College level and she successfully appealed both decisions. She was granted tenure and was promoted to Associate Professor effective July 1, 1987.

[9] During this time, the Applicant contacted the Faculty Association and requested that it obtain a legal opinion relating to the application of the Canadian Charter of Rights and Freedoms to tenure and promotion hearings. The Applicant believed that the promotion and tenure processes at the University did not comply with Charter requirements or with basic standards of fairness.

[10] A legal opinion obtained by the Faculty Association at the time concluded that the Applicant's promotion hearing was conducted in a manner that violated the rules pertaining to fair hearings and could be challenged under the grievance and arbitration provisions. However, the Faculty Association did not file a grievance as it understood that the Applicant was abandoning her complaint. The Faculty Association also preferred to deal with the issue in negotiations with the University, as opposed to the grievance and arbitration process.

[11] In these proceedings, the Applicant asserts that the Faculty Association's failure to take action on her behalf in 1986 was partly responsible for the University's subsequent attempt to dismiss her and for subsequent denials of promotion.

[12] The Applicant was on leave from the College of Law during the academic years of 1988-89, 1989-90, and 1990-91. Dean Peter MacKinnon, as he then was, contacted the Applicant during her first year of leave to see if she would be willing to accept payment in exchange for her resignation. The Applicant refused the offer.

[13] In 1991, the Applicant received a significant research grant from the Social Sciences and Humanities Research Council of Canada ("SSHRC") covering a period of three years. She was eligible to be considered for promotion to full professor in May 1992 but, on Dean MacKinnon's advice, postponed her application to the fall of 1992.

[14] In April 1992, Dean MacKinnon began the process of having the Applicant dismissed from the University. He recommended her dismissal to the President of the University, Dr. George Ivany. On May 6, 1992, Dr. Ivany acted on the recommendation and notified the Applicant that he would be recommending her dismissal to the University's Board of Governors effective August 31, 1992. In the meantime, she was temporarily relieved of her duties in the College of Law. On May 7, 1992, Dean MacKinnon advised the Applicant in writing that she would be required to vacate her office in the College effective May 22, 1992.

[15] The Faculty Association filed a grievance under Article 31.5 of the collective agreement challenging the President's recommendation to dismiss the Applicant. Mr. Jeffrey Sack, Q.C. acted as counsel for the Faculty Association in the dismissal arbitration. Mr. I. Christie chaired the arbitration board (the "Christie Board") that heard the dismissal recommendation grievance over 21 days in the winter of 1992 and spring of 1993.

[16] The arbitration board ruled that the University did not have grounds for dismissing the Applicant and ordered her reinstatement effective June 1, 1993. In its final written award issued April 25, 1994, the arbitration board held at pp. 78-79:

> *Based on the facts as I have found and explained them here, I have decided that several of the grounds for the President's recommendation that Professor Lucinda Vandervort be dismissed are not established and that the others are established only in*

> *part. To the extent that they are established they do not constitute good and sufficient cause for dismissal, nor do they constitute good and sufficient cause for any lesser form of discipline except for the placing on her personal file of warnings and the findings in this "Determination" that she exercised poor judgment.*
>
> *The University will place this "Determination" on Professor Vandervort's personal file, and in respect of her failure to try seriously to get to Fredericton for the Laskin Moot competition and the scheduling of a make-up in the last two weeks of the term, may put there warnings that failures of similar nature in the future may have disciplinary consequences. She may also be counseled in writing not to schedule too many make-ups into the last part of the term and to consider more carefully the situation of students before personalizing class discussion as she did in B's case. In respect of all of these matters, this determination itself is the final word.*

[17] While the dismissal grievance is not the subject of the current applications, the circumstances surrounding the Dean's recommendation to dismiss the Applicant formed a large part of her grievances and complaints in relation to the matters under consideration in these applications.

(ii) Faculty rights grievance

[18] The Faculty Association filed a grievance at the time of the President's dismissal recommendation protesting the removal of the Applicant from her office at the College of Law. This grievance is described as the "faculty rights grievance" and was dated May 19, 1992.

[19] Unlike employees in most work places, a member of the Faculty Association does not have to be dismissed before challenging a recommendation of the President for dismissal through the grievance and arbitration provisions of the collective agreement. Article 31.5.14 of the 1992-1995 Collective Agreement between the University and the Faculty Association provides as follows:

> *Unless, and until the Arbitration Committee recommends that the employee be dismissed and the Board acts upon such recommendation from the President, the employee shall retain the employee's appointment at full salary. The employee may, however, at the President's discretion, be temporarily relieved of duties at any stage in the dismissal procedures.*

[20] In his notice to the Applicant of May 6, 1992 recommending her dismissal, President Ivany temporarily relieved the Applicant of her duties in the College of Law. On May 7, 1992, Dean MacKinnon gave the Applicant written notice that she was required to vacate her office in the College by noon on Friday, May 22, 1992.

[21] Prof. John McConnell, then senior grievance officer, took up the matter with President Ivany in a letter dated May 11, 1992. In his letter, Prof. McConnell argued that the Applicant should maintain her appointment and the rights inherent in it and should not be removed from her office and the supports related to it.

[22] On May 12, 1992, the Applicant attempted to attend a meeting of the Faculty Council of the College and was advised by the Dean that she would not be permitted to attend during the period of her suspension from duties.

[23] On May 13, 1992, Dean MacKinnon advised the Applicant that he had arranged office space for her in Kirk Hall so that she could carry on the work related to her SSHRC research grant. Mr. Brown, Faculty Association grievance officer, relayed the Applicant's concerns relating to the proposed move to Dr. K. Smith, Chair of the University grievance committee.

[24] On May 19, 1992, Prof. McConnell filed the faculty rights grievance on the Applicant's behalf alleging that she was being denied the rights inherent in her appointment. Prof. McConnell demanded a meeting with the University's grievance committee forthwith.

[25] The Applicant explained in a letter to the Faculty Association on May 20, 1992 the difficulties she would face if her office were relocated to Kirk Hall. She indicated that she required an office at the College of Law, as well as all ordinary services available to all faculty members in the College, to support her research and academic development. In particular, the Applicant objected to the inconvenience of being removed from the College's library resources and to the absence of clerical support, computer services and general research and professional communication. The Applicant provided a copy of her letter to Dean MacKinnon.

[26] On May 22, 1992 Prof. Arne Paus-Jenssen, then Chair of the Faculty Association, wrote President Ivany to protest the treatment of the Applicant. Prof. Paus-Jenssen indicated that the Faculty Association had advised the University grievance committee that the Applicant was prepared to move her office to Kirk Hall if some minimum requirements were met and when the office at Kirk Hall was ready.

[27] President Ivany responded by indicating that the University had attempted to address the Applicant's concerns regarding her move and invited the Faculty Association to discuss the matters further with Dr. Smith.

[28] Despite the Faculty Association's efforts to prevent it, the Applicant's office was relocated to Kirk Hall.

[29] On July 6, 1992, the Applicant sent a memo assessing the outstanding issues on the faculty rights grievance to the grievance committee. In this memo, the Applicant described the effect of having her office relocated to Kirk Hall. She identified clerical support, computer services, general research and professional communications, lack of access to collegial decision-making meetings, staff travel grants and professional expense allowances as being the current issues arising under the faculty rights grievance.

[30] During her time at Kirk Hall, the Applicant experienced difficulties with her computers and with the transfer of her telephone calls from the College of Law. Prof. Paus-Jenssen addressed some of these issues in a meeting with Dean MacKinnon on November 24, 1992 and obtained the Dean's commitment to ensure that the Applicant was treated properly with respect to telephone and message services. The University and the Faculty Association exchanged a number of letters concerning this issue, all with the goal of ensuring that the Applicant's incoming telephone calls were properly relayed to her new office.

[31] Prof. Hamilton testified that members of the grievance committee worked hard during this period to ensure that the Applicant had the office space and resources necessary to continue her research work on the SSHRC grant. He did recognize,

however, that the Applicant was removed from her office in the College of Law from May 22, 1992 to June 3, 1993, when the interim decision of the Christie Board reinstated the Applicant to her position.

[32] The faculty rights grievance was "put on hold" during the period of the Christie Board hearings. Prof. Hamilton testified that at the time of the Applicant's return to work, members of the grievance committee were concerned with how the Applicant would be re-integrated into the College of Law. There was some discussion of "bundling up" the two outstanding grievances and pressing forward with them, but the grievance committee was more concerned with ensuring that the Applicant's return to the College was successful for her.

[33] In May 1994 Prof. Paus-Jenssen wrote to Mr. Sack seeking his advice on whether the faculty rights grievance and the academic freedom and discrimination grievance should be pursued in light of the final arbitration decision, which was issued on April 25, 1994. Prof. Oles repeated this request in July 1994. Prof. Hamilton explained that the grievance committee wanted Mr. Sack to provide information on the grievances. Mr. Sack responded in August 1994 stating that the grievances had merit.

[34] Prof. Hamilton testified that members of the grievance committee were divided on whether to proceed with the two outstanding grievances based on their assessment of the merits of the grievances. The grievance committee arranged to conduct a proper intake interview with the Applicant concerning the two grievances, which in Prof. Hamilton's assessment had never occurred.

(iii) Academic freedom and discrimination grievance

[35] During the preparation for and arbitration of the dismissal grievance, Prof. Paus-Jenssen was chair of the Faculty Association and played a key role in instructing Mr. Sack, counsel for the Faculty Association, and in assisting the Applicant. During that time, the Applicant raised a number of issues with the grievance committee, including issues pertaining to academic freedom and discrimination. The Applicant, Prof. Paus-Jenssen and Mr. Sack discussed filing a grievance that would raise these issues. As a result, the "academic freedom and discrimination grievance" was filed on October 2, 1992 stating, in part, as follows:

> *Professor Vandervort has been discriminated against and denied academic freedom at the University of Saskatchewan College of Law. The denial of academic freedom has been ongoing since 1984 and has culminated in dismissal proceedings against Professor Vandervort, which are currently pending. We request that full remedial relief be granted to the Applicant.*

[36] The Faculty Association received assistance from Mr. Sack in relation to the wording of the grievance and filed it as a tactical step in the dismissal case to allow a broader base of evidence at the dismissal hearing than might otherwise have been allowed. The Faculty Association viewed the grievance as a step taken to defend against the recommendation to dismiss. It sought to have the academic freedom and discrimination grievance heard at the same time as the dismissal grievance but the Christie Board refused to hear both grievances at once. The Faculty Association was, however, allowed to bring forward the evidence in support of the grievance as part of its case at the dismissal hearing.

[37] The Christie Board canvassed most of the evidence relating to the issue of academic freedom and discrimination in the course of its lengthy hearing. Significant for the purposes of the academic freedom and discrimination grievance, Arbitrator Christie found that "there was no concerted or improperly motivated activity against Professor Vandervort" (p. 32, Christie Arbitration Award).

[38] Prof. Paus-Jenssen testified that the grievance was put on hold until Arbitrator Christie issued his written decision in April 1994. At that time, in response to the Applicant's inquiries as to the state of the two outstanding grievances, Prof. Paus-Jenssen wrote Mr. Sack asking his opinion on advancing the two outstanding grievances.

[39] Prof. Paus-Jenssen was then replaced by Prof. Eric Neufeld as Chair of the Faculty Association and his daily involvement in the Applicant's academic freedom and discrimination grievance ceased.

[40] Prof. Oles, then senior grievance officer, followed up on Prof. Paus-Jenssen's letter to Mr. Sack by letter dated July 7, 1994. He advised Mr. Sack that the

grievance committee had considered the two outstanding grievances and was of the opinion that both should now be withdrawn. He asked Mr. Sack for his views on the matter.

[41] As indicated above, Mr. Sack's opinion was received in August 1994. He was of the view that "Professor Vandervort has substantial grounds for proceeding with her grievances in this matter." He attached a document entitled "Summary of the Dean's Failure to Follow Proper Procedures" which had also been submitted to Arbitrator Christie.

[42] Mr. Sack pointed out the problem arising from the Christie Board's finding that there was no "improperly motivated activity" against the Applicant and that this finding would likely be binding on another arbitration board. However, he concluded that, even without a suggestion of improper motive, there remained the issue as to whether Dean MacKinnon's failure to follow proper procedures, as alleged, violated the Applicant's academic freedom. The Applicant was provided with a copy of Mr. Sack's opinion letter shortly after the Faculty Association received it. There was no discussion in the opinion letter regarding possible remedies for the alleged breach.

[43] At a meeting of the grievance committee on December 13, 1994, which we review in more detail below, Prof. Paus-Jenssen expressed his view that the academic freedom and discrimination grievance was worthwhile pursuing given the evidence at the dismissal hearing. The minutes noted that Prof. Paus-Jenssen had no suggestions regarding the issue of an appropriate remedy for the grievance.

[44] The Faculty Association also consulted its solicitor, Mr. Bill Craik, in the fall of 1994 to provide an opinion on the academic freedom grievance. Mr. Craik received a copy of Mr. Sack's opinion letter and followed up in late December 1994 with a request to Mr. Sack to identify the facts that he relied on in coming to his opinion. Mr. Sack responded by providing Mr. Craik with the "Summary of the Dean's Failure to Follow Proper Procedures" document.

[45] Mr. Craik was not satisfied with this response and asked to meet with Mr. Sack in Toronto which meeting occurred in early March 1995. Mr. Sack undertook to

provide Mr. Craik with a copy of the informal transcript of the evidence presented at the dismissal hearing. Mr. Sack advised Mr. Craik that the facts on which he relied to give his opinion on the two grievances were contained within the dismissal case and there was no new evidence on which he relied.

[46] Mr. Craik explained in testimony before the Board that he found it difficult to understand Mr. Sack's opinion on the academic freedom and discrimination grievance. He questioned the value of running a hearing on a grievance that had been filed as a defence to the dismissal arbitration. The dismissal arbitration was successful for the Applicant and a considerable amount of Faculty Association time and money had been spent examining the matters raised in the academic freedom and discrimination issues in the dismissal arbitration.

[47] The Faculty Association's remaining efforts pertaining to the academic freedom and discrimination grievance are interwoven with the other grievances and will be discussed together under the following subsection.

(iv) Promotion grievance

[48] When the Applicant was reinstated to her position in the College of Law on June 1, 1993, she was eligible to apply for promotion to full professor. She submitted her application to Dean MacKinnon on August 4, 1993.

[49] Some time during the fall of 1993, Prof. Hamilton met with the Applicant and counselled her against applying for promotion at that stage. He felt that she needed to re-establish confidence in her teaching skills and that she lacked adequate documentation of her teaching abilities. He made his comments based on his rather extensive experience in assisting other faculty members with promotion issues. The Applicant rejected Prof. Hamilton's advice and concluded that he was ill informed with respect to her teaching. This incident coloured the Applicant's dealings with Prof. Hamilton throughout.

[50] A committee of the Faculty of Law called the College Promotion Committee, chaired by Prof. Russ Buglass, heard the promotion application. Prof. Buglass advised the Applicant that the Committee had received material from Dean

MacKinnon that included letters that students had submitted to him for purposes that eventually gave rise to the recommendation to dismiss the Applicant. These materials were attached as Appendix A to Prof. Buglass's memorandum to the Applicant and are referred to throughout as "Appendix A."

[51] The Applicant objected to Appendix A being included in the materials before the College Promotion Committee, as the materials were the subject of examination and cross-examination before the Christie Board and were subject to a confidentiality order made by Arbitrator Christie. Prof. Paus-Jenssen wrote to Prof. Buglass on November 23 and December 3, 1993 and January 11, 1994 stating the Faculty Association's objection to the materials and indicating that Mr. Sack on behalf of the Faculty Association would be bringing the matter up with Arbitrator Christie.

[52] On January 11, 1994 Mr. Sack wrote to Mr. Christie asking for a ruling on the use of the Appendix A materials in the promotion hearings. Arbitrator Christie did not agree to make a further order.

[53] The College Promotion Committee denied the application for promotion on January 24, 1994. Prof. Buglass outlined the Committee's reasons in a memo to the Applicant dated January 25, 1994 and established that the Committee had considered the Appendix A materials in arriving at its decision.

[54] The Applicant appealed the decision to the University Review Committee, which denied the appeal on March 21, 1994.

[55] She appealed further, to the Promotions Appeal Committee. Prof. Jim Miller attended the appeal as a Faculty Association observer and reported his observations to Prof. Paus-Jenssen. The Committee's reason for rejecting the Applicant's promotion related to her teaching record. Prof. Miller thought that the Committee was improperly influenced by the materials contained in Appendix A, taking its contents as fact without making any effort to determine the truth of the matters. Prof. Miller also noted that the Promotions Appeal Committee was critical of the manner in which the College of Law gathered evidence on teaching and other matters for the purpose of promotion.

[56] On May 31, 1994, the Applicant wrote to Prof. Paus-Jenssen asking the Faculty Association, among other things, to grieve the denial of her promotion to full professor. In the letter, the Applicant makes the following observation:

> *I will state for the record, however, that it is my view that in an arbitration dealing with the outstanding grievances as well as one based on denial of promotion the Association would be in a position to argue that but for bias, discrimination, breach of academic freedom, breach of proper procedure and the principles of natural justice, my case would have been dealt with by the same substantive standards as comparable promotions cases. The result would have been promotion to the rank of Associate Professor on July 1, 1986, and promotion to the rank of Full Professor on July 1, 1989, based on review of the period from July 1, 1985 to June 30, 1988. This opinion is based on my knowledge of this case and comparable cases and has been formed with due regard for the requirement that the evidence required to support the grievances be available.*

[57] On July 25, 1994, the Applicant met with the grievance committee, then consisting of Profs. Hamilton, Oles and Stewart. Prof. Hamilton indicated that he viewed this meeting as an intake meeting to obtain information from the Applicant on the two outstanding grievances and on the promotion matter. At the meeting, the Applicant presented the committee with a letter outlining her concerns relating to her current grievances and requesting that grievances be filed in relation to the denial of promotion, an overload pay issue relating to the 1992 Laskin Moot, and to issues of workplace harassment. In her letter, the Applicant made the following assessment of the promotion grievance:

> *I also require prompt notification that the Association is prepared to proceed to grieve the recent denial of my promotion to the rank of Full Professor. I have not included my detailed observations and comments about the promotion matter with this letter as these are best directed to counsel for the Association. Among the numerous matters to be addressed under the heading of procedure in connection with the promotion appeal is the reliance placed on the materials from the dismissal file known as "Appendix A". This matter was the subject of official comment in the report by the Association Observer of this promotion appeal. A closely related issue is the present status of these same materials.*

> *It is my position that in an arbitration hearing dealing with the outstanding grievances related to initiation of the dismissal proceedings, as well as the recent denial of promotion to Full Professor, the Association would be in a position to argue that but for bias, discrimination, breach of academic freedom, breach of proper procedure and the principles of natural justice, no disciplinary action or proceedings would have been initiated and my promotion cases would have been dealt with by the same substantive standards as comparable promotion cases. The result would have been promotion to the rank of Associate Professor on July 1, 1986, and promotion to the rank of Full Professor on July 1, 1989, based on review of the period from July 1, 1985, to June 30, 1988. This opinion is based on my present knowledge of this case and comparable cases and has been formed with due regard for the requirement that the evidence required to support the grievances be available. The Collective Agreement places no restrictions on the remedies available to the Arbitrator in a grievance based on denial of promotion. Hence I believe that the remedy, as well as the course of action I propose, is available. It is my opinion that had a grievance been brought following the promotion denial in 1986, or following the successful tenure and promotion appeals in 1987 with reference to numerous violations of the Collective Agreement established in evidence at the five day tenure appeal hearing, the subsequent pattern of conduct by members of the College of Law in violation of the Collective Agreement probably would have been curtailed. I suggest this only demonstrates that past failure by the Association to take vigorous action in defence of the provisions of the Collective Agreement has been unwise and harmful in its effect.*

[58] Prof. Hamilton stated that the tone of this letter was offensive to the grievance committee and he thought the meeting was not a normal first meeting between the grievance committee and a member over a potential grievance. At the meeting, the grievance committee indicated that it was awaiting a response from Mr. Sack regarding the outstanding grievances relating to academic freedom and discrimination and faculty rights, and that they would be meeting with the Faculty Association's solicitor, Mr. Craik, on the remaining issues and would get back to the Applicant.

[59] On August 2, 1994, the Applicant wrote to Prof. Neufeld, then Chair of the Faculty Association, to point out that the deadline for filing the promotion grievance appeared to be August 25, 1994. She asked to be informed of the Faculty Association's position on her grievance.

[60] The Faculty Association filed a grievance on the promotion issue on August 10, 1994. The Applicant was unhappy with the wording of the grievance and she wrote to Prof. Neufeld on September 2, 1994 to complain about the absence of references to the academic freedom and discrimination issues in the grievance. In the same letter, the Applicant made the following accusations relating to conflict of interest:

> *There is substantial evidence dealing with breaches of academic freedom and discrimination in the period commencing 1984. Indeed it is my view that had these matters been firmly addressed in the mid-1980's as they became apparent, the College of Law would not have tried to dismiss me in 1992. This observation suggests that the Faculty Association was insufficiently aggressive in its representation of me and my interests in the period from 1984 – 1987. That is indeed my view. I recognize that the Grievance Committee, key members of which are the same as a decade ago, may dispute this view. For the same reason that Committee may not be enthusiastic about now pursuing issues related to breaches of academic freedom and discrimination which they ignored at the time these events originally occurred. I would therefore ask the Executive to address their minds collectively to the problem of how they might best ensure me of fair representation in these matters at this time, recognizing the conflict of interest situation in which the Grievance Committee now finds itself because of its failure to raise these issues in the past when a number of its key members were the same as at present.*
>
> *There is also a further issue of conflict of interest related to the recent promotion grievance. In the Fall of 1993 prior to the College Promotion decision in my case, the present Senior Grievance Officer, Don Hamilton, attempted to persuade me not to seek promotion at that time. His arguments were remarkably similar to those relied on shortly thereafter by my colleagues. This makes it difficult for me to have full confidence in him in his role as Senior Grievance Officer in charge of a grievance arising out of those same promotion proceedings.*

[61] Prof. Neufeld informed the Applicant that he and two other members of the Executive would investigate her concerns. On October 3, 1994 the Faculty Association notified the University that it was amending the promotion grievance to rely as well on the academic freedom and no discrimination clauses contained in the collective agreement. Prof. Neufeld did not respond directly to the Applicant's allegations of conflict of interest.

[62] On October 18, 1994, the grievance committee asked to meet with the Applicant the next day. She wrote to Prof. Neufeld indicating that in the absence of a response to her September 2, 1994 letter to him, such a meeting would be inappropriate.

[63] On November 18, 1994, Prof. Neufeld responded to the Applicant's letters stating that the Executive Committee had considered the matters she raised. He also encouraged the Applicant to meet with the grievance committee as soon as possible to discuss the outstanding issues. Prof. Neufeld also indicated that if the Applicant was dissatisfied with the actions of the Association grievance committee, she could appeal the matters to the membership of the Association at a general meeting.

[64] In a letter dated November 29, 1994, the Applicant said that she would meet with the grievance committee under protest. She also put the Faculty Association on notice as follows:

> *In any event, I must have and continue to receive full information on an on-going basis about the handling of the various grievances on my behalf and any decisions taken by the Grievance Committee in matters related to those grievances in order to be able to determine whether I regard those actions as appropriate. Accordingly I shall be requesting that the Grievance Committee provide me with copies of all correspondence, both from and to them, touching on these grievances since the date each was initiated, as well as written statements as to the position they will be taking on each of the grievances, and when and how they intend to proceed with them. This should also facilitate effective communication between myself and the Grievance Committee and thorough preparation.*

[65] Prof. Hamilton concluded from this letter that the Applicant did not want to go through the normal grievance channels with the grievance committee and, instead, wanted to be represented by a lawyer. Nevertheless, the grievance committee extended an invitation to the Applicant to meet with the entire grievance committee on December 13, 1994 or with a smaller group comprised of Prof. Hamilton, senior grievance officer, Profs. Oles and Stewart, grievance officers, and Paula Hesselink, the executive secretary of the Faculty Association on December 6, 1994.

[66] At the outset of the December 6, 1994 meeting, the Applicant insisted on being provided copies of the notes being taken by Ms. Hesselink to enable her to correct and comment on the meeting records. Prof. Hamilton explained that Ms. Hesselink's notes were just that – her notes – and he invited the Applicant to take her own notes of the meeting. The Applicant refused to participate further in the meeting.

[67] On the same day, the Applicant wrote Prof. Neufeld to complain about Prof. Hamilton's refusal to provide her with copies of Ms. Hesselink's notes and to state that she would confine her communication with Prof. Hamilton to written communication.

[68] The Applicant also wrote to Prof. Hamilton to describe the events that transpired at their brief meeting and to state that, in the future, she would deal with him in writing only. The Applicant also complained about the manner in which Prof. Hamilton had responded to her telephone request for a meeting with him in July 1994. She complained that Prof. Hamilton was exceedingly rude in the telephone call.

[69] Prof. Hamilton recalled that he had told the Applicant that arbitration on the promotion issue was not a "winning route" as applications for promotion can be made each year. He disagreed with the Applicant's assertion in her July 25, 1994 letter that an arbitrator could award a promotion. It was his view that the collective agreement required an arbitrator to send the matter back to the collegial processes of promotion committees. Peer review was the policy adopted by the Faculty Association in its collective bargaining with the University and the Faculty Association would not take a different view of an arbitration board's powers in the Applicant's case. The Applicant and the Faculty Association continued throughout to disagree over the powers of an arbitrator in relation to the promotion grievance. Prof. Hamilton maintained that the annual promotion hearings could award promotions retroactively.

[70] The Applicant also complained in her letter of December 6, 1994 that she had expected that the matters of harassment and discrimination that she had experienced at the College of Law and her various grievances would have been dealt with during the period from July 1, 1994 to December 31, 1994 while she was on sabbatical leave from the College. She renewed her demand for copies of all correspondence dealing with her grievances and asked that notice of intent to proceed

to arbitration be given to the Administration of the University on the grievances filed. The Applicant requested the opportunity to review draft copies of such letters before they were forwarded to the University and she asked for the dates and times of the joint grievance committee meetings so she could exercise her right to appear before the committee if she deemed it appropriate to do so.

[71] Prof. Hamilton responded to the Applicant the same day expressing his and the committee's dismay with her unwillingness to continue the meeting. He explained that the committee needed to discuss the outcome of the joint grievance committee held on December 2, 1994 with her. He noted that the University was no longer willing to extend time limits on the three outstanding grievances (including the promotion grievance). Prof. Hamilton explained that the Faculty Association had to decide if it would arbitrate all or any of the Applicant's grievances and whether any or all of them could be combined into a single arbitration. He advised the Applicant that the entire grievance committee would be meeting on December 13, 1994 and he encouraged her to attend this meeting.

[72] That meeting proceeded in a fashion similar to the earlier meetings. The Applicant asked to be provided copies of Ms. Hesselink's notes and Prof. Hamilton refused to provide them to her on the grounds that it was not the normal practice of the Faculty Association to provide Ms. Hesselink's notes to grievors. The Applicant then withdrew from significant participation in the meeting. As the Applicant explained in a letter to Mr. Neufeld on the same date, the consequences of her refusal to participate were somewhat predictable:

> *As a direct consequence of [Prof. Hamilton's] decision to deny me the opportunity to review and comment on Paula's notes, I was not in a position to contribute much to the meeting and found it necessary to decline to comment on almost all questions put to me and views expressed by others. In these circumstances the Committee soon found it pointless to put further questions to me and I was excused from the meeting.*

[73] The minutes of the meeting record that the Applicant declined to comment when asked about a remedy for the grievance on denial of appointment, and declined to comment when asked if there was anything to share that would be of

assistance on the other two outstanding grievances (academic freedom and discrimination and faculty rights) and the two outstanding potential grievances (overload pay for Laskin Moot and harassment).

[74] The minutes of the December 13, 1994 grievance committee record that it was agreed as follows:

- *inform the Employer that the [Joint Grievance Committee] should extend the opportunity to Professor Vandervort to be heard by it;*
- *ask Professor Vandervort in writing if there is any further information that she wishes to provide on the outstanding grievances (a.s.a.p.);*
- *further investigate the security issue (speak to Ish, Craik, Fritz), then, if appropriate, approach the Employer;*
- *confirm the decision to continue to represent her in the manner we represent all members and to that end decline her request to see all notes and correspondence, except as appropriate;*
- *ask Committee members to review (re-read) the complete files prior to next meeting.*

[75] By letter dated December 23, 1994, Prof. Hamilton carried out the committee's instructions. He registered his dissatisfaction with the Applicant's behaviour at the grievance committee meetings and advised her that she would be dealt with in the same manner as other members. Prof. Hamilton invited the Applicant to provide the grievance committee with any additional information that might be useful to the committee in deciding how to proceed with her outstanding grievances. He also informed her that the Chair of the University's grievance committee had been informed that the Applicant was interested in being heard by the joint grievance committee. He advised the applicant of the time and place of that committee's up-coming meeting and asked her to indicate if she would attend.

[76] The Applicant did not reply directly to Prof. Hamilton's letter, but wrote instead to Prof. Neufeld, indicating that she felt it was pointless to respond to Prof. Hamilton's letter and seeking a meeting with the executive committee of the Faculty Association. She also objected to the fact that Prof. Hamilton had advised the Chair of the joint grievance committee that she wished to attend and speak to her grievances and suggested that the communication was improper. According to the Applicant, she had

not requested that she be heard by the committee but had only reminded the Faculty Association of the provision in the collective agreement that gave her the right to attend such meetings.

[77] Prof. Neufeld responded to the Applicant's letter on January 12, 1995 as follows:

> *On your instructions, we have advised the Chair of the Employer's Grievance Committee that you will not attend personally and make representations before the Joint Grievance Committee at this time.*
>
> *The Employer has agreed that the Faculty Association has until January 16th, 1995 to advise whether the grievances will be proceeding to arbitration. We will be advising the Employer that the grievances will so proceed, solely to buy time at this point.*
>
> *Should you continue to decline to provide any information on these matters within a reasonable period of time, the Faculty Association will decide if its grievances will proceed, and the manner in which they will proceed. For further clarification, this decision may involve declining to proceed with arbitration.*

[78] The Faculty Association did serve notice on the University on January 13, 1995 that it intended to arbitrate the faculty rights grievance, the academic freedom and discrimination grievance and the promotion grievance.

[79] The Applicant was invited to and did attend a meeting of the executive committee of the Faculty Association on January 19, 1995. The Applicant sought information from the executive on what the Faculty Association was going to do in relation to her three outstanding grievances and her two new complaints related to the alleged pattern of harassment in the College of Law and the non-payment of overload pay for the 1991-92 Laskin Moot.

[80] Prof. Neufeld did not testify at the hearing but in his correspondence to the Applicant dated February 17, 1995, he indicated that the Faculty Association had notified the University that it intended to arbitrate the promotion grievance and that the matter would now be handled by the Faculty Association's solicitor, Bill Craik. He instructed the Applicant to make an appointment to meet with Mr. Craik.

[81] Prof. Hamilton clarified in a letter to Mr. Craik that the Faculty Association wanted Mr. Craik to prepare for arbitration on the promotion grievance if Mr. Craik thought the grievance had sufficient merit.

[82] The Applicant met with Mr. Craik on March 24, 1995. During the meeting, Mr. Craik explained his instructions from the Faculty Association. The Applicant raised an issue with Mr. Craik about his conflict of interest, being a graduate of the College of Law and having to cross-examine various members of the College. The Applicant expressed her preference to have all the grievances heard together.

[83] The Faculty Association was attempting to get the University to agree to the same proposal, i.e. combine the three grievances into one hearing, but the University was unwilling to have the same arbitrator deal with all three grievances and insisted that separate arbitration boards be established to hear each grievance.

[84] On March 31, 1995, shortly after her initial meeting with Mr. Craik, the Applicant filed the first duty of fair representation application with this Board. The application alleged that the Faculty Association's delay in dealing with the three outstanding grievances and its lack of candour in its communications with her constituted a breach of the duty of fair representation. The Applicant also asserted a claim relating to conflict of interest against the members of the grievance committee.

[85] Mr. Craik entered into correspondence with her regarding the application in his role as counsel to the Faculty Association. In one of his letters, he put the Applicant on notice that the Faculty Association would be seeking solicitor-client costs from her. The Applicant and her legal counsel concluded that Mr. Craik was in an actual conflict of interest situation, representing the Faculty Association in relation to her grievances against the University and representing the Faculty Association in defending against the duty of fair representation application. Mr. Craik did not agree that he was in a conflict of interest as his client throughout was the Faculty Association, not the Applicant.

[86] In September 1995, Mr. Bainbridge, who was assisting Mr. Craik, wrote to the Faculty Association seeking instructions with respect to the various grievances. Mr.

Bainbridge acknowledged in his letter that the duty of fair representation matters and the grievances were completely intertwined and that it would be difficult to keep them separated. He recommended that the Faculty Association proceed with the faculty rights grievance and the promotion grievance and leave the academic freedom and discrimination grievance to be resolved after the hearing of the duty of fair representation hearing. He noted that his office had been unable to discuss the academic freedom and discrimination grievance with the Applicant and did not have sufficient information to recommend that the grievance proceed or be withdrawn.

[87] During the period from March 31 to November 15, 1995, work on the grievances largely came to a halt. Mr. Craik received the informal transcript of the evidence at the dismissal arbitration from Mr. Sack in April 1995. There was an exchange of correspondence between the Faculty Association and the Applicant relating to the duty of fair representation application and hearing dates were set for November 1995. On November 15, 1995, Mr. Craik advised the Applicant that he had received instructions from the Faculty Association to proceed on four grievances which were then outstanding – that is, the faculty rights grievance, the academic freedom and discrimination grievance, the promotion grievance and the overload pay grievance (which will be discussed below). At the same time, Mr. Craik asked the Applicant to meet to discuss the matters.

[88] During the fall of 1995, Mr. Craik contracted with Ms. Darien Moore, a lawyer, to organize and catalogue the files, clarify the legal issues on the grievances and prepare briefs of facts and law for Mr. Craik.

[89] The parties met in December 1995 and January 1996 in the course of dealing with the duty of fair representation application and agreed to proceed with the four grievances and to adjourn the application to April 1996. They also agreed to the following protocol (the “Protocol Agreement” or the “Protocol”) for working together on the grievances:

1. *There will be full mutual disclosure of facts;*
2. *There will be full mutual disclosure of documents;*
3. *There will be mutual identification of potential witnesses;*

4. *Lucinda Vandervort shall be involved in strategy meetings with counsel for the Faculty Association alone and together with Faculty Association representation. Strategy shall include any discussion regarding the grouping of grievances and the choices of arbitrators.*

5. *Lucinda Vandervort shall receive copies of all correspondence, documents and memos passing between counsel representing the Faculty Association and the Faculty Association regarding these grievances. Such written documentation shall relate to all correspondence generated subsequent to any determination to proceed with any or all of the grievances.*

6. *Lucinda Vandervort shall have the right to comment verbally or in writing about any disclosures referred to in the immediately preceding paragraph.*

7. *Communication passing between Lucinda Vandervort, counsel between the Faculty Association and the Faculty Association is of a confidential and sensitive nature. It is recommended that the Faculty Association appoint a litigation committee consisting of not more than two individuals who will be responsible for instructing Faculty Association counsel regarding these grievances. Information regarding these grievances prior to any hearing shall not be disclosed to parties other than the litigation committee and the litigation committee shall be charged with the responsibility of keeping such information confidential.*

8. *Lucinda Vandervort shall be notified of date of grievances and to attend.*

9. *Clarify the grievances which are being pursued at the present time.*

10. *Relief to be sought in the grievances.*

[90] The Faculty Association established a litigation committee consisting of Profs. Stewart and Neufeld and Mr. Bill Craik. According to Prof. Stewart, the committee was formed to address the Applicant's desire to limit access to the grievance materials to a small group of people, as opposed to the entire grievance committee. Prof. Stewart also acknowledged that forming the litigation committee provided a way around the testy relationship that had developed between the Applicant and the grievance committee. Prof. Stewart noted that the grievance committee was frustrated with the Applicant as it had never encountered a grievor who refused to share information with them. He also noted that it was unusual for the Faculty Association to engage legal counsel to prepare and carry forward a grievance. In his view, the Applicant had more attention in this regard than other faculty members.

[91] The Applicant met with Mr. Craik, Ms. Moore and members of the litigation committee in February and March 1996 to share information and to discuss the grievances. Mr. Craik provided the Applicant with copies of the grievance files and she

provided him with boxes of documents pertaining to her grievances. Ms. Moore reviewed the Applicant's materials and contacted her by telephone during this time to clarify various matters. She also prepared memoranda for Mr. Craik dealing with each grievance or potential grievance, outlining the factual and legal issues.

[92] During this time, the Applicant pressed Mr. Craik for an outline of the steps he intended to take on the grievances. On March 4, 1996, Mr. Craik conducted an extensive interview with the Applicant to get her thoughts on appropriate remedies. By April 4, 1996, Mr. Craik had prepared his opinion letter and he forwarded it directly to the Applicant. The opinion letter was largely based on Ms. Moore's analysis and had largely been prepared by her, subject to Mr. Craik's review and approval.

[93] In the opinion letter, Mr. Craik assessed the grievances as follows:

(1) Academic freedom and discrimination grievance

[94] Mr. Craik indicated that the discrimination aspect of the grievance was not supported by evidence of discrimination on the grounds enumerated in Article 7 of the collective agreement.

[95] He noted that he was unable to find any case law on the topic of academic freedom to assist in the interpretation of Article 6.1 of the agreement. Mr. Craik noted that there was a time limit problem but concluded that the grievance could deal with the incidents identified by Mr. Sack in his opinion letter of August 1994.

[96] On the remedial issue, Mr. Craik indicated that:

> *On the matter of remedy, I would argue that you should receive an award of general damages for the harm done to your career and reputation by the spurious allegations Dean MacKinnon used to attempt to dismiss you, an award of a further amount for the anxiety and stress caused you during the course of that year, and a further amount as damages for the year of lost research time.*

(2) Faculty rights grievance

[97] Mr. Craik set out the evidence that would be relied on to make out a case under Article 5.2 of the collective agreement (a provision preserving all rights, benefits,

working conditions enjoyed by members) and the arguments supporting an award of general damages.

(3) Post-reinstatement harassment

[98] Mr. Craik pointed out the time limit problems caused by the absence of a grievance at this stage. He noted that if a grievance were filed now, only incidents that occurred in the 90-day period prior to filing could be raised in the grievance. He suggested that some of the incidents might be assimilated into the faculty rights or academic freedom grievance. He reviewed other incidents in detail and explained why they would not likely be found to establish harassment. Mr. Craik concluded:

> *Our decision as to how to best present your case to an arbitrator is influenced by the fact that you have refused to take on the role of a victim. In many instances where a minor disagreement between yourself and a colleague threatens to escalate, you have adopted a tactic, it appears from your correspondence, of taking an aggressive stance, no doubt to discourage your colleague from any further attacks. While, given the climate you are working under, this tactic is understandable, I would be cautious about presenting evidence of those incidents because if the arbitrator were not convinced of the climate of the college as we see it, he might view those documents and that evidence in an entirely different light which would be so prejudicial to you that I think its not worth taking the chance.*

[99] Mr. Craik recommended that only the best examples of harassment be taken forward and that the case not be diluted with "weak and tenuous examples."

(4) Overload pay grievance

[100] Mr. Craik indicated that the overload pay grievance could be run on an agreed statement of facts, provided the University would agree, given the outcome of the earlier McConnell arbitration award on the same issue.

(5) Promotion grievance

[101] Mr. Craik set out the issues to be raised on the promotion grievance and discussed the remedial options. He concluded that a good argument could be made for substantial damages. He did not agree that an arbitrator could order that the Applicant be promoted to full professorship with retroactive pay. He concluded that the only available remedy was a re-hearing of the promotion application.

(6) Remedial Issues

[102] Mr. Craik indicated that the claims for damages were not without some difficulties. In particular, he noted the limited power of arbitrators to order damages for tort-like claims. He then reviewed the various remedial claims that the Applicant wished to pursue. He concluded that some claims were too remote to be accepted under the general damage principles while other claims could be pursued. Generally, his assessment of the remedial prospects was cautiously optimistic.

[103] At the conclusion of his opinion letter, Mr. Craik asked the Applicant for her thoughts and invited her to call on her return from Easter break.

[104] Mr. Craik persisted in obtaining a response from the Applicant concerning his April 4, 1996 opinion letter, which the Applicant indicated she would prepare in writing. She also requested copies of the internal memos prepared by Ms. Moore for Mr. Craik to assist her in understanding what materials Ms. Moore relied on in preparing the opinion document. Mr. Craik refused to provide these memoranda to the Applicant as they were working documents prepared for his sole use.

[105] During this period, the Faculty Association kept up its attempts to have the University agree to one arbitration board for all the grievances. The University insisted that separate arbitrators hear the grievances. The Applicant identified a conflict of interest between her and the arbitrator who normally would be assigned to hear a grievance. The Faculty Association notified the arbitrator and the University of the conflict and the first two grievances were assigned to a different arbitrator.

[106] The Applicant and Prof. Stewart met with Mr. Craik on April 25, 1996 to discuss the selection of arbitrators. They agreed that Prof. Stewart would keep pressing the issue of a single arbitration board and not set the grievances down for hearing. The Applicant appeared to be under the misapprehension that the Faculty Association could require the University to place the three grievances before a single arbitrator. She criticized the Faculty Association for failing to obtain an agreement with the University to hear the three grievances together.

[107] On May 8, 1996, the Applicant asked Mr. Craik to advise her if the Faculty Association could amend the two oldest grievances to include the overload pay, promotion and on-going poisoned work-environment issues. Alternatively, she wanted to know if evidence of these matters could be led in the academic freedom and faculty rights grievances without formal amendments. The Applicant wanted this information to enable her to advise Mr. Craik of the road she wished him to take in the event the University would not agree to have all three grievances heard by one arbitrator. The Applicant wanted a reply from Mr. Craik with respect to the issue of amending the grievances prior to providing him with a response to his April 4, 1996 opinion letter.

[108] Mr. Craik set aside a substantial amount of time in June and July 1996 to prepare for the Applicant's arbitration cases. He expected that she would reply to his April 4, 1996 opinion letter and be available for interviews over the course of the summer months. The Applicant did not reply to his letter or make herself available during that period.

[109] Mr. Craik next met with the Applicant and Prof. Stewart on August 14, 1996. According to Mr. Craik, the Applicant informed Mr. Craik that his legal opinion was not seasoned enough and that he could "do better" than he had done in his April 4, 1996 letter. Mr. Craik was surprised that these remarks were all that the Applicant had to offer 4 months after receiving his opinion letter.

[110] On the other hand, the Applicant recalled that she had told Mr. Craik that he should revisit his analysis of the grievances as set out in his April 4, 1996 letter. She suggested, "it would be useful to give further consideration to the strong interrelationships between the various grievances as a step towards developing an integrated analysis of the whole pattern of conduct." The Applicant also indicated that she was preparing a written summary of the facts for Mr. Craik but that she required the use of a typist and an adjustment in her teaching schedule at the College of Law to take her preparation time on the grievances into account.

[111] In September 1996 Prof. Dooley, then President of the Faculty Association, joined the litigation committee with Prof. Stewart. They instructed Mr. Craik to ask the Applicant for her response to Mr. Craik's opinion letter. Mr. Craik explained in

testimony before the Board that given the Applicant's comments at the August 14, 1996 meeting, the Faculty Association wanted to know her response to the opinion letter in more detail.

[112] The Applicant replied by indicating that she required his internal working memos to assist her in preparing a detailed response to his April 4, 1996 opinion letter. Mr. Craik again refused to provide his working memos to her.

[113] By correspondence dated November 22, 1996, the Applicant provided Mr. Craik with a 105-page chronology of her experiences at the College of Law beginning with her appointment in July 1, 1982 and continuing up to October 1996. The document was not what Mr. Craik had expected to receive from the Applicant and he did not find it helpful in understanding her criticism of his opinion letter. Mr. Craik forwarded copies of the document to Profs. Stewart and Dooley.

[114] The Applicant met with the litigation committee and Mr. Craik in January 1997 to discuss the matters further. Mr. Craik did not find the Applicant responsive to his request that she advise the Faculty Association of her position or view of his April 4, 1996 opinion letter. At the meeting, the Applicant asked Mr. Craik to revise his analysis of the grievances based on a review of her 105-page document. Mr. Craik did not think that the problem rested with his analysis. In a letter to the Applicant dated January 31, 1997, he commented as follows:

> *You will recall that in January 1996 the Faculty Association and yourself agreed on the details of the cooperation with counsel for the Faculty Association and yourself. Those details included, inter alia:*
>
> *a. A full mutual disclosure of facts;*
> *b. A full mutual disclosure of documents;*
> *c. A mutual identification of potential witnesses.*
>
> *We trust that you have to the extent known to yourself provided to us all of the facts and documents and identification of witnesses that you believe are relevant to your case.*
>
> *That understanding between yourself and the Faculty Association went on to state that you shall be involved in strategy meetings. The difficulty we have at this time is that . . . when we receive very little specific or targeted feedback from you in response to a very*

> *specific outline of our strategy leaves us in the position of not knowing whether you agree or disagree to our proposed actions.*
>
> *The matter is compounded at the present time by the fact that the University of Saskatchewan has already put us on notice that it will be raising time limitations when the arbitrations begin.*
>
> *I would ask you once again to consider a specific response to our letter of April 4. After that point, we would have the advantage of knowing exactly where you stand and where the Faculty Association stands on the critical issues of our strategy, the theory of the case, and indeed, the details and specific evidence that could be led to support the grievances and what should not be led.*
>
> *In our conversation, you stated that I am the lawyer and with that I wholeheartedly agree. As the client, we are only asking of you to advise whether you agree or disagree with our assessment of this case so that we can proceed.*

[115] At the same time, Mr. Craik advised the Applicant of the selection of arbitrators arising from the negotiations between the University and the Faculty Association.

[116] Subsequently, the Applicant had to leave Saskatoon to attend to a family crisis. On her return, she was faced with a number of issues that took her and the Faculty Association's attention away from the current grievances.

[117] First, students in the Applicant's advanced criminal law seminar registered complaints with the acting dean about the lack of class time, reading lists and the like. This resulted in disciplinary action being recommended by Acting Dean Ish against the Applicant and it became the subject of a grievance and arbitration. We will discuss this matter more fully later in our Reasons.

[118] Second, President Ivany made unflattering remarks in reference to the Applicant and the Faculty Association at a general academic assembly; these were reported in the local press. The Faculty Association filed a grievance on behalf of itself and the Applicant in relation to these remarks. Again, this matter will be discussed in more detail later in these Reasons.

[119] During this same period, the Applicant received an anonymous, threatening and obscene letter at her lectern in her first year criminal law class. Students in this class also complained to the acting Dean regarding the number of classes that were cancelled and re-scheduled by the Applicant, many of which related to her absence due to her family crisis.

[120] The Applicant blamed the Faculty Association and Mr. Craik and their delay in dealing with the outstanding grievances. In a letter to Mr. Craik on May 31, 1997, the Applicant concluded:

> *As you may be aware there have been some very serious further developments at the University this Spring including public vilification of me by the President of the University and misogynist/pornographic material left on my lectern. The former singled me out as an officially approved target. The latter contained implicit and explicit death threats. This is not to even mention the extensive media campaign against me which had all appearances of being fomented by someone in administration.*
>
> *I am not pleased by any of these events.*
>
> *It is my opinion that none of this would have occurred had the grievances been dealt with in a timely fashion. As you are aware I have serious concerns about the approach you have taken to the grievances. The underlying problem may well be the conflict of interest inherent in the position in which you find yourself in attempting to act as the representative of the Faculty Association defending against my LRB application and as the representative of the Faculty Association prosecuting the grievances on my behalf where these same grievances form a central aspect of the matters at issue on the LRB application. In addition it is my view that you are in breach of the terms of co-operation between you and I that were set out as a condition of the adjournment of my LRB application. The reference in your letter of January 31 to strategy meetings is puzzling as my experience has been that as yet you have not actually progressed to that stage in handling these grievances.*
>
> *I have referred these concerns to the Chair of the Faculty Association. If no resolution can be found in the immediate future I regretfully anticipate that we shall find it necessary to return to the Board.*

[121] On the same day, the Applicant wrote to Prof. Paus-Jenssen, who had returned as chair of the Faculty Association, asking for a meeting to discuss the various

grievances and the problems associated with them. In addition, she forwarded to him her "summary case analysis" which she indicated was prepared by her in November 1996 in conjunction with the factual summary forwarded to Mr. Craik earlier. The case analysis was not shared with Mr. Craik and he did not see a copy of it until shortly before the beginning of this hearing. It was not clear in the Applicant's letter to the Faculty Association that she had not shared this document with Mr. Craik.

[122] In the case analysis document, the Applicant concludes that the College of Law's denial of her promotion in 1982 was an expression of the College's intolerance of her scholarship and a rejection of her critical approach to law and the teaching of law. In her view, the subsequent dismissal attempt, the relocation of her office, the denial of promotion, the refusal of overload pay and the incidents of alleged harassment after her return to the College of Law all formed part of a pattern of intellectual intolerance that amounted to a denial of her academic freedom.

[123] Mr. Craik responded to the Applicant's May 31, 1997 letter, reminding her that he was still waiting for her detailed response to his April 4, 1996 opinion letter and that he was concerned about further delays. The Applicant did not forward her case analysis to Mr. Craik or make him aware that she had forwarded it to the Faculty Association.

[124] In June 1997, Mr. Craik advised the Applicant that the Faculty Association was considering approaching the University to discuss possible settlement of her grievances. He urged her to respond to the litigation committee's requests.

[125] The Applicant advised Mr. Craik that she wished to discuss the grievance matters with Prof. Dooley, then chair of the Faculty Association, and she asked Mr. Craik to hold off on any action. She indicated that the central issue for discussion with the executive of the Faculty Association was Mr. Craik's conflict of interest. The Applicant also clarified how she viewed her role in the matter as follows:

> *I can only emphasize, as I believe I have in effect in previous correspondence with you, that our roles in this matter are distinct. It is you who are on a legal retainer to prepare these matters for arbitration. I am not. I have long ago provided disclosure of the facts. If there is something further required here related to the*

> *facts perhaps I can assist you but much of what I saw remaining to be done required investigation and interviews with potential witnesses or legal research and analysis that it was not appropriate for me to do and on which I cannot comment in the absence of disclosure to me of your files relative thereto as provided in the terms of the adjournment.*

[126] The Applicant's new grievances dealing with discipline and the President's remarks were assigned to the grievance committee of the Faculty Association. She met with the grievance committee in July 1997. Prior to the meeting, the Applicant again raised the conflict of interest issue. The Applicant saw the new matters as part of the pattern of intolerance toward her academic scholarship and approach to teaching. Again, the Applicant blamed the Faculty Association for the new incidents. In a letter to Prof. Dooley dated June 30, 1997 the Applicant concluded:

> *Since I wrote that letter I have been advised by D. Ish of the decision to recommend the issuance of a reprimand against me as noted above. I therefore suggest the Association re-examine its entire approach to legal representation of me before the situation deteriorates further and I am subjected to yet further negative administrative action as a consequence of the University's perception that I am effectively without legal representation. This perception undeniably exists because I am sure the lawyers for the University are keenly aware of the conflict of interest that results from a single lawyer attempting to defend and prosecute with respect to the same group of issues.*

[127] During the summer of 1997 the Applicant and Mr. Craik had no contact related to the grievances. In October 1997, the litigation committee, consisting then of Profs. Stewart, Paus-Jenssen and Dooley, met with the Applicant. They agreed that Mr. Craik would no longer act as counsel for the Faculty Association in relation to the Applicant's duty of fair representation application before this Board. Prof. Dooley explained that the Faculty Association was not prepared to start with a new law firm on the various grievance matters as that would be a waste of money and time in the preparation of the files. Prof. Dooley was of the opinion that the conflict of interest was inevitable as the Applicant had outstanding grievances and an outstanding duty of fair representation application in relation to those grievances.

[128] Prof. Dooley noted that at the October 1997 meeting, it remained the Faculty Association's intent to proceed with all six grievances. The discussions at the joint grievance committee were exhausted and the Faculty Association was running into difficulty getting the University to agree to hear all the grievances together as the Applicant desired. He indicated that Mr. Craik had instructions to proceed to arbitration on the four original grievances.

[129] The Applicant was not satisfied that the conflict of interest issue was adequately addressed by the Faculty Association's decision to remove Mr. Craik from the duty of fair representation complaint.

[130] During this period, Prof. Paus-Jenssen had returned to the grievance committee and he met with the Applicant in February 1998 in his office. He suggested to the Applicant that consideration be given to settling the outstanding grievances on the following basis: (1) the overload pay grievance be paid in full; (2) the University undertake not to remove a faculty member from his or her office upon issuing a recommendation to dismiss; (3) President Ivany apologize for the remarks made at the General Academic Assembly; (4) the Appendix A materials be removed from any consideration of promotion; (5) the reprimand grievance be sent to arbitration; and (6) the academic freedom issues be rolled into the reprimand grievance as a defense.

[131] According to Prof. Paus-Jenssen, the Applicant asked him who thought of such a stupid idea. When he told her that it was his idea, he recalled her telling him that he was as stupid as the rest of them. Up to this point, Prof. Paus-Jenssen had been able to maintain a positive relationship with the Applicant, but the positive relationship came to an end at this meeting.

[132] On March 25, 1998, Mr. Craik asked to meet with the Applicant to review the four outstanding grievances and to interview her in relation to the two new grievances. At this meeting, Mr. Craik put a settlement proposal to the Applicant along the same lines as had been proposed by Prof. Paus-Jenssen earlier, particularly that the academic freedom grievance be rolled into the reprimand grievance as a defence.

[133] The meeting was not productive. Prof. Dooley recalled that the Applicant stood up and accused him of betraying her. She then left the meeting. Prof. Dooley took the Applicant's conduct as signaling an end to her co-operation with the Faculty Association. He concluded that the Applicant wanted the grievances to be pursued her way or no way.

[134] Mr. Craik agreed to set out the proposal for rolling the academic freedom grievance into the reprimand grievance in a letter to the Applicant. She responded by letter stating her disagreement with the proposed strategy and her opinion that the proposal breached the terms of the protocol agreement and the Faculty Association's undertaking to pursue the grievances to arbitration.

[135] After the Applicant left the March 25, 1998 meeting, the grievance and litigation committees agreed that Prof. Paus-Jenssen would approach the University to discuss settlement options and Mr. Craik was instructed to approach counsel for the University for the same purpose.

[136] Prof. Dooley testified that he assessed the Applicant's behaviour as unco-operative and dogmatic. It was his view that it was in the Faculty Association's best interests to obtain a settlement of most of the grievances. He viewed the grievances as wasting both the time and money of the Faculty Association. In his assessment, apart from the reprimand grievance, the grievances were not very substantial. He thought it was possible to win the overload pay grievance because Prof. McConnell's earlier grievance on the same issue had been successful. Prof. Dooley was not convinced that faculty members have the right to retain their office space when the President recommends dismissal. There was no provision in the agreement granting such a right. He thought that the best resolution that could be obtained was an agreement by the University not to remove a faculty member from their office pending the conclusion of a dismissal hearing in the future.

[137] In relation to the academic freedom grievance, Prof. Dooley indicated that the Applicant's grievance was weak. He viewed a violation of the academic freedom clause as requiring evidence that the University had used some means to stop the Applicant from expressing her views. He did not think that there was any direct evidence

of this. He felt that it was not sufficient to demonstrate that members of the faculty disagreed with the Applicant's views as that is to be expected at a University.

[138] In relation to the promotion grievance, Prof. Dooley thought that it was possible to get the University to agree to remove the Appendix A material from the documents to be considered during a promotion hearing. The Applicant could re-apply for promotion any year and seek retroactivity at that time.

[139] The McConnell precedent would deal with the overload pay grievance.

[140] In relation to the defamation grievance, Prof. Dooley did not think there was a great chance of recovering damages from the University. He noted that the President was required to report to the General Academic Assembly. Mr. Dooley also assessed the remarks made by President Ivany as true. He thought the best resolve was to ask for a letter of regret from President Ivany.

[141] The Applicant continued to object to the legal representation by Mr. Craik and his firm due to the conflict of interest referred to above.

[142] In May 1998, Mr. Craik advised the Applicant that he was engaged in some preliminary discussions with the solicitor for the University relating to settlement of her grievances. He suggested that he and the Applicant meet in late May to discuss any results from the settlement efforts.

[143] The Applicant wrote to advise Mr. Craik that she was awaiting the Faculty Association's response to the settlement proposed by Mr. Craik in relation to all of the outstanding grievances. She understood that the Faculty Association would consider her earlier written objections and provide her with its decision on whether to proceed to arbitration or settlement. The Applicant repeated her concern with Mr. Craik's perceived conflict of interest and with his and the Faculty Association's breach of the Protocol Agreement. The Applicant would not agree to a further meeting until these matters were addressed.

[144] Mr. Craik did not respond in a substantive manner to the Applicant's concerns.

[145] During May and June 1998, settlement discussions between the Faculty Association and the University proceeded.

[146] The Faculty Association received an offer in writing from the University's solicitor on June 30, 1998. The first offer followed the settlement proposals made by the Faculty Association to the Applicant in March 1998, with the exception of the approach to the reprimand grievance. The University proposed that the reprimand be reduced to a written warning from the Dean. This proposal remained subject to the President's approval.

[147] After considerable discussion, the Faculty Association decided not to accept the proposed settlement of the reprimand grievance and to refer that grievance to arbitration instead. In the end, the grievance was unsuccessful and the arbitration board upheld the letter of reprimand.

[148] The Faculty Association did not notify the Applicant of the offer to settle this grievance based on a letter of warning. Prof. Dooley explained that the Faculty Association viewed the settlement as unsatisfactory; the Faculty Association was certain that the Applicant would view it as totally unacceptable. Prof. Paus-Jenssen testified that the Faculty Association was also concerned that the proposed settlement opened up a new form of discipline of members – that is, a letter of warning as opposed to a "reprimand." The collective agreement only contemplated "reprimands," not written warnings. Prof. Paus-Jenssen sought to settle the reprimand grievance by having the University remove the reprimand altogether. When this was not achieved, he recommended that the grievance be sent to arbitration.

[149] It was also the case that the President of the University would not agree to substitute a written warning for the written reprimand as a method of settling the outstanding reprimand grievance. As such, the proposed settlement of the reprimand grievance was not ratified by either party and did not form part of the final agreement.

[150] Both Profs. Dooley and Paus-Jenssen agreed that they did not communicate the first offer to the Applicant and that Mr. Craik did not communicate the offer to the Applicant until the offer was finalized with the University and the Faculty Association.

[151] After several meetings between Prof. Paus-Jenssen and Dr. Ken Smith, the University made a second offer to the Faculty Association. In this offer, the University agreed to arbitrate the reprimand grievance unless the parties could reach a settlement of it in further discussions prior to arbitration. The University removed the offer to substitute the reprimand with a written warning from the agreement. Solicitors for the University forwarded this agreement to Mr. Craik on July 16, 1998. The agreement itself was dated June 30, 1998.

[152] On receipt of the signed offer from the University, the Faculty Association instructed Mr. Craik to notify the Applicant of the settlement terms, to discuss them with her and to sign the agreement within a short period of time after contacting her.

[153] On July 20, 1998 Mr. Craik forwarded a letter by ordinary mail to the Applicant setting out the terms of the settlement and inviting her to meet with him before July 24, 1998, after which he would be gone on holidays. In the letter, Mr. Craig disclosed the University's initial offer to settle the reprimand grievance and indicated that the Faculty Association would keep the Applicant informed of any further developments in the settlement of the reprimand grievance.

[154] The Applicant received the letter on July 22, 1998. She responded to it by letter dated July 24, 1998 rejecting the settlement and advising Mr. Craik that she was suspending her co-operation with the Faculty Association and noting that she did not authorize the Faculty Association to enter into any agreement with the University with respect to her grievances.

[155] Mr. Craik, in the meantime, signed the agreement on behalf of the Faculty Association and forwarded a copy of the signed document to the Applicant on August 10, 1998.

[156] Prof. Dooley had hoped that the Applicant would have had more time to respond to the proposed settlement offer. He was not aware of the tight time lines set by Mr. Craik. However, on his assessment of the grievances, Prof. Dooley thought that the Faculty Association was likely to lose all of the grievances. As a result, in his view, the settlement agreement was reasonable. He also testified that the Faculty Association, to date, had spent approximately $400,000 on its overall representation of the Applicant. This was an unusual situation as the Faculty Association seldom takes cases to arbitration and has developed a practice with the University of achieving settlement on most grievances.

[157] The Applicant filed her second duty of fair representation application on February 16, 1999, challenging the settlement of her outstanding grievances.

(v) Harassment Complaint

[158] In response to a number of incidents that occurred in the fall of 1994, the Applicant asked the Faculty Association to file a further grievance. The complaint came to be known as the "harassment complaint" and is mentioned above. It did not result in a new grievance.

[159] The facts and matters surrounding the complaint included:

(1) circulation of a petition by first year students in a colleagues' class related to delay in obtaining the Applicant's moot marks;

(2) vetting of the Applicant's exams;

(3) the case book incident involving an angry confrontation with a colleague over the Applicant's failure to return his case book material.

[160] The Faculty Association investigated the matters on two occasions. Initially, members of the grievance committee interviewed key individuals involved in the various matters. The committee reported to Prof. Neufeld who advised the Applicant in February 1995 that no grievance would be filed in relation to the various incidents.

[161] The matters were also referred to Mr. Craik for consideration. Ms. Moore reviewed the incidents with the Applicant and recommended to Mr. Craik that many of the incidents would not support a harassment grievance. Mr. Craik reviewed the various incidents in his April 4, 1996 opinion letter to the Applicant. He proposed that a harassment grievance take only the best examples of harassment. He also suggested that the academic freedom clause in the collective agreement might be used as a basis for a grievance, although he did not specifically recommend that a grievance be filed in relation to these complaints. Prof. Stewart carried out an investigation of some aspects of these complaints in December 1995 and came to the conclusion that Prof. Neufeld's decision should stand, i.e. there was no factual basis for a complaint.

[162] As a result, no grievance was filed in relation to these matters although the Applicant kept pressing for such a grievance.

(vi) The overload pay grievance

[163] The overload pay grievance related to pay for the Applicant's teaching of the 1991- 1992 Laskin Moot course. The grievance is not in dispute in these proceedings as the Applicant accepts the settlement of the grievance as arrived at by the Faculty Association and the University in the June 30, 1998 agreement.

(vii) The defamation grievance

[164] On April 10, 1997, at a General Academic Assembly, President Ivany was reported as having "slammed the faculty union for trotting out academic freedom to defend 'bad performing members who blacken the image of the university'." According to a report by Star Phoenix reporter Kathryn Warden, President Ivany went on to state, "We have a professor that I accuse of psychologically abusing a student to the point of making her cry and declaring in class that she's a lesbian. The defence of that member by the union was academic freedom. Bullshit. I would be absolutely in total defence of academic freedom but don't give me garbage like that. The union shouldn't defend that professor every single time."

[165] President Ivany testified at the hearing that these comments represented an accurate report of his statements and that he knew that, although he had not named

the Applicant directly, his remarks would be understood in the public at large as referring to her and the dismissal case. He also indicated that he did not intend the comments to suggest that the Applicant "outed" the student in class, but that the student felt it necessary to disclose her sexual orientation as a result of the Applicant's comments in class. President Ivany recognized at the time that the Christie Board had not upheld his version of the incident, that is, the Applicant's conduct in the class was not considered to be psychological abuse. President Ivany agreed that his remarks at the General Academic Assembly were intemperate and that they were primarily aimed at the Faculty Association.

[166] On April 10, 1997, the Faculty Association filed a grievance with the University on its own behalf to protest President Ivany's remarks. It also sought a legal opinion from Mr. Craik in relation to whether a defamation action could be taken against the President. Mr. Craik concluded that a defamation action would need to be brought under the collective agreement and could not be brought as a civil action for damages. Mr. Craik also verbally advised the Faculty Association that there probably was no basis for a defamation action. He indicated that the Faculty Association was not required to act but it might wish to do so in any event and suggested that a retraction of the remarks may be an appropriate resolution.

[167] The grievance committee met with the Applicant on May 30, 1997 to discuss the defamation grievance. The Applicant provided the Faculty Association with a written outline of how she would like the case developed and she referred the Faculty Association to the lead case on defamation, *Hill v. Church of Scientology* ([1995], 2 S.C.R. 1130). The Faculty Association forwarded these remarks to Mr. Craik for review and comment.

[168] On July 7, 1997, Prof. Paus-Jenssen filed a grievance on behalf of the Applicant alleging that President Ivany's remarks were defamatory, constituted harassment and violated Articles 2, 3.2, 7.1 and 10.1 of the collective agreement. On the same day, notice was given to proceed to arbitration on the policy grievance filed by the Faculty Association on the same matter.

[169] The Faculty Association and the University agreed to consolidate the two grievances and the University responded to the grievance by denying that they constituted a breach of the provisions of the agreement. An arbitrator was selected from the normal rotation of arbitrators to hear the matter.

[170] Details of the remaining steps taken by the Faculty Association in relation to the settlement of this grievance are set out above.

(viii) The discipline grievance

[171] This grievance related to discipline imposed on the Applicant by the President of the University in relation to the conduct of her criminal law seminar in the academic year 1996-97. The Faculty Association grieved the discipline. The grievance was heard and a Board of Arbitration upheld the discipline. This grievance does not form part of the complaint before this Board, although it was referenced in relation to the settlement agreement entered into between the University and the Faculty Association.

(ix) Other matters

[172] Prof. Linda Wason-Ellam gave evidence concerning a meeting she had with President Ivany on July 8, 1998 around 1:30 p.m. Prof. Wason-Ellam testified that during her meeting, President Ivany told her that the Faculty Association "boys" approached him about helping him "get rid" of Lucinda Vandervort. Prof. Wason-Ellam had personal issues with the manner in which the Faculty Association had failed to represent her in relation to a serious workplace incident and she was meeting with President Ivany to discuss the role of the Faculty Association in relation to her dispute.

[173] Prof. Wason-Ellam testified that she saw Profs. Dooley and Paus-Jenssen, whom she knew to be members of the Faculty Association, leaving the general area of the President's office when she arrived at the meeting. She assumed that they had just met with the President. Prof. Wason-Ellam did not know the Applicant at that time. When she was eventually introduced to the Applicant, she relayed the information to her.

[174] Profs. Dooley and Paus-Jenssen both testified that on July 8, 1998 they were involved in discussions over various complicated pension issues with members of Administration and others in the University's Administration Building. Mr. Craik attended the meetings with them. They both denied meeting President Ivany on that occasion and both denied having told President Ivany that they would "help him get rid of the Applicant." Prof. Paus-Jenssen testified that he met separately with President Ivany in the spring of 1997 to attempt to head off any recommendation by President Ivany to reprimand the Applicant. He testified that the meeting was brief and unsuccessful.

[175] President Ivany testified that he had several meetings with Prof. Wason-Ellam to discuss a serious problem that she had at the University. He holds Prof. Wason-Ellam in high regard and, although he did not recall telling her that members of the Faculty Association approached him with an offer to help him get rid of the Applicant, he accepted that either he lied about that to her or she misconstrued what he had said to her. He recalled that he was chuckling about how the Faculty Association must wish they had not defended the Applicant so vigourously once she turned the tables and brought the duty of fair representation complaint against the Faculty Association. President Ivany denied that he had met with members of the Faculty Association to conspire to get rid of the Applicant. He described his relationship with the Faculty Association as one of "ritualized adversarialism."

Part C – Position of the parties:

(i) **Applicant's arguments**

[176] Mr. Renouf, counsel for the Applicant, argued that the Faculty Association handled her grievances in an arbitrary fashion primarily by entering into an agreement to settle the grievances without taking into account the significance of the Applicant's interests that were at stake in the various grievances.

[177] In particular, counsel noted that the University and the Faculty Association entered into the settlement agreement without providing the Applicant an opportunity to discuss it or have input into it. In this regard, the Faculty Association cannot claim that it took the Applicant's interests into account in settling her grievances.

[178] In addition, counsel argued that information pertaining to the settlement of the grievances, particularly the reprimand grievance, was deliberately withheld. The Applicant was not informed that the University had offered to settle the matter by reducing the letter of reprimand to a written warning. Counsel noted that in reaching the settlement with the University, the Faculty Association did not comply with the terms of the Protocol Agreement, which required it to provide the Applicant with copies of correspondence between the Faculty Association and the University and to permit her to discuss the strategy of the grievance handling. In so doing, the Faculty Association did not engage in a balancing of the Applicant's interests against the interests of other faculty members but simply considered the broader interests in not establishing a third rung of discipline under the collective agreement.

[179] Counsel for the Applicant also claimed that the Faculty Association failed to assess the value of the defamation grievance to her, that is, it did not undertake to obtain the necessary legal or other assessment of the value of the defamation grievance to the Applicant and settled it without regard to her interests.

[180] Counsel pointed out the Faculty Association's inconsistent approach to the Applicant's grievances. The legal opinions that it obtained supported her claim that her grievances were well founded and ought to be sent to arbitration. Mr. Sack's opinion letter indicated that there were substantial arguments to go forward to arbitration on the academic freedom and discrimination grievance and the faculty rights grievance. Mr. Craik's opinion letter of April 4, 1996 likewise supported the Applicant's position that she had good cause to go forward on the academic freedom part of the academic freedom and discrimination grievance, the faculty rights grievance, the promotion grievance, the harassment grievance (with qualification), the overload pay grievance, and the promotion grievance. Mr. Craik suggested that the Applicant would be entitled to general damages for some of the losses suffered.

[181] Counsel for the Applicant also pointed to Mr. Craik's opinion letter with respect to the defamation grievance in which he advised that Faculty Association that its and the Applicant's only remedies would be through the grievance and arbitration processes. Counsel argued that if Mr. Craik's opinion changed, there is nothing in writing to the Faculty Association or to the Applicant explaining the change. The

settlement agreement ignored the legal advice and did not take into account the Applicant's legitimate interests.

[182] Counsel argued that it is not necessary for the Board to find bad faith given the arbitrary handling of the grievances by the Faculty Association. However, the evidence of Prof. Wason-Ellam could be relied on to establish bad faith in the handling of the Applicant's grievances. In addition, counsel argued that Mr. Craik misled the Applicant about the settlement offer, indicating to her that it was an "offer" when, in fact, Mr. Craik had already signed the agreement on behalf of the Faculty Association.

[183] Mr. Renouf filed a series of cases with the Board dealing with the duty of fair representation and with defamation, which the Board has considered.

(ii) Faculty Association's arguments

[184] Mr. Scherman, counsel for the Faculty Association, argued that the Faculty Association had the authority to determine whether a grievance would be filed with respect to the Applicant's harassment complaints and that the Faculty Association had the authority to abandon, settle and withdraw the remaining grievances.

[185] With respect to the harassment complaints, counsel noted that in the Applicant's correspondence to the Faculty Association, she complained of three post-reinstatement incidents under the general heading of a potential harassment grievance. The incidents included a student petition concerning the Applicant being circulated in another faculty member's class; one of the Applicant's exams being vetted by faculty members; and the incident with another faculty member concerning the failure of the Applicant to return his casebook. Counsel for the Faculty Association noted that the particulars supplied by the Applicant in her complaint to this Board in relation to the harassment complaint raised matters that had not been previously raised with the Faculty Association, and as such, could not now be brought forward by her.

[186] Counsel for the Faculty Association asserted that there was no breach of the duty of fair representation with respect to the three incidents of complaint. The Faculty Association investigated each incident; sought legal advice with respect to the matters raised; and relied on the legal advice in not filing a harassment grievance. In

particular, counsel noted that Ms. Moore pointed out that there was no “anti-harassment” clause in the collective agreement.

[187] Counsel argued that the Faculty Association has authority to abandon, settle or withdraw grievances inherent in its general power to determine if a grievance will be forwarded to arbitration. In its view, the Protocol Agreement entered into between the Applicant and the Faculty Association did not surrender the Association’s authority over the Applicant’s grievances to her. Counsel characterized the Protocol as an agreement on process only. In the alternative, counsel alleged that the Applicant did not comply with the terms of the Protocol, as she did not co-operate with the Faculty Association or with Mr. Craik with respect to her grievances. Counsel asserted that the Faculty Association had by and large complied with the Protocol by providing the Applicant with the information and documents and by including her in strategy discussions.

[188] Counsel noted that the Protocol Agreement did not prevent the Faculty Association from settling the Applicant’s grievances “against her wishes.” The agreement simply dictated some of the processes to be used in resolving the matters. In relation to the Memorandum of Understanding entered into between the Faculty Association and the University with respect to the grievances, counsel asserted that the Applicant was consulted on the settlement terms.

[189] Counsel argued that the agreements reached were based on an assessment of the factual issues and the legal opinions obtained from Mr. Craik and Ms. Moore. The faculty rights grievance was resolved mainly through the Faculty Association’s actions at the time of the Applicant’s office relocation. It negotiated a campus office for her during the period of her suspension from duties at the College of Law. The remaining claims under this heading related to matters that are too remote to compensate under grievance arbitration.

[190] Counsel asserted that many of the incidents the Applicant relied on in the academic freedom grievance were untimely in relation to the grievance and arbitration processes. In addition, he asserted that there was little case law in support of the

Applicant's claims and few substantive facts to support her claims relating to a denial of academic freedom.

[191] In relation to the promotion grievance, Counsel for the Faculty Association noted that the settlement achieved certainty for the Applicant regarding the use of Appendix A in future promotion decisions. It was noted that the Faculty Association disagreed with the Applicant's view of the remedial authority of an arbitrator. In light of its support for peer decision-making on promotion matters, the Faculty Association would not seek promotion as a remedy before an arbitration board, but would request that the matter be referred back to the peer review mechanism for a determination.

[192] Counsel for the Faculty Association pointed out that there is no dispute in relation to the overload pay grievance and that the reprimand grievance was arbitrated. In relation to the latter grievance, the Faculty Association took the position that it was entitled to reject the proposal that a new form of discipline be introduced into the collective bargaining process. As a result, its rejection of the tentative settlement was valid in light of the competing interests among faculty members.

[193] Finally, in relation to the defamation grievance, counsel for the Faculty Association argued that there was uncertainty over the chances of success on this grievance as the Association assessed the defence of fair comment as being strong. The letter of apology was an appropriate settlement.

[194] Counsel argued that the evidence on collusion between the Faculty Association and the University was based either on a profound misunderstanding on the part of Prof. Wason-Ellam or on a delusion.

[195] In relation to the conflict of interest allegations made by the Applicant, counsel noted that Mr. Craik's client was the Faculty Association, not the Applicant. In addition, once the Protocol Agreement was entered into in January 1996, the Faculty Association agreed that Mr. Craik would not represent it on a continuation of the duty of fair representation application, if it became necessary to proceed with the application.

[196] Counsel asserted that, throughout this matter, the Faculty Association obtained and relied on legal advice. Counsel pointed out that four or five lawyers had considered the Applicant's issues over the course of her employment at the University. Most significantly, from the Faculty Association's point of view, was its hiring of Mr. Sack for the Applicant's termination grievance at a cost to the Faculty Association of $300,000.00. Counsel argued that the Faculty Association cannot be found to have conducted itself in an arbitrary fashion in relation to the handling of the Applicant's grievances when it did obtain and act on legal advice.

[197] Counsel argued that the Applicant's own conduct should prevent her from obtaining relief from the Board. He pointed to instances of lack of co-operation, rejection of advice from the Faculty Association, delay and non-disclosure of important information, as examples of a "lack of clean hands" on the part of the Applicant in seeking relief from this Board.

[198] Counsel also argued that the Applicant exploited the duty of fair representation doctrine by using it as a tool to motive the Faculty Association to conduct the case in the manner she desired.

[199] Counsel encouraged the Board to keep its eye on the big picture and to examine the conduct of the Faculty Association overall in its representation of the Applicant.

[200] In relation to the Protocol Agreement, counsel for the Faculty Association took the position that the document represented a mutual co-operation protocol, or an agreement as to the process of dealing with the Applicant's grievances, but that it was not a legally binding agreement. In the alternative, he argued that if it is a legally binding agreement, then the Applicant repudiated it by her own lack of co-operation. In addition, he argued that if the agreement were breached, the only result would be a return to the duty of fair representation application.

(iii) University's argument

[201] Ms. Catherine Sloan, counsel for the University, argued that the University is required by the terms of the certification Order and the collective agreement

to negotiate respective grievances only with the Faculty Association. The University took the position that the Memorandum of Agreement settling the Applicant's grievances cannot be set aside by the Board on a duty of fair representation application and that an Order directing arbitration of the grievances is not appropriate.

(iv) Applicant's argument in reply

[202] In relation to the effect of the Protocol Agreement, counsel for the Applicant argued that it was a binding agreement between the parties. Counsel noted that the agreement was detailed in its content, was negotiated between lawyers for both parties and was set out in a letter exchanged between the parties. The Applicant made the Faculty Association aware in her letter of April 6, 1998 that she was relying on the terms of the Protocol Agreement. Counsel noted that the Faculty Association did not inform the Applicant that the agreement was repudiated or abandoned. Counsel argued there is clear evidence before the Board that the Faculty Association breached the agreement in reaching a settlement of the grievances with the University.

[203] Counsel also argued in reply that there is no substance to the claim that the Applicant was unco-operative or that she failed to disclose information to the Faculty Association. Counsel noted that the factual circumstances related to the faculty rights grievance were well known to the Faculty Association in May 1992. In relation to the academic freedom and discrimination grievance, the Faculty Association had received two legal opinions on the grievance, one from Mr. Sack and one from Mr. Craik, supporting the Applicant's position. Counsel pointed out that the Faculty Association did not act on the legal advice provided and noted that the Faculty Association never obtained legal advice to abandon, settle or withdraw the grievance. The factual circumstances of the promotion grievance were well known to the Faculty Association as it had been involved in the matter throughout and was kept well informed of the factual matters both by the Applicant and by the Faculty Association's observers in the Promotion Appeals process. Similarly, the factual circumstances of the overload pay grievance were well known to the Faculty Association.

[204] In relation to the Applicant's unwillingness to share information with the grievance committee, counsel reminded the Board of the Applicant's evidence that she had been admonished in the dismissal proceedings for discussing her case outside of

the confines of a solicitor-client relationship and she applied this advice to the new matters.

[205] Counsel argued that in relation to the period between July 1994 and March 1995, when Mr. Craik was engaged to proceed with the Applicant's grievances, she was dealing with Prof. Hamilton and attempting to protect her interests and the long-term interests of the Faculty Association against his dismissive and hostile attitude toward her. Prof. Hamilton made remarks concerning the Applicant's teaching abilities that she knew to be untrue. Counsel alleged that Mr. Hamilton was actually biased and was ill informed about the dismissal arbitration.

[206] Counsel argued that there is no evidence of non-co-operation by the Applicant following her agreement with the Faculty Association on the Protocol Agreement. The Applicant provided Mr. Craik with her documents. She responded to his April 4, 1996 opinion letter by suggesting that he reconsider his position, as she knew that his opinion letter was incorrect with respect to the issue of whether there were authoritative interpretations of academic freedom articles in faculty collective agreements.

[207] In relation to the allegation that the Applicant abused the duty of fair representation process, counsel noted that the Applicant had real cause for raising conflict of interest issues. Counsel pointed out that the Applicant raised the issue in two contexts. First, she raised it in the context of institutional bias to refer to the preference of the Faculty Association to use the collegial decision making model as a shield to bar the introduction and effective enforcement of legal standards of evidence and proof in the tenure and promotions process. The Applicant first raised this issue in 1986 and the Faculty Association obtained a legal opinion supporting her position. Many of the individuals who decided not to pursue the Applicant's concerns in 1986 remained on the grievance committee or executive of the Faculty Association in 1994 and onward.

[208] The conflict of interest allegation was also used by the Applicant in the context of the real conflict that arose as a result of Mr. Craik acting for the Faculty Association in relation to the duty of fair representation case and, at the same time, acting on behalf of the Applicant in the pursuit of her grievances.

[209] In relation to the various grievances, counsel for the Applicant noted that the faculty rights grievance did not pertain solely to the question of obtaining an office and support services for her during the period of her suspension from her duties, but included her participatory rights as a member of the faculty of the College of Law in relation to normal faculty decision-making.

[210] Counsel noted that, despite the Faculty Association's claim that the academic freedom and discrimination grievance was filed at the insistence of Mr. Sack as a defensive grievance in the dismissal proceedings, Mr. Sack's on-going legal opinion was that the grievance had merit and should be pursued.

[211] In relation to the promotion grievance, counsel pointed out that the Faculty Association did not consider the considerable financial loss the Applicant suffered as a result of the improper consideration of Appendix A by the Promotions Committee. Even if the Faculty Association would not seek promotion as a remedy in the arbitration, its act of settling the grievance removed any possible retroactive remedy that the Applicant might receive had an arbitration board ordered that her 1994 promotion application be reheard.

[212] Counsel for the Applicant pointed out the deficiencies in the Faculty Association's legal analysis of the defamation grievance and noted that the Faculty Association settled the substantial defamation suit potentially worth hundreds of thousands of dollars without consulting the Applicant.

[213] In relation to the reprimand grievance, counsel reiterated that the Faculty Association did not convey to the Applicant the University's offer to reduce the reprimand to a non-disciplinary penalty of a letter of warning. Arbitrator Christie's award made it clear that under the terms of the collective agreement, there are only two forms of discipline – reprimand and termination.

Part D – Analysis:

[214] The duty to fairly represent employees in a bargaining unit imposes on a union a duty not to act in a manner that is discriminatory, in bad faith or arbitrary. In this

case, the Applicant alleges that the settlement of her grievances by the Faculty Association was carried out in a manner that was arbitrary. She also alleges that there is evidence of bad faith as demonstrated in the testimony of Prof. Wason-Ellam and the withholding of information about offers made by the University to the Faculty Association concerning the disciplinary warning. We will deal first with the allegation of arbitrary treatment and assess the grievances against the standards set in the following cases.

(i) Arbitrary treatment

[215] Arbitrariness is generally equated with perfunctory treatment and gross or major negligence. This standard arose from *Canadian Merchant Service Guild v. Gagnon,* [1984] 1 S.C.R. 509, where the Supreme Court set out five aspects of the duty of fair representation as follows at 527:

> 1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> 5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence and without hostility towards the employee.*
>
> [emphasis added]

[216] This Board has also adopted standards set by the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Inc. v. International Woodworkers of America, Local 1-217 et al.,* [1975] 2 Can L.R.B.R. 196, at 201-202 as follows:

> *The Union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race or sex (which are illegal under the Human Rights Code) or simple, personal favouritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*
>
> [emphasis added]

[217] This standard was expanded on by the Board in *Radke v. Canadian Paperworkers Union, Local 1120,* [1993] 2nd Quarter Sask. Labour Rep.57*,* LRB File No. 262-92, at 64:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or view of an individual employee.*

[218] As noted by counsel for the Faculty Association in his brief to the Board, this Board in the *Banga v. Saskatchewan Government Employees' Union,* [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, adopted comments as well from the Ontario Labour Relations Board in *Prinesdomu v. Canadian Union of Public Employees,* [1975] 2 Can L.R.B.R. 310:

> *It could be said that this description of the duty requires the exclusive bargaining agent to "put its mind" to the merits of a grievance and attempt to engage in a process of rational decision making that cannot be branded as implausible or capricious.*

[219] In *Rousseau v. International Brotherhood of Locomotive Engineers et al.,* 95 CLLC 220-064 at 143, 558-9, the Canada Labour Relations Board described the duty not to act in an arbitrary manner as follows:

> *Through various decisions, labour boards, including this one, have defined the term "arbitrary." Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.*
>
> *Negligence is distinguishable from arbitrary, discriminatory or bad faith behaviour. The concept of negligence can range from simple negligence to gross negligence. The damage to the complainant in itself is not the test. Simple negligence may result in serious damage. Negligence in any of its variations is characterized by conduct or inaction due to inadvertence, thoughtlessness or inattention. Motivation is not a characteristic of negligence. Negligence does not require a particular subjective stage of mind as does a finding of bad faith. There comes a point, however, when mere/simple negligence becomes gross/serious negligence, and we must assess when this point, in all circumstances, is reached.*
>
> *When does negligence become "serious" or "gross"? Gross negligence may be viewed as so arbitrary that it reflects a complete disregard for the consequences. Although negligence is not explicitly defined in section 37 of the Code, this Board has commented on the concept of negligence in its various decisions. Whereas simple/mere negligence is not a violation of the Code, the duty of fair representation under section 37 has been expanded to include gross/serious negligence . . . The Supreme Court of Canada commented on and endorsed the Board's utilization of gross/serious negligence as a criteria in evaluating the union's duty under section 37 in Gagnon et al. [[1984] 1 S.C.R. 509]. The Supreme Court of Canada reconfirmed the utilization of serious negligence as an element to be considered in Centre hospitalier Régina Ltée v. Labour Court, [1990] 1 S.C.R. 1330.*
>
> [emphasis added]

[220] These tests, variously stated, require the Board to consider the steps taken by the Faculty Association in its representation of the Applicant with respect to each grievance.

(ii) The faculty rights grievance

[221] This grievance was filed at the time that the Applicant was asked to vacate her office in the College of Law. In addition to filing the grievance, the Faculty Association negotiated an office for the Applicant in Kirk Hall and met with the Dean of the College of Law to resolve various problems that the Applicant experienced in relation to the forwarding of mail and phone calls. At the same time, the Faculty Association concentrated its efforts appropriately on the dismissal arbitration.

[222] The Applicant noted that she was denied access to various collegial decision-making processes during the period of her suspension; that she lacked access to travel and professional development funds; that she did not have access to clerical or other support services at the College of Law (which she acknowledged she used mostly in relation to her teaching responsibilities); she incurred expenses related to mail, photocopying, telephone, laser printing; and she had to purchase two pieces of computer equipment to get her temporary computer system up to the standard required by her research project.

[223] When the Applicant was reinstated to her position and office at the College of Law, the Faculty Association grievance committee referred the question of whether the grievance should proceed to Mr. Sack and to Mr. Craik. Mr. Sack's opinion letter of August 19, 1994 sets out various collective agreement provisions dealing with the issues of academic freedom but it does not assess the validity of the faculty rights grievance, other than to note in the attached "Summary of Dean MacKinnon's Failure to Follow Proper Procedures" that "[Dean MacKinnon] removed Professor Vandervort from her teaching duties and deprived her of an office; Faculty Council participation; library and photocopy services; access to law school facilities - - all on his own initiative."

[224] In his opinion letter of April 4, 1996, Mr. Craik outlined the evidence that could be called with respect to the faculty rights grievance and proposed to argue for an award of general damages. Later in his opinion letter, he set out the various legal

problems with requests of general damages in the arbitration context. However, in relation to this grievance, Mr. Craik indicated that reimbursement for the computer equipment paid from the Applicant's grant funds was a reasonable claim.

[225] By 1994, the issues outstanding in relation to this grievance involved an assessment of the actual financial losses incurred by the Applicant as a result of her removal from her office. Ms. Moore and Mr. Craik had access to the Applicant's documents in relation to these claims and the only substantive claim noted was the cost of computer equipment, which the Applicant had paid for through her research grant and wished to have reimbursed by the College of Law. Other financial losses were considered by Ms. Moore, in particular, in a thorough fashion and not found to be substantial on the evidence provided to Ms. Moore by the Applicant.

[226] In addition, at the time of settlement, Prof. Dooley assessed the merits of the grievance based on his understanding of the provisions relating to the recommendation for termination. He was an experienced member of the executive and grievance committee of the Faculty Association and had a good appreciation of the likelihood of success on the faculty rights grievance. In his view, the chances of success were not great on the main issue of whether a faculty member who is removed from duties following a recommendation to dismiss is entitled to retain his or her office and accompanying rights.

[227] In the end, the Faculty Association obtained the agreement of the University not to remove faculty members from their offices automatically upon making a recommendation to dismiss. In addition, the Applicant was provided with a letter from President Ivany expressing regret that the removal from her office may have affected her research activities.

[228] Overall, the Board concludes that the Faculty Association did investigate and undertake a thorough study of the grievance and did not act without due regard for the Applicant's interests. The Faculty Association achieved a good portion of any available remedy under the grievance through its original negotiations with the University where it obtained an office for the Applicant during the period of her suspension and

assisted her with on-going problems related to her removal from the College of Law. These efforts achieved a significant result for the Applicant.

[229] For these reasons, subject to our conclusions on other issues, we find that the Faculty Association did not violate the duty of fair representation by settling the faculty rights grievance on the basis that it did on July 24, 1998.

(iii) Academic freedom grievance

[230] The October 2, 1992 grievance alleged that the University had violated the academic freedom and no discrimination clauses of the collective agreement ongoing since 1984 and culminating in the dismissal proceedings. The grievance does not indicate what conduct constituted discriminatory treatment or breaches of the Applicant's academic freedom, other than the reference to the dismissal proceedings. As a result, it is necessary to refer to the legal opinion obtained from Mr. Sack to determine the factual matters that were relied on at the time to found the grievance.

[231] Mr. Sack's August 19, 1994 opinion set out the possible grounds for arguing that the Applicant's rights under the academic freedom clause had been breached by Dean MacKinnon's failure to follow proper procedures in handling the matters that gave rise to the recommendation to dismiss her. As indicated above, Mr. Sack did not discuss any remedial issues in his opinion letter.

[232] The Faculty Association sought further input from Mr. Craik and he went to some lengths to investigate the matter and to consult with Mr. Sack. In his opinion letter of April 4, 1996, Mr. Craik concluded that there was no basis in law for the discrimination grievance and that a computer search for cases to assist in providing a legal interpretation of the academic freedom clause was not fruitful. Mr. Craik went on in his opinion letter to discuss the time limitations set out in the collective agreement and the limitations thereby imposed on the evidence that could be used to assert a breach of the collective agreement. In assessing the evidentiary issues, Mr. Craik concluded that he would rely on the matters set out by Mr. Sack in his earlier opinion letter, i.e. the failure of Dean MacKinnon to follow proper procedures.

[233] On the remedial matters, Mr. Craik concluded:

> *On the matter of remedy, I would argue that you should receive an award of general damages for the harm done to your career and reputation by the spurious allegations Dean MacKinnon used to attempt to dismiss you, an award of a further amount for the anxiety and stress caused you during the course of that year, and a further amount as damages for the year of lost research time.*

[234] Mr. Craik then went on at some length in his opinion letter to set out the legal issues pertaining to the Applicant's claims for damages, noting the limited remedial authority of arbitrators and the limited application of cases such as *Vorvis* v. *Insurance Corporation of British Columbia,* [1989] 1.S.C.R. 1085, a decision of the Supreme Court of Canada, for claims related to aggravated and punitive damages. As indicated above, Mr. Craik's overall assessment was cautiously optimistic. He referred to *Re Ontario Hydro,* (1990) 16 L.A.C. (4th) 264 (Kates), where a similar claim for damages arose out of the employer's allegedly cavalier treatment of the grievor during the period relevant to the decision to terminate. In that instance, the Board of Arbitration found that it was jurisdictionally possible for it to award aggravated or punitive damages provided the rather strict conditions set out in the *Vorvis* decision, *supra,* were met, which they were not in that instance.

[235] In *Vorvis, supra,* the Supreme Court indicated that the contractual relationship between employer and employee "has always been one where either party could terminate the contract of employment by due notice and therefore the only damages which could arise would result from a failure to give such notice." As explained in *Re Ontario Hydro, supra,* at 269:

> *The majority S.C.C. decision with respect to the third aspect of its analysis in Vorvis placed an almost insurmountable obstacle in the way of awarding either aggravated or punitive damages in wrongful dismissal cases. As we understand the court's pronouncements the impugned employer actions that triggered the request for these extraordinary remedies on account of the victim's mental suffering would have to be capable of being made the subject matter of "an independent cause of action." That is to say, it will not suffice for the aggrieved employee to rely simply on the principal cause of action, namely, breach of "the reasonable notice period" in support of such claim for aggravated and punitive damages. Rather, in order to succeed the aggrieved employee would have to*

> *demonstrate that the untoward employer action that resulted in the aggrieved employee's mental suffering is capable of being clothed in a separate and identifiable (i.e. independent) cause of action apart from the principal cause of action.*

[236] No doubt Mr. Craik raised these cases and issues with the Applicant and his client, the Faculty Association, because the subject matter of the academic freedom and discrimination grievance centered on Dean MacKinnon's decision to recommend the Applicant's dismissal to the President. Although clothed in wording of academic freedom and discrimination, the grievance was, in its essence, a claim for aggravated and punitive damages for the manner in which Dean MacKinnon went about the process of making his recommendation.

[237] The Applicant was critical of Ms. Moore and Mr. Craik for their inability to locate any decisions on academic freedom and their inability to think in a more holistic manner concerning the question of her overall experience at the College of Law as it related to her critical approach to the study and teaching of law.

[238] It may be that had Mr. Craik reviewed the cases on academic freedom that were filed at the hearing by Mr. Renouf, he would have focused more of his analytical efforts in determining if the conduct the Applicant complained of could or did constitute a breach of the academic freedom article in the collective agreement. For instance, as Mr. Renouf pointed out in *University of Manitoba* (unreported February 11, 1991), Arbitrator Schulman held at 60 that discipline is not necessary before a breach of academic freedom can be found as "there are ways that a university could bring pressure on a professor to alter his views short of discipline; for example, by assignment of duties, withholding of increments, withholding promotions." We note, however, that the main focus of the grievance was on the events surrounding the Dean's recommendation for dismissal.

[239] If an arbitration board did find that Dean MacKinnon's conduct surrounding his recommendation to dismiss the Applicant violated the academic freedom provisions contained in the collective agreement, the question of the appropriate remedy would still be a significant issue. In our view, Mr. Craik's preoccupation with the remedial issue was not unrealistic in light of the Applicant's success in the Christie

arbitration, where the disciplinary measures were set aside and the Applicant was restored to her position in the College of Law. In addition, the Applicant suffered no wage loss during the period because the collective agreement required the University to continue her salary until the arbitration was completed and a decision rendered. Ordinarily, an arbitrator would issue a "make whole" [1] order that would reverse the offending disciplinary action. This remedy was achieved in the Christie grievance. Given the unusual circumstances of the case, Mr. Craik was then required to assess the likelihood of achieving a general damage award for intangible injuries of damage to reputation and mental distress, including loss of research time.

[240] Subsequent case law in this area, such as the decision of Arbitrator P.S. Picher in *Re Seneca College,* (2001), 102 L.A.C. (4th) 298, confirms the difficulties in seeking damages in collective agreement arbitration for intangible injuries. At 318-319, the arbitrator concluded as follows:

> *The alleged infliction of mental distress and the alleged defamation are serious allegations and of utmost importance. However, while the dispute occurred in the workplace and while the dispute occurred between parties who are subject to the terms of the collective agreement, those facts, alone, do not mean that the alleged wrongdoings have arisen "inferentially" under the collective agreement. The alleged wrongdoing of defamation and the intentional infliction of mental distress do not violate any term of the collective agreement. There is no term of the agreement prohibiting defamation or the intentional infliction of mental distress. As noted by Iacobucci J., speaking for the majority of the Supreme Court of Canada in* Wallace [[1997] 3 S.C.R. 701]*, "[a]n employment contract is not one in which peace of mind is the very matter contracted for . . ." Unlike the situation in* Weber [[1995] 2 S.C.R. 929] *there is no provision in the collective agreement between the instant parties that provides for the airing of allegations of "unfair treatment" through the grievance procedure, let alone the arbitration procedure.*[2]
>
> *The discharge of Mr. Olivo arises under the collective agreement. It has been adjudicated by this Board and he has been reinstated with full compensation for his losses. Allegations of anti-union animus arise under the collective agreement. Any breach of the*

[1] Brown & Beattie, Canadian Labour Arbitration, para. 2:41410.
[2] Also see Picher, M.G., "Defining the Scope of Arbitration: The Impact of Weber; An Arbitrator's Perspective", November 2000, Labour Arbitration Yearbook, 1999-2000 (Toronto: Lancaster House and Butterworths, 2000), where the author argues that the Supreme Court in *Weber* confused "grievability" with "arbitrability" when it ruled that all matters that could be the subject of a grievance must be remedied through arbitration.

> *no-discrimination article of the collective agreement may be remedied by the normal "make whole" remedies that would include the reversal of improperly motivated action taken against Mr. Olivo, along with "make whole" compensation, where appropriate. Further allegations of tortious conduct in the form of intentional infliction of mental distress and defamation, however, do not arise under the collective agreement, expressly or inferentially.*

[241] Clearly, the issues raised in the academic freedom and discrimination grievance were complicated both in a factual and legal sense.

[242] Subsequent to his April 4, 1996 opinion letter, Mr. Craik sought further input from the Applicant, which was not forthcoming. At a later date, the Applicant did present her case analysis to Prof. Paus-Jenssen but it did not address the central issue of what remedial relief would be available to her under the terms of the collective agreement for the alleged breach of academic freedom.

[243] Prior to settlement of this grievance, Prof. Dooley indicated that he assessed the academic freedom and discrimination grievance as being weak because there was no evidence that the University had used some means to stop the Applicant from expressing her views. He did not think that it was sufficient to demonstrate that members of the faculty disagreed with the Applicant's approach to legal scholarship.

[244] On the basis of the evidence filed, the Board finds that the Faculty Association carefully investigated and considered the Applicant's grievance relating to academic freedom and discrimination. There were two legal opinions obtained, both with qualifications. Mr. Craik's legal opinion, in particular, addressed the difficult issue of the appropriate remedy. Prior to the agreement to withdraw the grievance, Prof. Dooley did consider the likelihood of success of the grievance, given his knowledge of the collective agreement and the arbitration process. Again, we find that Prof. Dooley had the experience and knowledge to make such judgments.

[245] Subject to our comments on other issues below, we do not find that the Faculty Association acted in an arbitrary fashion by withdrawing the academic freedom and discrimination grievance.

(iv) The promotion grievance

[246] The central issue between the parties on the promotion grievance also centered on the issue of the appropriate remedy. The Faculty Association, particularly Prof. Hamilton, noted that a promotion grievance was not necessarily a "winning route," as applications for promotion can be made each year and an arbitration board would be restricted in its remedial authority to ordering a new promotion hearing during which the offending materials contained in Appendix A could not be considered. The Applicant disagreed with Prof. Hamilton's approach and advice.

[247] In his legal opinion of April 4, 1996 Mr. Craik indicated that the appropriate remedy for the grievance was to strike a new promotion committee to hear the promotion application without considering the offending material.

[248] In the final settlement, the Faculty Association obtained the agreement of the University to exclude the documents that had been included in Appendix A from consideration before the Promotions Committee.

[249] The Applicant complains that such a result denied her any effective remedy for the past harm of not considering her promotion application fairly in 1993 and thus, potentially denying her a salary increase for the academic year 1993-94 and onward.

[250] Prof. Dooley indicated in his evidence that the promotion could be made retroactive on any annual application to the Promotions Committee. He did not view the withdrawal of the grievance as denying the Applicant the right to seek a promotion back to the 1993-1994 academic year.

[251] In assessing the Faculty Association's handling of this grievance, we note that the Board has in past decisions indicated that a union may refuse to take a position in a grievance or arbitration process that is at variance with its preferred interpretation of a collective agreement provision: see, for instance, *Meaden v. Saskatchewan Union of Nurses,* [1997] Sask. L.R.B.R. 45, LRB File No. 174-96. In that instance, a junior nurse sought to grieve the employer's decision to appoint a more senior, but, according to the

junior nurse, less qualified nurse to a regular part-time position. The Union refused to grieve because of its policy of supporting seniority on promotion cases. The Board held at 61:

> *In this respect, we do not think it was necessary for the Union to proceed simply because Ms. Meaden and her successive counsel estimated that a grievance could have been successful. Given the complexity and range of jurisprudence which has arisen in connection with these issues, she may well have been right.*
>
> *In our view, however, the Union is entitled to wide discretion in choosing the ground on which they choose to fight an employer, provided that they do it in accordance with the duty of fair representation. In this instance, the Union had concluded at a previous time that the interests of their membership as a whole were best served by an insistence on obtaining the greatest emphasis on seniority which could be gained within the terms of the existing collective agreement, and by making continuing efforts to alter the terms of the agreement to reflect an even greater weight for seniority. By this means, they hoped to ensure that their members would have the widest range of job options, and the highest possible degree of mobility in the event of selections, transfers and layoffs.*
>
> *As we have seen, this position could be expected to have a less favourable impact in general on employees with less seniority as other characteristics would be relatively devalued in accordance with this stance. It is, however, a position which the Union is entitled to take, and entitled to take consistently.*

[252] In the present case, the Faculty Association maintained its position that the remedial authority of the arbitrator was limited to referring the matter back to the Promotions Committee with the elimination from its consideration of the materials in Appendix A. This position conformed to the Faculty Association's strong emphasis on peer review as the method of determining both tenure and promotions, which is reflected in Articles 15–Tenure and Article 16–Promotion of the Collective agreement. Both provisions restrict the ability of the faculty member and the Faculty Association to grieve a denial of tenure or promotion as follows:

> *15.19* *<u>Grievance in the Case of the Denial of Tenure:</u> A grievance may be made in the case of the denial of tenure on only four grounds:*
>
> *(i)* *that proper procedures have not been followed; or*
>
> *(ii)* *that the Academic Freedom Article (Article 6) has been violated; or*

> *(iii) that the Non-Discrimination Article (Article 7) has been violated; or*
>
> *(iv) that the Board has reversed a positive recommendation from the University Review Committee or a Renewals and Tenure Appeals Committee.*

[253] In Article 15.20 of the collective agreement, the arbitrator's powers to order the issuing of tenure as a remedy are curtailed except in the circumstance described in sub-clause 15.19(iv) above.

[254] In the promotions provisions, a grievance is subject to the same limitations as set out in Article 15.19. The promotions article leaves open the question of whether an arbitration board is restricted in its ability to order an actual promotion as there is no reference in Article 16 to its companion Article 15.20.

[255] In our view, it is acceptable policy for the Faculty Association to adopt an interpretation of the remedial powers of an arbitration board acting under Article 16, based on its preference for peer review as the method of determining promotion matters.

[256] Overall, subject to our determination on the remaining issues, the Board finds that the Faculty Association carefully considered the promotion grievance and took efforts to resolve it in the Applicant's favour by reaching the agreement with the University to prevent the Dean from forwarding the Appendix A material to the Promotions Committee in future promotion applications.

[257] Prof. Hamilton and Prof. Dooley were both of the view that applications for promotion can have retroactive effect, that is, that there would be no monetary loss suffered by the Applicant should she successfully apply for promotion after the settlement was reached and Appendix A removed from the consideration of the Promotions Committee. On this basis, they felt comfortable having settled the grievance on the basis that Appendix A would not be considered in subsequent promotion applications. To the extent that both Prof. Hamilton and Prof. Dooley "put their minds" to this issue and made an informed and reasoned judgment, we are satisfied that they have not acted in an arbitrary fashion by settling the promotion grievance.

(v) Post-reinstatement harassment

[258] No grievance was filed by the Faculty Association with respect to various incidents referred to collectively as “post-reinstatement harassment.” However, the various elements of these matters were investigated by the grievance committee, Mr. Craik with the assistance of Ms. Moore, and later on, by Prof. Stewart.

[259] Mr. Craik’s opinion letter of April 4, 1996 is somewhat confusing in relation to the advice given as he dismissed all the examples of harassment brought forward by the Applicant, but then concludes: “My philosophy is to take only the best examples of harassment forward and not dilute or diminish our case with weak and tenuous examples.” He notes, however, that there is no anti-harassment provision in the collective agreement or statute law and suggests that these matters be raised under the rubric of academic freedom.

[260] Again, it is our view that Mr. Craik was cautiously optimistic in his advice to the Applicant, with emphasis on “cautiously.” Given his actual assessment of the individual complaints, however, the Faculty Association was justified in not grieving the various matters. They lacked substance overall and consisted mainly of peer-to-peer conflicts that are not readily amenable to resolution through any grievance procedure. The Board does not find that the Faculty Association failed to seriously investigate and consider the Applicant’s complaints in relation to the various incidents of alleged harassment.

(vi) The overload pay grievance

[261] This grievance was settled to the Applicant’s satisfaction and will not be addressed further in these Reasons.

(vii) The defamation grievance

[262] The Applicant argues that the Faculty Association did not take a reasoned view of the defamation grievance and settled it without fairly considering her interests.

[263] Counsel for the Applicant pointed out the large damage awards that are now available for defamatory statements following the Supreme Court of Canada’s

decision in *Hill v. Church of Scientology, supra,* and argued that the harm to the Applicant's professional reputation as a lawyer and law professor caused by President Ivany's remarks was similar to the defamatory incidents referred to in the *Hill* case. The Supreme Court recognized the significance of the harm of suggesting in writing that a lawyer is unethical and dishonest by awarding Mr. Hill general damages in the amount of $300,000.

[264] The Applicant argued that it did not appear that the Faculty Association had conducted a proper assessment of damages arising from the defamatory conduct, although it did obtain an opinion letter from its lawyers that the Applicant's remedy would need to be found in the collective agreement and could not be pursued through legal action for defamation in the civil courts following the judgment of the Supreme Court of Canada in *Weber,* [1995] 2 S.C.R. 929. Counsel for the Applicant agreed with Mr. Craik's legal advice on this point.

[265] While the Board is not required to assess the validity of the legal advice provided in this instance, we would point out that the *Weber* case, *supra,* required both an assessment of the essential nature of the dispute and the ambit of the collective agreement. We do not find any language in the collective agreement that suggests, directly or inferentially, that the parties intended their agreement to cover claims for defamation. Unlike the *Weber* case, the collective agreement does not define "grievance" as permitting complaints about unfair treatment. It is possible to argue that management rights must be exercised "fairly" and that defamatory remarks by a member of the University's management team constitute "unfair treatment." However, that seems to this Board to be stretching the notion of contractual intent unduly especially when it is understood that by including such claims in the collective agreement, the individual's right to ordinary tort remedies is removed. The collective agreement itself contemplates that it does not cover all matters and those that it does not cover are to be resolved under a process of consultation.[3] This provision is a clear indicator that the parties did not intend the agreement to cover all aspects of the relationship between them.

[3] Article 2.1 states in part: "Both parties recognize that there may be matters which are not covered in this Agreement and agree to use the Joint Committee for the Management of the Agreement as the vehicle for resolving such matters."

[266] However, as both parties proceeded on the basis that the matter was covered by the agreement, the Board will assess the Faculty Association's representation efforts on this assumption.

[267] The Applicant pointed out the vagueness of Prof. Paus-Jenssen's and Prof. Dooley's testimony concerning their assessment of the value or the merits of the grievances that they were giving up in the settlement negotiations. In the end result, the Applicant was provided a letter of regret signed by President Ivany which, she felt, did not adequately address the harm caused to her by his remarks to the General Academic Assembly.

[268] The Faculty Association argued that it took a reasoned view of the defamation grievance. It assessed the defences available to the President including the defence of fair comment. It recognized the uncertainty of the issue of proper forum as the case law was changing and different courts were coming to different conclusions when applying the principles contained in *Weber, supra.* Counsel argued that the Faculty Association was entitled to weigh the matters and balance the competing interests, including the fact that there was a "bigger fish to fry" in terms of dealing with the Applicant's reprimand grievance.

[269] This Board has accepted the proposition that a union is entitled to settle grievances with employers and is not required to move each grievance to arbitration, even if the grievance entails competing claims of employees. In *Rayonier Canada (B.C.) Ltd.* case, *supra,* the British Columbia Labour Relations Board concluded:

> *Within the context of the Act which grants exclusive status to a trade union for the dual purposes of negotiating the terms of a collective agreement and negotiating the settlement of disputes and grievances that arise under the terms of the agreement, carriage of a grievance is the responsibility of the trade union and is not vested in the individual employee. This authority extends to decisions to initiate, carry forward, settle or arbitrate any particular grievance.*

[270] The authority to negotiate settlement of grievances is not, however, an unfettered authority as noted by L'Heureux-Dubé J. in *Centre hospitalier Régina Ltée v. Québec (Labour Court)*, [1990] 1 S.C.R. 130 at para. 38:

> *As Gagnon pointed out, even when the union is acting as a defender of an employee's rights (which in its estimation are valid), it must take into account the interests of the bargaining unit as a whole in exercising its discretion whether or not to proceed with a grievance. The union has a discretion to weigh these divergent interests and adopt the solution which it feels is fairest. However, this discretion is not unlimited. Simply saying that the union has the right or power to "sacrifice" any grievance, which it feels is valid at that stage, during negotiations with the employer in order to obtain a concession of better working conditions or other benefits for the bargaining unit as a whole, would be contrary to the union's duty of diligent representation of the employee in question. On the other hand, completely rejecting the possibility that the union and the employer may settle a great many grievances in negotiations for a new collective agreement, or on other occasions, would be to ignore the reality of labour relations.*

[271] And, at para. 41, the learned Justice continued:

> *The exercise of this discretion by the union will also depend on the nature of the rights which the employee is seeking to enforce by his grievance. There will be situations where the abandonment of an apparently valid grievance by the union will have such consequences for the employee in question that it will substantially restrain the union's discretion. When, for example, the purpose of the grievance is to challenge a dismissal, the employee will not accept any half measures: only reinstatement will be a suitable remedy.*

[272] L'Heureux-Dubé J. went on to set out the competing theoretical approaches to the duty of fair representation. The "individual rights" approach to the duty of fair representation is premised on the notion that individual employees are entitled to determine the process of resolving their complaints; the "union control" approach assumes that unions are permitted to control the grievance process with limited restraints; and the "critical job interest" approach restricts the union's discretion to settle, compromise or withdraw a grievance in instances involving critical job interests, such a dismissal grievances.

[273] We note that the "union control" approach is the general approach to the duty of fair representation by labour relations boards and courts in Canada starting with the Supreme Court's decision in the *Gagnon* case, *supra,* and confirmed in the recent Supreme Court decision in *Noël v. Société d'énergie de la Baie James,* [2001] 2 S.C.R.

207. That is, unions are entitled to settle, compromise or withdraw employee grievances, even those involving critical job interests. This approach is tempered by the practice of requiring unions to exercise greater care and restraint in the exercise of discretion when the job interests involved in the grievance are critical to the individual employee. Typically, such critical job interests include dismissal, discipline, and seniority related issues that are at the heart of the employment relationship.

[274] In the labour relations context, the defamation grievance did not involve a critical job interest as the Applicant's employment was not directly threatened by the President's remarks. The Applicant argues that the defamation seriously hurt her academic reputation and her professional standing in the community.

[275] Even if the defamation grievance could be considered to affect a critical job interest, we find that the settlement arrived at between the University and the Faculty Association addressed the academic and professional reputational harm by providing the Applicant with a letter of regret from President Ivany. The letter provided her with the means to "set the record straight" in her future dealings at the University and in the community. In the employment context, the Faculty Association achieved a result that considered the long-term impact of the disputed employer conduct on the employee. It may not represent a financial award of the proportions obtained in the *Hill* case, *supra,* but it does provide an on going "make whole" remedy to the Applicant, consistent with usual collective agreement remedies.

[276] We find, however, that there is some merit to the Applicant's argument that the Faculty Association did not conduct a thorough assessment of the damages that might be awarded to the Applicant on the defamation grievance should it be successful. In this sense, it may have entered into a settlement agreement with the University with respect to the defamation grievance without a clear picture of what it was giving up for the Applicant. As indicated above, Mr. Renouf argued that the *Hill* case, *supra,* set a damage range for such defamatory conduct at the level of $300,000. This award was set by a jury in a civil trial arising out of false allegations that a prosecutor committed criminal contempt of court.

[277] On the arbitration side, in *CEPU, Local 434 v. ABT Building Products Canada Ltd. et al.,* [2000] N.S.L.A.A. No. 15, Arbitrator Christie applied common law principles to damages for slander in the workplace to determine that no damage claim was available to the grievor for the slanderous remarks made by his employer. In *AUPE v. Edmonton Sun,* [1986] A.J. No. 1147 (McFayden J.), correctional officers were awarded damages in a civil action for defamation in amounts ranging from $1,500 to $3,500 as a result of the publication of an article demeaning of correctional officers as a group.

[278] In our view, the Faculty Association's failure to assess potential monetary damages in a detailed manner, while it may constitute negligence, did not demonstrate serious negligence amounting to arbitrary conduct. The state of the law was uncertain in relation to many aspects of the defamation grievance, including the size of potential damage awards, as can be seen from the existing case law on defamation. The Faculty Association was aware to some extent of this uncertainty and balanced it against the certainty that could be obtained through the settlement agreement with the University. It also balanced it against the other outstanding grievances affecting the Applicant in particular, and took into account the relative seriousness of the grievances. As indicated, the settlement addressed the reputational harm claimed by the Applicant and provided her with a practical method of overcoming that harm.

[279] Overall, the Board does not find that the Faculty Association acted in an arbitrary manner when it settled the defamation grievance with the University.

(viii) The discipline grievance

[280] This matter was not before this Board and will not be addressed further.

(ix) Bad faith/dishonest dealings

(a) Evidence of Prof. Wason-Ellam

[281] Dishonest dealings by the officers of a Union toward a member in relation to the handling of grievances may result in a finding of bad faith: see *Woodside v. Regina Police Association et al.*, [2000] Sask. L.R.B.R. 496, LRB Files Nos. 167-99, 168-99 & 169-99. Prof. Wason-Ellam's evidence, if accepted by the Board, suggests

that the Faculty Association and the University conspired to “get rid” of the Applicant. This evidence, if accepted, suggests behind-the-scenes dealings that would demonstrate that he Faculty Association handled the grievances dishonestly or with duplicity of purpose, both of which are unacceptable methods of handling grievances.

[282] Both the members of the Faculty Association and President Ivany denied Prof. Wason-Ellam’s allegations. In this circumstance, the Board must determine on some objective basis if it accepts or rejects her testimony.

[283] In *Lasko v. International Union of Painters and Allied Trades, Local 739 et al.,* [2003] Sask. L.R.B.R.---, LRB File No. 234-02, the Board faced a similar evidentiary issue and relied on a quote from *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-357, as follows:

> *If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. <u>In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.</u> Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial*

> *suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to day "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*
>
> [emphasis added]

[284] Applying these factors to the present case, we note that Prof. Wason-Ellam was an independent witness in the sense that she had no interest or knowledge of the Applicant's grievances or unfair labour practices at the time of her meeting with President Ivany. The meeting occurred around the time that the Faculty Association and the University were negotiating the settlement of the Applicant's grievances when the President would have been consulted regarding the terms of the settlement. Prof. Wason-Ellam noted that Profs. Dooley and Paus-Jenssen were in the executive area of the Administration building when she arrived to meet with President Ivany. She was familiar with the Faculty Association officers due to her concerns with the Faculty Association's handling of an unfortunate workplace incident relating to her. These aspects of Prof. Wason-Ellam's testimony demonstrate internal and external consistency and believability.

[285] Prof. Wason-Ellam's testimony must also be assessed in relation to the evidence of President Ivany and Profs. Dooley and Paus-Jenssen. Profs. Dooley and Paus-Jenssen denied that they met with President Ivany on the date in question and denied that they offered to help the President "get rid of " the Applicant. Prof. Paus-Jenssen, in particular, had assisted the Applicant in numerous ways during the period of her suspension and after. He arranged for Mr. Sack to represent the Faculty Association at the Applicant's dismissal hearing. He actively encouraged the continuation of the Applicant's grievances and advocated strenuously on her behalf. He did admit to meeting with President Ivany in the spring of 1997 to attempt to head off the reprimand issue, but with no success. His role in relation to the Applicant was as a strong and tireless advocate. Prof. Wason-Ellam's evidence is not consistent with the overall role that Prof. Paus-Jenssen played in assisting the Applicant.

[286] The evidence is also inconsistent with the relationship between President Ivany and the Faculty Association. The President described the relationship as

“ritualized adversarialism” and his attitude toward the Faculty Association was clearly demonstrated by his remarks to the General Academic Assembly in the spring of 1997, when he criticized the Faculty Association in relation to its representation of the Applicant.

[287] The evidence is also inconsistent with the results of the settlement agreement in which the President provided the Applicant with a letter of regret concerning his remarks at the General Academic Assembly and her removal from her office at the College of Law during the period of her suspension from duties.

[288] It is conceivable to this Board, after having heard the evidence of the Faculty Association and President Ivany, that the latter would have made some sharp remarks concerning the Faculty Association and the Applicant to Prof. Wason-Ellam, but, on the whole, we do not find her evidence overall to be “in harmony with the preponderance of possibilities” in this case.

[289] For these reasons, the Board prefers the testimony of Profs. Paus-Jenssen and Dooley and President Ivany and does not find that the Faculty Association was dishonest or duplicitous in its handling of the Applicant’s grievances.

(b) Breach of Protocol Agreement and Failure to Communicate

[290] The Protocol Agreement was the subject of much debate before the Board. The Protocol Agreement was entered into as a method of advancing the grievances while, at the same time addressing the Applicant’s duty of unfair representation complaint before the Board. The parties agreed to adjourn the duty of unfair representation application while the Faculty Association and the Applicant proceeded to deal with the grievances. In one of her letters to the Faculty Association, the Applicant pointed out that the Protocol Agreement was entered into as a condition of adjourning the duty of fair representation application before the Board. Implicit in this arrangement is that a breach of the Protocol Agreement would lead to a resumption of the duty of unfair representation complaint, which is exactly what happened.

[291] The Applicant’s primary complaint in relation to the Protocol Agreement is that the Faculty Association entered into the settlement agreement with the University

without consulting her or including her in the decision-making process. Counsel argued that the short time frame between the time of communicating the offer to the Applicant and the signing of the agreement by Mr. Craik denied the Applicant the opportunity of seeking an appeal of the settlement to the membership of the Association.

[292] The Faculty Association argued that its officers did discuss its settlement proposal with the Applicant on two occasions: first, when Prof. Paus-Jenssen met with the Applicant in February 1998 when he outlined in detail the proposal to settle all outstanding grievances; and second, at a meeting with Bill Craik and members of the grievance and litigation committees on March 25, 1998 when the entire proposal was put to the Applicant. Mr. Craik followed up on the meeting with a letter to the Applicant outlining the proposed settlement terms. On each occasion, the Applicant rejected the settlement proposals.

[293] After the March 25, 1998 meeting, the Faculty Association decided to proceed with the settlement negotiations. The final results of the negotiations were put to the Applicant, albeit with short notice, and she responded by withdrawing all further co-operation.

[294] The Board finds that the settlement process was not flawed to the point of being arbitrary. The negotiations were carried on by the Faculty Association on the basis that they had proposed earlier to the Applicant. The offer was also communicated to the Applicant prior to being accepted by the Faculty Association although it was agreed by the Faculty Association that the notice was indeed short and, with hindsight, Mr. Craik ought to have provided the Applicant with a longer period of time in which to respond formally to the proposed settlement document.

[295] The cases demonstrate that failure to communicate is not *per se* arbitrary treatment: see *Young v. United Transportation Union*, [1989] CLLC 16,034. Overall, the Board finds that there had been adequate opportunities extended to the Applicant to express her opinion and views on the proposed settlement from March 25, 1998 forward. It is not an unusual process for a union to discuss potential settlement positions with a grievor, obtain her feedback, and then assess whether the union should proceed to arbitration or settlement. Prof. Dooley laid out the process used by the Faculty

Association for assessing the likelihood of success on the various grievances. His assessment took into account the various legal uncertainties that existed and the need to focus on the impending and more serious discipline grievance. In our view, his assessment of the issues and priorities at stake was thoughtful and thorough.

[296] Finally, we find that the Faculty Association did not act in an arbitrary fashion by excluding the Applicant from the settlement discussions. Carriage of the grievance and its settlement is in the hands of the Faculty Association, subject to the tests set out above. The failure to include the Applicant in the discussions did not lead to a failure to consider her position or the strengths and weakness of the grievance, both of which were canvassed thoroughly by the Faculty Association.

[297] Counsel for the Applicant argued that the failure to provide the Applicant with a copy of the settlement offer reducing the penalty of reprimand to a letter of warning constituted a clear violation of the duty of fair representation. As discussed above in relation to the promotion grievance, the Faculty Association may make decisions with respect to individual grievances that balance the interests of the individual member and the interests of the bargaining unit as a whole. In this instance, it concluded that the introduction of a written warning as a step in the University's disciplinary arsenal was not in the best interests of its members as a whole. Counsel for the Applicant argued that such a warning would clearly not constitute "discipline" in the context of the terms of the collective agreement given the Christie decision which concluded that discipline could only consist of reprimands and dismissal. However, the Faculty Association was obviously concerned that the settlement would set a precedent for the use of written warnings as some form of disciplinary penalty. It did not want to appear to condone the use of written warnings. In our view, its concern was genuine and legitimate. In the end result, the President would not agree to the reduction of penalty from reprimand to written warning and the matter was no longer an issue. The Board does not find that the Faculty Association's failure to communicate the offer constituted dishonesty or bad faith.

(iii) Conflict of Interest

[298] As indicated above, the Applicant raised conflict of interest allegations with respect to the Faculty Association's handling of her tenure application in 1984 and onward. She suggested that the grievance committee (composed of some of the same members in 1994 as were part of the committee in 1984) might not be able to properly represent her interests in relation to her grievances as they had failed to vigorously defend her in the earlier proceedings. The Applicant was critical of the Faculty Association's failure to insist on more stringent procedural safeguards in the tenure and promotions systems and its failure to ensure that the peer review committees established under the collective agreement followed the principles of natural justice.

[299] This theme informed the Applicant's subsequent dealings with the Faculty Association, despite the efforts made by the Faculty Association to ensure her successful dismissal grievance and her reintegration into the College of Law. The Applicant felt that all of her difficulties stemmed back to the original denial of tenure and delays in promotion. The Applicant adopted a "but for" approach to her experiences with the Faculty Association and the College of Law – if the Faculty Association had been more diligent in pursuing natural justice issues with the tenure and promotions processes, the Applicant would not have been denied tenure and promotions and would not have suffered through the dismissal process and the subsequent problems that she experienced at the College of Law.

[300] To a great extent, it is unfortunate that the Applicant took this approach with the members of the grievance committee because it prevented her from developing a working relationship with them in order that they could properly represent her in the subsequent grievances. Aside from the Applicant's allegation, however, there is no indication in the evidence that members of the Faculty Association's executive or grievance committee failed to carry out a proper investigation of her grievances, or to properly consider her grievances because of some overriding conflict of interest arising out of the manner in which they dealt with her complaints in 1984.

[301] The Applicant also raised the question of conflict of interest with Mr. Craik, first arising from his status as an alumnus of the College of Law and latterly, as

the lawyer for the Faculty Association on the duty of fair representation application, as well as on her grievances.

[302] We do not find any legal basis for concluding that alumnus status raises an actual or perceived conflict of interest.

[303] With respect to the second allegation of conflict of interest, it is based on the assumption that the Applicant was Mr. Craik's client. However, as confirmed in cases such as *Dwyer v. Cavalluzzo, Hayes, Shilton, McIntyre and Cornish*, [2000] O.J. No. 2556 (Ont. C.A.), the "client" in labour arbitration cases is the trade union; in this case, it was the Faculty Association. As such, the rules that prevent lawyers from acting in cases against former clients did not apply to prevent Mr. Craik from continuing to represent the Faculty Association in the duty of fair representation case brought by the Applicant and continuing to act for the Faculty Association in relation to the Applicant's grievances.

[304] In relation to the duty of fair representation case, at the time the application was filed, Mr. Craik had minimal involvement in the grievances and he would not have been disqualified from appearing at that stage as a result of him needing to be a witness in the proceedings. When the matter did come to the Board for hearing and it was clear that Mr. Craik would be required as a witness for the Faculty Association, he did not appear before the Board in both capacities - as a witness and as counsel for the Faculty Association. While the Board has not had occasion to consider if the dual role is improper for counsel appearing before it[4], it is a situation that most counsel avoid.

[305] The Board finds that there was no conflict of interest on the part of Mr. Craik acting initially as counsel for the Faculty Association in relation to the duty of fair representation and as counsel for the Faculty Association in relation to proceeding with the Applicant's grievances.

(c) Conduct of the Applicant

[306] Given our findings with respect to the duty of fair representation, we do not find it necessary to deal with the Faculty Association's arguments that the Applicant

[4] Non-lawyers frequently appear before the Board in the dual capacity as witness and representative.

abused Board processes by her lack of co-operation in dealing with the Faculty Association or her delay in bringing this application to hearing.

Conclusion:

[307] The Board finds that the Faculty Association did not fail in its duty to fairly represent the Applicant in relation to her grievances against the University and dismisses the duty of fair representation applications in LRB File Nos. 102-95 & 047-99.

DATED at Regina, Saskatchewan, this **1st** day of **April, 2003.**

LABOUR RELATIONS BOARD

Gwen Gray, Q.C.
Chairperson