Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

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

Applicants

- and -

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

Respondents

FACTUM OF THE RESPONDENT, THE BOARD SENATE HEARING PANEL FOR SEXUAL HARASSMENT/ANTI-DISCRIMINATION UNDER THE MCMASTER UNIVERSITY ANTI-DISCRIMINATION POLICY

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PART I – OVERVIEW

1) This is an Application brought by Dr. Chris Bart, Dr. Devashish Pujari, Dr. William Richardson, Dr. Joe Rose, Dr. Sourav Ray, Dr. George Steiner, and Dr. Wayne Taylor for judicial review of the Board Senate Hearing Panel for Sexual Harassment/Anti-Discrimination's (hereinafter referred to as the "Tribunal") decision under the McMaster University Anti-Discrimination Policy (hereinafter also referred to as the "Policy").

2) The Tribunal respectfully asks the court to consider the following positions on this Application:

   (a) The Tribunal functions in accordance with the requirements of the Policy and the *Statutory Powers Procedure Act*, RSO 1990, c. S. 22 (the "*SPPA*").

   (b) Even if issues of procedural fairness are reviewable on a correctness standard, the Tribunal's procedural choices attract significant deference in the circumstances.

   (c) The Applicants consented through their counsel to many of the alleged unfair procedural processes.

   (d) The Applicants never raised with the Tribunal any reasonable apprehension of bias issue about Dr. Bonny Ibhawoh. The first time this became an issue was on judicial review.

   (e) The Tribunal remedial discretion is exercised within the scope of its jurisdiction. The Tribunal's discretion need only be exercised within the range of reasonable outcomes.

PART II – THE FACTS

The Tribunal's Participation in the Judicial Review

3) The *Judicial Review Procedure Act* provides, in s.9(2), as follows:

> (2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

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

4) The Tribunal takes no position on the facts in dispute. The following is submitted to explain the Tribunal's role and jurisdiction. The Tribunal will reference the record where it can assist the Court while seeking to maintain its adjudicative impartiality.

***Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, paras. 52 to 74.**

5) The following describes the relevant statutory provisions and the procedural context under which the Tribunal proceeded.

The Tribunal's Jurisdiction

6) The *McMaster University Act*, 1976 ("the *MUA*") is an Act of the Ontario Legislature which incorporated McMaster University and established a Board of Governors and a Senate, each with its own jurisdiction and powers. This bicameral system of university governance is in place at most Canadian universities.

***An Act respecting McMaster University*, S.O. 1976, c.98, s.9.**

The Board of Governors

7) The legal responsibilities of the Board of Governors are set out in section 9 of the *MUA*. Except for such matters as are assigned by the *MUA* to the Senate, the government, conduct, management and control of the University and of its property, revenues, business and affairs are vested in the Board.

The Senate

8) The University Senate has broad representation from the University. Representation includes *inter alia* the Chancellor, administration, alumni, faculty, undergraduate and graduate students.

***An Act respecting McMaster University*, S.O. 1976, c.98, s.12.**

9) The Senate of the University has been delegated ultimate responsibility for determining academic policy and regulating the system of education, which includes academic regulations, the criteria and procedures for granting tenure and promotion to faculty members and so on. Section 13(1) provides the Senate with the powers to appoint such committees as it may deem advisable and delegate to any such committee any of its powers.

***An Act respecting McMaster University*, supra, s.13.**

The Anti-Discrimination Policy

10) The Senate and the Board of Governors approved the Policy pursuant to the authority delegated under the *MUA*. The Senate and the Board of Governors have delegated specific aspects of the decision making process to a hearing committee established in the Policy. Sections 12 through 20 of the Policy also address jurisdiction.

11) The University Secretariat is the body at the University responsible for impartially administering hearings under various policies. The executive member responsible for the Policy is the University Secretary.

12) The Policy is intended to prevent discrimination and harassment, whether under the *Ontario Human Rights Code* or the *Occupational Health and Safety Act*. Section 6 confirms:

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

13) Furthermore, the Policy reflects the University's statutory obligations under the *Human Rights Code,* RSO 1990, c.H.19 (the "*Code*") to provide a workplace free from discrimination and harassment. Discrimination (s.11a) and harassment (s.11b) are defined under the Policy. The broad definition of harassment in the Policy includes non-*Code* based harassment.

14) Sections 12 and 13 confirm that the Policy applies to all members of the University community. Members of the University are defined to include administrative, research, teaching and non-teaching employees of the University as well as students.

15) The Policy identifies that the University can be a complainant (ss.33 to 36) or initiate a complaint on behalf of one of its members (s.16(b)). Section 59 of the Policy confirms that the parties to the hearing are those who are identified as signatories to the written complaint and the persons alleged in the written complaint to have breached the Policy.

16) The composition of the Hearing Panel is established under Section 48. Selection of the teaching staff who serve on the panel is made by the Senate.

17) Objections to the proposed slate is addressed in Section 54. A process is expressly made available to the parties under Section 54 prior to the commencement of the hearing which enables a party to *inter alia* raise bias concerns. Bias concerns could have also been raised with the Tribunal in accordance with the principles of natural justice.

18) A party could request that the hearing or some part of it should be held in public, in which case the Tribunal would have been required to address any objection to proceeding in-camera.

Anti-Discrimination Policy, Section 66.

The Tribunal's Procedure

19) The *Statutory Powers Procedure Act* ("*SPPA*") in conjunction with the procedural rules established by the Policy govern a hearing conducted by the Tribunal (sections 56 and 57).

20) The Policy recognizes that in the event that a matter is not dealt with either by the Policy or the *SPPA*, the Tribunal will establish their own procedure in accordance with principles of fairness (section 57).

The *Statutory Powers Procedure Act*

21) The *SPPA* confirms that its provisions shall be liberally construed to secure the just, most expeditious and cost effective determination of every proceeding on its merits.

Statutory Powers Procedure Act, Section 2.

22) The *SPPA* also confirms that any rule made by a tribunal under Subsection 17.1(4) or Section 25.1, *"shall be liberally construed to secure the just, most expeditious and cost effective determination of every proceeding on its merits."* Section 25.1(1) also specifically affirms that, *"a tribunal may make rules governing the practice and procedure before it."*

Statutory Powers Procedure Act, Section 2 and 25.1(1).

23) Substantial compliance with the requirements respecting any rule made under the *SPPA* is sufficient.

Statutory Powers Procedure Act, Section 28.

24) Procedural requirements under the *SPPA* or the Tribunal's rules may be waived with the consent of the parties and the Tribunal.

Statutory Powers Procedure Act, Section 4.

25) Furthermore, proceedings involving similar questions of fact, law or policy, may be combined with the consent of parties under the *SPPA*.

Statutory Powers Procedure Act, Section 9.1(1)(a).

26) The Tribunal is empowered to classify proceedings and set guidelines for procedural steps or processes (Section 4.7) including holding any combination of written, electronic and oral hearings (Section 5.2.1).

Statutory Powers Procedure Act, Section 4.7.
Statutory Powers Procedure Act, Section 5.2.1.

27) Under the *SPPA*, the record the proceeding does not include any audio recording but only the *"transcript, if any, of the oral evidence given at the hearing"*.

Statutory Powers Procedure Act, Section 20(e).

28) The *SPPA* confirms that subject to Subsections (2) and (3), a tribunal may admit as evidence, any oral testimony and any document or other thing, whether or not proven under oath or admissible as evidence in a Court. Such evidence, if relevant to the subject matter of the proceeding may be acted upon by the tribunal which may also exclude any evidence which is unduly repetitious.

Statutory Powers Procedure Act, Section 15.

The Tribunal's Remedial Authority

29) The Tribunal has jurisdiction to issue orders under the *SPPA*. Section 16.1 of the *SPPA* confirms that a tribunal can "make interim decisions and orders" and also that a tribunal

may impose "conditions on an interim decision or order". Section 17 confirms that a tribunal can make orders with written reasons in its final decision.

30) In addition, the Policy identifies sanctions and remedies which may be imposed upon "any respondent", whether a member (Section 71) or a student (Section 72). It further permits the Tribunal to make recommendations concerning "any appropriate sanction or remedies it deems necessary to guarantee that the behaviour is not repeated" (Section 73). Section 57 confirms the procedures set out in the Policy are "in addition" to those provided by the *SPPA* unless they are in "conflict".

31) The Tribunal can recommend that the University take action, including that policies be reviewed or individuals be trained including those who are not parties to a complaint. Section 73 required the Tribunal to recommend appropriate sanctions or remedies that it deemed necessary to guarantee the behaviour was not repeated.

32) The Tribunal was required to consider the directives provided to it under the Policy in deciding whether and how to exercise its remedial discretion.

PART III –ISSUES AND THE LAW

A. The Issues

33) The Tribunal wishes to address the following:

a) The legal framework under which the Tribunal functioned.

b) The requirement that the Tribunal provide an adequate level of procedural fairness and natural justice after the complaints were referred to it.

c) The standard of review applicable to the Tribunal's findings and the recommendations made or the sanctions imposed on the Applicants.

B. The Legal Framework under which a University Functions

34) The Supreme Court of Canada in *Harelkin v. University of Regina* commented on the public and private characteristics of a Canadian university:

> *"The Act incorporates a university and does not alter the traditional nature of such institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidized by public funds may be in a sense regarded as a public service entrusted with the responsibility of ensuring the higher education of a large number of citizens ... its immediate and direct responsibility extends primarily to its present members, and in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances domestic autonomy of the university by making provisions for the solution of conflicts within the university."*

***Harelkin v. University of Regina* 1979 CanLII 18 (SCC).**

35) Courts have been reluctant to interfere with academic decisions of universities unless there has been "manifest unfairness" in the procedure adopted or the decision is unreasonable.

***Paine v. University of Toronto* (1982), 34 O.R. (2d) 770 (C.A.).**
***Mulligan v. Laurentian University* 2008 ONCA 523 at para. 20 and 22.**

C. The Law

(a) Were the Applicants Provided with an Adequate Level of Procedural Fairness and Natural Justice?

i) The Content of the Duty of Procedural Fairness

36) In *Baker v Canada (MCI)*, the Supreme Court confirmed that the requisite content of the duty of procedural fairness depends on the particular statute at issue and the context of the rights affected.

***Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para. 22.**

37) *Baker* provides a non-exhaustive list of factors relevant to determining the content of the duty of fairness:

(1) The nature of the decision being made and the process followed in making it;

(2) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(3) The importance of the decision to the individual or the individuals affected;

(4) The legitimate expectations of the person challenging the decision; and

(5) The choices of procedure made by the agency itself.

***Baker*, supra, at paras. 23-27.**
***Congregation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontain (Village)* [2004] 2 S.C.R. 650 at para. 5.**

38) The following general comments were provided by the Supreme Court in *Kane v. Board of Governors of the University of BC* concerning the process which may be followed by an internal University body:

> *"The following propositions, in my view, govern the outcome of this appeal:*
>
> *1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate.*

...

The Board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case.

...

It would be wrong, therefore, to ask of them, in the discharge of their quasi-judicial duties, the high standard of technical performance which one may properly expect of a court. They are not fettered by the strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice: per Lord Parmoor in Local Government Board v. Arlidge, at p. 140.

...

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [Ridge v. Baldwin, at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in Russell v. Duke of Norfolk, at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake.

...

A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views.

...

5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellante authority must not hold private interviews with witnesses (de Smith, Judicial Review of Administrative Action (3rd. ed.) 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in Kanda v. Government of the Federation of Malaya, at p. 337, "... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

...

6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so.

...

In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment.

...

We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons."

***Kane v. Board of Governors of the University of BC*, [1980] 1 S.C.R. at 1112 to 1116.**

ii) The Tribunal's Procedural Choices are Owed a Degree of Deference

39) The general standard of review on issues of procedural fairness is correctness. However, the correctness of procedural choices is assessed within the context of the Tribunal's jurisdiction as provided by the statutory policy framework within which it functions. The Tribunal's procedural choices are also entitled to deference under the *SPPA*.

Statutory Powers Procedure Act, Sections 2, 25.1(1) and 28.

40) The Court in *Baker* directs that the choice of procedures made by the agency itself and its institutional constraints be accorded "important weight".

***Baker*, supra, at para. 27.**

41) In *Re: Sound*, the Court commented on the decision-maker's procedural choices. Evans J.A. wrote at paragraph 42 that:

> In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other.

***Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48.**

42) In *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 ("Forest Ethics"), Stratas J.A., writing for the majority, considered the *Re: Sound* and noted that according to the current state of the authorities in the Federal Court of Appeal "the standard of review is correctness with some deference to the Board's choice of procedure" (para. 70). Further, courts are to be "respectful of the agency's choices" and exercise a "degree of deference" (para. 81).

***Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245.**

43) Many of the procedural issues raised by the Applicants are procedural choices authorized by the Policy and the *SPPA*. The Court should also consider the choices and representations made by the participants, all of whom were represented by legal counsel when considering claims of procedural unfairness. The Court's deference appears appropriate in the circumstances.

iii) Did the Applicants Waive a Right to Challenge the Tribunal's Procedural Choices through Acquiescence or Consent?

44) The processes followed by the Tribunal need only be reasonable and/or constitute substantial compliance with hearing requirements. Furthermore, the procedural matters raised by the Applicants must rise to a total absence of jurisdiction on the part of the Tribunal over the subject matter at hand. The Applicants have raised less serious procedural concerns which can be waived under the *SPPA* or which appear to attract the Court's deference.

***RZCD v Williams*, 2015 ONSC 1792 at para. 53.**
SPPA ss.2, 25.1(1), 28, 4, 9.1(1)(a).

45) In *RZCD*, the Court relied on Giroux v The King, 1917 CanLII 81 (SCC) for the proposition that "consent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter." The

Court accepted that acquiescence or consent could waive privileges which would otherwise have resulted in a breach of jurisdiction. The Court considered Professor de Smith's *Judicial Review of Administrative Action*, 4th Ed. where the author stated:

> Consent, waiver and acquiescence. The general rule is that want of jurisdiction cannot be cured by such conduct on the part of the person over whom the purported jurisdiction is exercised, whereas voidable acts may become unimpeachable as a result of such conduct.

***RZCD*, supra, at paras. 52 and 53.**
***Judicial Review of Administrative Action*, 4th Ed., Stanley A. De Smith.**

46) The Court has the discretion to refuse a remedy where there is a waiver of, or acquiescence to a proceeding alleged to have been conducted without procedural fairness or in breach of the rules of natural justice.

R. v Marshall, 2002 NSSC 233, at para. 16.

47) An allegation of a violation of natural justice or bias should be raised at the earliest reasonable opportunity. Otherwise, the common law principle of waiver and/or acquiescence may apply. If Applicants acquiesced to the proposed process or consented to decisions and/or if the Applicants failed to raise as an objection during the course of the hearing, they may have waived any subsequent right to challenge the Tribunal's procedural choices.

***Ayaichia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 239, paras. 23 and 25-26.**

48) Alternatively, a party may be estopped from relying upon a breach of the principles of procedural fairness when legal counsel did not object at the hearing.

Keranda v. Canada (Citizenship and Immigration), 2009 FC 125, at para. 23.

iv) Reasonable Apprehension of Bias

49) The Supreme Court of Canada has articulated the test for reasonable apprehension of bias as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

***Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R., 369 at 394-5.**

50) Further, there exists a strong presumption of judicial and quasi-judicial impartiality. Analysis of bias allegations requires careful consideration of the entire context and is highly fact-specific.

> [I]mpartiality is the fundamental qualification of a judge and the core attribution of the judiciary (Canadian Judicial Council, Ethical Principles for Judges (1998), at p.30). It is the key to our judicial process, and must be presumed. As was noted by L'HeureuxDube J. and McLachlin J. (as she then was in *S.(R.D.)*, supra at para. 32, **the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.**
>
> ...
>
> ... this is an inquiry that remains highly fact specific. ... [the inquiry] must be addressed carefully in light of the entire context. There are no shortcuts"

***Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at paras. 59, 76 and 77.**

51) The presumption of adjudicative integrity and impartiality is not easily rebutted. The onus lies on the Applicants to provide cogent evidence showing that a reasonable person, appraised of the relevant circumstances, would think that Dr. Ibhawoh failed to decide the issues impartially and independently.

***Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 22.**

52) The reasonable person described in this test is not one who is overly sensitive.

***R. v. S(R.D.)*, [1997] 3 SCR 484 at para. 36.**
***Committee for Justice and Liberty* supra, at 394-5.**

53) The Applicants are required to rebut the presumption of adjudicative integrity and impartiality as well as establish a reasonable apprehension of bias in regards to Tribunal member Dr. Bonny Ibhawoh.

Institutional Bias

v) Failure to Raise a Reasonable Apprehension of Bias at the Earliest Possible Opportunity

54) It is improper for a party to hold an allegation of procedural fairness, including an apprehension of bias in reserve for use only if the outcome is not in its favour. Waiting until the results of the hearing are known deprives the adjudicative body of the opportunity to address the concern. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect the objection to be raised. Failure to object at the earliest practical opportunity constitutes a waiver.

***Rally v Telus Communications Inc.*, 2013 FC 858, at para. 18.**
***Eckervogt v British Columbia*, 2004 BCCA 398, at paras. 47-49.**
***Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, at paras. 212-220.**

55) If a Tribunal member is unable, for any reason, to complete the hearing or participate in the decision, then the remaining members may complete the hearing and render a decision under the Policy.

Statutory Powers Procedure Act, Section 4.4(1).
Anti-Discrimination Policy, Section 70(a).

(b) The Standard of Review Applicable to the Tribunal's Decision on Liability and Penalties is Reasonableness

56) In *Dunsmuir v. New Brunswick*, the Supreme Court rearticulated its approach to the reasonableness standard of review and the concept of judicial deference as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one

specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

***Dunsmuir v. New Brunswick*, (2008) SCC 9, at para. 47.**

57) Further, pursuant to *Dunsmuir*:

> ... the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [para. 62]

***Dunsmuir*, supra at para. 62.**

58) Under *Dunsmuir*, the standard of correctness governs:

(1) A constitutional issue;

(2) A question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62);

(3) The drawing of jurisdictional lines between two or more competing specialized tribunals; and

(4) A "true question of jurisdiction or *vires*" (paras. 58-61).

***Dunsmuir*, supra at paras. 58-61.**

59) Reasonableness is normally the governing standard where the question:

(1) Relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54);

(2) Raises issues of fact, discretion or policy; or

(3) Involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

***Dunsmuir*, supra at paras. 51, 53 and 54.**

60) Reviewing judges can usefully begin their analysis by determining whether the subject matter of the decision before them for review falls within one of the non-exhaustive categories identified by *Dunsmuir*.

***Dunsmuir*, supra at para. 64.**

61) Other than alleged breaches of natural justice and procedural fairness, the issues raised in this application appear to fall within categories which, according to *Dunsmuir*, attract the standard of reasonableness.

***Mulligan*, supra at para. 20.**
***Telfer v University of Western Ontario*, 2012 ONSC 1287, at para. 47.**
***Deng v University of Toronto*, 2011 ONSC 835, at paras. 30-32.**
***Baharloo v University of British Columbia*, 2014 BCSC 762, at paras. 56-63.**
***Alghaithy v University of Ottawa*, 2012 ONSC 142, at para. 31.**

(c) Judicial Review of Issues of Fact and Mixed Fact and Law

62) *Dunsmuir* articulates the expectation that deference will be afforded to a tribunal's findings of fact or mixed fact and law. Deference should also be afforded to tribunals when they exercise discretion or make policy decisions.

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

***Dunsmuir*, supra at para. 53.**

> Yet when the standard of review is reasonableness, the reviewing judge's role is not to posit alternate interpretations of the evidence; rather, it is to determine whether the Committee's interpretation is unreasonable (...) With respect, when applying a standard of reasonableness *simpliciter*, the reviewing judge's view of the evidence is beside the point; rather, the review judge should have asked whether the Committee's conclusion on this point had some basis in the evidence (see *Ryan*, supra).

***Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC at para. 41.**

(d) Context and Adequacy of Reasons

63) Applying these principles to the task of judicial review ensures respect for the context in which the decision is made, and for the adjudicator's knowledge regarding the complexities, nuances, and imperatives of the particular legislative regime. Reasonableness review "takes its colour" from this context.

***Dunsmuir*, supra, at para. 49.**
***Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.**

(e) Review of the Tribunal's Decisions

64) The question for a reviewing court is whether the result arrived at by the Tribunal falls within the range of possible and acceptable outcomes which are defensible in respect of the facts and the law. The focus of this inquiry distinguishes judicial review from review on an appeal.

***Shaw v. Phipps*, 2012 ONCA 155 at para. 10.**
***Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at paras. 30-31.**

65) The Court of Appeal's decision in *Peel Law Association v. Pieters* clarifies these principles.

> The only issue on judicial review was whether the Vice-chair's decision fell within the range of reasonable outcomes. On judicial review it is not enough that the reviewing court be persuaded that one could arrive at a different decision based on the same evidentiary record. To succeed on judicial review in this case it was necessary to show that the tribunal could not reasonably arrive at the decision it did.

***Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 132.**

PART IV - ORDER REQUESTED

66) The Tribunal takes no position with respect to the orders sought by the Applicants, other than if the Application is allowed, the Tribunal asks that any unresolved matter under the Policy be remitted to it.

67) The Tribunal does not seek its costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this the 22nd day of October, 2015.

Mark J. Zega
Filion Wakely Thorup Angeletti LLP

Lawyer for the Respondent, the Board Senate Hearing Panel for Sexual Harassment/Antidiscrimination under the McMaster University Anti-Discrimination Policy

Court File No. 210/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

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

Applicants

- and -

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

Respondents

FACTUM OF THE RESPONDENT, THE BOARD SENATE HEARING PANEL FOR SEXUAL HARASSMENT/ANTI-DISCRIMINATION UNDER THE MCMASTER UNIVERSITY ANTI-DISCRIMINATION POLICY

I estimate that 30 minutes will be needed for my oral argument of the appeal, inclusive of reply.

An order under 61.09(2) (original record and exhibits) is not required.

DATED at Hamilton, Ontario this 22nd day of October, 2015.

Mark Zega