4-25-1994

Re University of Saskatchewan Faculty Association and University of Saskatchewan

Innis Christie

Nancy Hopkins

Suzie Scott

Case No.: AI-324

IN THE MATTER OF AN ARBITRATION COMMITTEE PROCEEDING PURSUANT TO ARTICLE 31.5.6 OF THE COLLECTIVE AGREEMENT:

BETWEEN:

THE UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION

(The Association)

and

THE UNIVERSITY OF SASKATCHEWAN

(The University)

RE: Professor L. Vandervort and the College of Law

BEFORE: Nancy Hopkins, Q.C., University Nominee
Suzie Scott, Association Nominee
Innis Christie, Q.C., Chair

HEARING DATES: Nov. 10-13 and Dec. 28-30, 1992; Feb. 22-24, April 12-16 and May 17-21, 1993

AT: Saskatoon, Saskatchewan.

FOR THE ASSOCIATION: Jeffrey Sack, Q.C., Counsel

FOR THE UNIVERSITY: Neil Gabrielson, Q.C., Counsel

DATE OF DECISION: April 25, 1994

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Under Article 31.5.5 of the 1991-2 Collective Agreement, the Association on behalf of Professor Vandervort contests the President's recommendation to the Board of Governors that she be dismissed, on the ground that reasons for dismissal do not exist.

On behalf of Professor Vandervort, the Association requested that the University be directed to reinstate her with no discipline whatever. The University requested that this Committee find that reasons for dismissal do exist or, alternatively, that reasons exist for some lesser discipline, to be substituted as provided for by Articles 31.1.3 and 31.5.10.7 of the Collective Agreement.

At the outset of the hearing in this matter counsel for the parties agreed that this Committee is properly constituted and properly seized of this matter, that we should remain seized after the issue of our determination to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

INTRODUCTION

This is the determination of an Arbitration Committee established to hear and determine whether or not the grounds for the President's recommendation for the dismissal of Lucinda Vandervort, a tenured Associate Professor, are established and, if established, whether or not they constitute good and sufficient cause for dismissal. The Committee has already issued an interim decision that, even if established, the grounds for the President's recommendation for dismissal do not constitute good and sufficient cause for dismissal and Professor Vandervort has been fully reinstated pending this determination. We advised the parties of our conclusion to that effect after the

University had put in its case, in the hope that time and money would be saved. It suffices to say that it did not have that effect.

The Interim Decision of the Committee, issued on May 27, 1993, stated:

INTERIM DECISION

> Pursuant to Article 31.5.6 of the Collective Agreement between the parties, the Committee has determined that even if the grounds for dismissal upon which the President's recommendation that Professor Vandervort be dismissed are established they do not constitute good and sufficient cause for dismissal. The Committee therefore directs, pursuant to Article 31.1.3, that Professor Vandervort be fully reinstated. This is to be effective June 1, 1993, as agreed by the parties after we announced this interim decision to counsel at the conclusion of the hearings in this matter.
>
> In our final Decision in this matter the Committee will determine if any lesser form of discipline is appropriate.
>
> (signed by)
> Suzie Scott
> Association Nominee
>
> (signed by)
> Innis Christie
>
> The dissent of Nancy E. Hopkins, University Nominee, is attached

DISSENT

> I dissent from the interim Order of the Committee in the above matter dated May 27, 1993.
>
> (signed)
> Nancy E. Hopkins, Q.C.
> University Nominee

Three questions remained; (a) whether the grounds for the President's recommendation, or any of them, were established, (b) if so, whether they constituted grounds for any discipline, and (c) if they did, what lesser form of discipline the Committee considered appropriate and would order substituted.

The hearing in this matter was long and complex. There were several preliminary matters which will be reported upon below, considerable documentary evidence and a lot of, sometimes conflicting, oral testimony. The result was a hearing that lasted much longer than any of us had been prepared for and resulted in unforeseen timing conflicts

with other commitments on the part of the Chair at least. This has resulted in an unfortunately delayed award for which the Chair apologizes, although the effect has been ameliorated by the issue of the Interim Decision.

While the Committee was able to agree on some findings, the nominees of both the Association and the Employer dissent from the determination of the Chair in important respects. According to Article 31.5.12, therefore, "the decision of the Chairman shall prevail".

DETERMINATION OF INNIS CHRISTIE, CHAIR

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 judgement.

Nevertheless, the President's recommendation that Professor Vandervort be dismissed was not, as alleged on her behalf, "frivolous, vexatious and totally unfounded".

Much of the evidence related to matters of background or context of marginal relevance and to incidents which, taken alone, seem almost trifling. All of this evidence has been considered by the Committee, although not all of it, by any means, is reflected in the findings of relevant fact, which follow. Where there was conflicting evidence with respect to a relevant matter of fact I will explain how I reached the finding I did.

Essentially, the Association's case on behalf of Professor Vandervort was that Professor Vandervort's performance of her duties was not grounds for any discipline and that the actions of the University, mostly in the person of the Dean of the College of Law, could only be understood and assessed in the context of what had gone before. The University's case, on the other hand, was based on a series of alleged failings on Professor Vandervort's part which, taken together, were said to demonstrate insensitivity to students and failure to meet the requirements of her position as a member of the College of Law to such a degree that dismissal was justified.

In what follows I will first set out the relevant provisions of the Collective Agreement that define this rather unusual process. I will then explain for the record several preliminary rulings which the Committee was called upon to make. Specifically I will address the question of who was entitled to attend the hearing and the confidentiality of University proceedings in so far as we were required to rule on that issue in the course of the hearing. I will then describe how this whole matter reached us and, against that background, deal with the preliminary issue of "after-added grounds". Finally before turning to the merits, I will deal with the submissions of counsel on burden and standard of proof.

I will then set out the grounds of discharge or discipline properly before us and the provisions of the Collective Agreement under which we considered them.

Under the heading "The Facts", I will state my findings with respect to each of the grounds of discharge or discipline properly before us. Under the heading "The issues", I will reiterate the questions set out in the opening paragraph above, with reference to the provisions of the Collective Agreement that pose them for us; under the heading "Decision" I will deal with each of the issues in the context of the facts as I have found them and finally, under the heading "Conclusion", I will formally state the outcome of this determination, as it follows from my findings of fact and interpretation of the Collective Agreement.

Relevant Process Provisions of the Collective Agreement. This is not a grievance arbitration, although it bears close resemblance to such a process. Under this Collective Agreement procedures for discipline are initiated by the dean of a college. Article 31.5.1 provides:

> 31.5.1 When the dean of a college is convinced that grounds for dismissal of an employee do exist, he shall give written notice of this to the President with a full statement of reasons.

The initiative then shifts to the President, but his powers extend only to making a recommendation to the Board of Governors of the University:

> 31.5.2 If, after consultation with the dean, the President considers the case warrants further action, he shall forward to the employee concerned, and to the Association, copies of the dean's recommendation and appoint a time to discuss the matter.
>
> 31.5.3 The President shall then hold discussions with the employee, together with the dean and a representative of the Association, to consider the circumstances pertinent to the matter.
>
> 31.5.4 The President shall, within a reasonable time thereafter but not exceeding 30 days, notify the employee, in writing, either that the matter will not proceed further or that it is his intention to make a recommendation to the Board that the employee be dismissed. The notification of the employee shall include a full statement of the reasons for dismissal. In no case shall the effective date of the dismissal be less than three months from the date of the President's notification.

The employee and her Union do not have to await the actual dismissal to challenge it under the Collective Agreement. Article 31.5.5 gives them the right to "contest" the recommendation. Indeed, although that question is not before us, the intent may well be that dismissals are not to be challenged through the regular grievance and arbitration

process set out in Article 29, although Article 29.7 does not say so.

The procedure for contesting the Presidents' recommendation is set out in Articles 31.5.5 and .6 and following sub-clauses, two of which are set out here and several more of which I will quote later in this determination:

> 31.5.5 If the Association in its own right or on behalf of an employee wishes to contest the President's recommendation, it shall so advise the President, in writing, within fourteen days of the receipt of the President's letter and request the establishment of an Arbitration Committee to hear and determine the matter. In default of such request, the Board may proceed to deal with the recommendation. The Association and the Arbitration Committee shall, in accordance with the provisions of Articles 10 and 12, have access to all information and documents in the possession of the Employer that may be relevant to the case.
>
> 31.5.6 The Arbitration Committee shall determine whether or not the grounds for the recommendation for dismissal are established and, if established, whether or not they constitute good and sufficient cause for dismissal, and shall determine such other matters as the President and the Association, on behalf of the employee, may agree in writing to submit to the Arbitration committee.
>
> ....
>
> 31.5.10 At any hearing to consider the case for dismissal of an employee, the Arbitration Committee:
>
> 31.5.10.1 Shall establish it own rules of procedure and of evidence.
>
> 31.5.10.2 Shall rest the burden of proof for dismissal with the Employer.
>
> ....
>
> 31.5.10.7 Shall have the power to substitute a more appropriate disciplinary action.
>
> ....
>
> 31.5.14 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 his appointment at full salary. He may, however, at the President's discretion, be temporarily relieved of his duties at any stage in the dismissal procedures.

Article 31.1.3 is particularly relevant to Article 31.5.10.7 and our central concern here, which is whether any lesser discipline should be substituted for the dismissal that we have already determined was not justified by good and sufficient cause:

> 31.1.3 Discipline shall take the form of (i) reprimand, or (ii) dismissal, except that when an Arbitration Committee decides not to uphold a recommendation for dismissal, the Committee shall have the power, under Article 31.5.10.7, to substitute whatever lesser form of discipline it considers appropriate, aside from change in academic rank or tenure.

PRELIMINARY RULINGS.

Attendance at the Hearing. While Article 31.5.10.1, set out above, empowers the Committee to set its own rules of procedure, 31.5.10.5 provides that it,

> Shall hold its meetings in camera unless the Association on behalf of the employee and the Employer, by mutual consent, agree that the meeting shall be open to the public.

At the outset there was concern expressed about the meaning of "in camera" and who would be entitled to attend the hearings. The result was that was agreed that only specified members of the Association executive, and the observer for the Canadian Association of University Teachers, and specified officers of the University would be entitled to attend. Each of these people was entitled to send an alternate, with notice to the Committee, where she or he was unable to attend. The Committee received undertakings from the parties to the effect that only general information would be made available to those not present at the hearing, including the media.

These arrangements appear to have proved satisfactory. At least the Committee heard no more about this issue after the initial arrangements were made.

Confidentiality. In the course of the hearing witnesses, including Professors Beth Bilson and Norman Zlotkin, were questioned with respect to past tenure and promotion proceedings involving Professor Vandervort, which the Committee had ruled to be relevant to this matter. In this context the question was posed whether witnesses were required to reveal confidential material, both documents and oral statements or votes which had not been recorded. With respect to the former, the Collective Agreement clearly gives us the power to require that such material be put in evidence. With respect to the latter, the general principles of the law of confidentiality appear to apply.

On February 22, 1993 this Arbitration Committee ruled that Professors Bilson and Zlotkin would be required to respond to questions on the matters here in issue. In relation to both documents and oral testimony the Committee was careful not to intrude on the allegedly confidential nature of material more than was justified by the importance of the matter before us and the relevance of the material sought to be

introduced in evidence.

Article 31.5.5, it may be recalled, provides, in part;

> The Association and the Arbitration Committee shall, in accordance with the provisions of Articles 10 and 12, have access to all information and documents in the possession of the Employer that may be relevant to the case.

The references to Articles 10 and 12 are in no way limiting on the Arbitration Committee's access. Article 10.5.6 gives the Association rights to confidential information that comes before committees on which it has representatives and observers, and Articles 12.3, 12.4 and 12.8 set the extent the rights of an employee to know confidential information about himself or herself, and of officers and employees of the University to know confidential information relevant to decisions they must make on such matters as tenure. It is Article 12.10 that is most relevant to the concerns of an Arbitration Committee such as us:

> 12.10 When confidential information is to be used by the employer or his agents in the course of proceedings under Article 31 of this Agreement, such confidential information, clearly identified as transmitted in confidence, shall be made available of the Chairman of the Association or his designate, and the Senior Grievance Officer.

With respect to votes or statements made in a committee where there was an expectation of confidence, the law appears to be most authoritatively stated by the Supreme court of Canada in **Slavutych v. Baker** (1975), 55 D.L.R.(3d) 224, where Spence J., speaking for a unanimous Court, adopted the four "Wigmore rules" as determinative of when communications (other than communications between lawyer and client) are privileged against disclosure, citing 8 **Wigmore on Evidence,** 3rd ed. (McNaughten Revision, 1961), para. 2285:

> (1) The communications must originate in a **confidence** that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be **greater than the benefit** thereby gained for the correct disposal of the litigation.

In making its February 22nd, 1993, ruling this Arbitration Committee relied on the fourth

of these rules, although we expressed doubt that those participating in Professor Vandervort's tenure proceedings did so with any real basis for an expectation of confidence. The University's tenure appeal processes appear to contemplate considerable openness, in the sense that the faculty member who is appealing his or her denial of tenure has a right to attend the appeal hearings, and his or her counsel has access to even the most confidential documents. See Articles 15.14 (v) and (x) of the Collective Agreement.

An arbitrator under Article 29 of this Collective Agreement, or an Arbitration Committee under Article 31, with the powers of a court to order the giving of evidence by virtue of The Trade Union Act, R.S.S. 1978, Ch T-17, as am., s. 25(2)(a), must, as the fourth of the Wigmore rules suggests, weigh the interests involved with great care before violating an expectation of confidentiality, but has the power to do so.

I note that Article 31.5.10.3 speaks only of our right to "call, examine and cross-examine witnesses" whereas Article 29.3, dealing with the general right to arbitration of grievances refers to the "powers enumerated in the Trade Union Act, R.S.S. 178, Chapter T-17, Section 25(2)". However, that provision in the Trade Union Act explicitly bestows the statutory power in question on "An arbitrator or the chairman of an arbitration board". Our conclusion, therefore, was that we had power, both under Article 31.5.10.3 of the Collective Agreement and by virtue of the Trade Union Act, to order the disclosure of statements made in confidence, where they were of sufficient relevance to matters of sufficient weight, bearing in mind the importance of confidentiality in tenure deliberations and the like in the University.

The Procedures Followed; the Dean's Allegations. Article 31.5.1. calls for a dean to initiate dismissal procedures by letter to the President "with a full statement of reasons". Dean MacKinnon had raised his concerns about Professor Vandervort's behaviour with the President in a meeting of the University's Executive, but that did not constitute formal initiation of the proceedings. He formally initiated the procedures which led to this arbitration proceeding by giving the written notice called for by Article 31.5.1 by letter dated March 30, 1992. His letter read, in full:

> Dear Dr. Ivany:
>
> Re: **Dr - Lucinda Vandervort, Associate Professor of Law**

I write to advise you that I find it necessary to allege that Professor Lucinda Vandervort in the College of Law has not performed her duties at a standard that is considered acceptable. My allegation is founded upon separate, although in some cases related, sets of circumstances. The first of these is a signed statement of a second year College of Law student which summarizes Professor Vandervort's conduct towards her as follows:

> "This is intended as a summary of my experience in Professor Vandervort's CLS class in the fall of 1991. She was very open to class discussion and suggestions

> regarding materials for the class. But in the course of the class (early in October, 1 think) an event occurred which changed the atmosphere for me. In the course of her lecture she referred to "limp-wristed judges". From the context she quite clearly meant "stupid judges" and the implicit inference for students to draw was that limp-wristedness and stupidity are co-extensive, i.e. that lesbians and gays are dumb. I was mortified - so disturbed that I could not comment on it for the remainder of the class. I went to her office after class - she wasn't there so I left a notice explaining that I was offended by that particular comment. I also asked for an apology on the note. At that point I still had no sense of whether she made the comment out of malice or gross insensitivity.
>
> The next day she arrived in class - the students were present already - she sat down, looked me in the eye and asked, "[B], what are we going to do with you?" I still have no idea what this meant. She then proceeded to talk for half an hour explaining the manner in which her ways of speaking are products of her up-bringing and so on. I responded that she is nevertheless, responsible for the effects of her language and conduct on others. She went on and made my letter seem ungrounded in the eyes of my classmates. She read the letter in the class, which I think betrayed the privacy in which it was intended. She also told me to develop a tougher skin. Would a professor dare to suggest that to an Aboriginal student? Eventually I felt obliged to explain to my peers why I had written the letter: that her comment hurt me directly because I'm gay. I am pretty sure that my crying while she was speaking would have been unintelligible to my classmates without some explanation from me. Professor Vandervort has not apologized although she did say that she "didn't mean anything malicious".
>
> I skipped the subsequent class and I learned later that she did the same. Eventually class got back on track but I still skipped frequently because I was completely unsure of exactly how safe the atmosphere was for me. I immediately decided that I just wanted to get through the class with an A, which I have done."

If this report is substantiated by the evidence, I believe that Professor Vandevort's behaviour was both invasive of the student's privacy and on act of humiliation toward the student.

I have a related though distinct allegation in connection with this matter. On March 23, 1992, I wrote to Professor Vandervort, reproducing for her the above excerpts from the student's statement and asking her to respond. Upon receiving my letter, Professor Vandervort initiated improper contact with the student, thereby placing her in a compromising position with respect to approaching the Dean's office with concerns about the way she was treated.

The next set of circumstances has to so with what I believe to be the failure of Professor Vandervort to perform her duties at an acceptable level with respect to the Laskin Competition Moot. This moot is described as a seminar in the College calender and is awarded credit as a course designated Law 441.3 Laskin Moot. For the academic year

1991-2, Professor Vandervort was responsible for faculty supervision of the moot, and for grading students based on their performance.

My allegation is that Professor Vandervort did not properly discharge her duties at an acceptable level in that she failed to attend the last two practice moots before the competition and did not attend the Laskin Moot Competition in Fredericton.

My final allegation is that Professor Vandevort failed to discharge her duties at an acceptable level in that she published to college personnel a written allegation that a student in the Laskin Moot had lied to the Bench and had otherwise been dishonest in conjunction with the work of the College's Laskin team, without first investigating the allegations or causing them to be investigated by the Dean's Office.

I am aware of that these are serious allegations, but if the facts as alleged are borne out, I believe that they constitute grounds for discipline pursuant to clause 31 of the Collective Agreement, and in particular for the dismissal of Professor Vandervort from her appointment as Associate Professor of Law.

I am prepared to discuss these matters at your convenience.

The President, considering "that the case warrant[ed] further action", forwarded copies of the Dean's letter to Professor Vandervort and the Association and arranged a time to discuss the matter, in accordance with Article 31.5.2. in the meantime the Dean had become aware of the fact that Professor Vandervort had cancelled certain classes and rescheduled them in a way which the Dean thought demonstrated the same lack of concern for students to which he took exception in the matters itemized in his letter to the President. Dated April 13, 1992, he wrote a second letter to the President, as follows;

> **Re: Dr. Lucinda Vandervort, Associate Professor of Law**
>
> In my letter of March 30th I alleged that Professor Lucinda Vandervort in the college of Law has not performed her duties at a standard that is considered acceptable. I outlined the particulars of that allegation. I am now obliged to add to those particulars by alleging that Professor Vandervort was absent from scheduled first year criminal law classes without permission or approval on a number of occasions during the year 1991-21; and that Professor Vandervort violated college policy relating to rescheduling classes by scheduling a large number of make-up sessions in the last few weeks before the end of term.
>
> in my letter of March 30th I expressed the view that in my opinion the allegations against Professor Vandervort constitute grounds for discipline pursuant to Clause 31 of the collective agreement, and in particular for the dismissal of Professor Vandervort from her appointment as Associate Professor of Law. I believe that the allegation which I now bring to your attention is a further indication that my advice to you is well founded. In the event that you choose to accept my advice

> in this matter, I would ask that you convey the further allegation contained in this letter to Professor Vandervort, and to those acting on her behalf.

On that same date the Dean sent a letter to Professor Vandervort setting out in greater detail the basis of this allegation;

> It has been brought to may attention that you were absent from scheduled classes in your first year class on a number of occasions throughout the year. I was aware that you were absent upon the opening of term on Tuesday, September 3rd, 1991. Indeed, I offered to take your class on that date and did so in order that the first year small group of students would be able to meet with a faculty member on the opening day of term. However it is now my understanding that you did not meet with your first year class on the next scheduled date; as well it is my understanding that you were absent not only for Bridging week, but from the classes immediately preceding and immediately subsequent to Bridging week as well. I am further advised that you did not meet your classes during the first scheduled week of classes in January and during the first scheduled week of classes in February.
>
> It is may further understanding that you scheduled extra classes in March, I take it to compensate for those which had been missed earlier. This involved a substantial additional load upon your students in the month immediately preceding their exams in order to accommodate your absences from scheduled classes. I should add that scheduling make-up classes in this way is a violation of College policy relating to rescheduling and cancelling classes.
>
> It is, of course, well understood academic policy that Professors are expected to meet their classes at the assigned times unless there are compelling reasons why they cannot do so. What you have done, in my opinion, is unilaterally and substantially change the College schedule by which you were to meet with your students. If my information is correct, I note that you missed the first week of both the first and second terms, as well as the other blocks of time mentioned above.

The following day, April 14, but before he had received Dean MacKinnon's second letter, the President wrote to Professor Vandervort, attaching Dean MacKinnon's first letter of March 30, to advise her that he would be contacting her to arrange a time for the "discussion" with her and an appropriate representative of the Faculty Association. Dean MacKinnon's second letter was not "forward[ed]" by the President in accordance with Article 31.5.2.

The meeting between the President and the Dean, on the one hand, and the Professor Vandervort and Professor John MacConnell, Senior Grievance Officer for the Faculty Association, on the other, took place on April 21 at 3:00 p.m. in the President's office. It hardly amounted to the "discussions" optimistically envisioned by Article 31.5.3. Professor Vandervort had been advised by legal counsel advising the Association at that time (not Mr. Sack) to say nothing whatever, and to all intents and purposes she

followed that advice. On that occasion the President made it clear that he was concerned about the matters set out in both of the Dean's letters quoted above.

On May 6, 1992, acting in accordance with Article 31.5.4, the President notified Professor Vandervort in writing of his intention to recommend to the Board of Governors that she be dismissed effective August 31, 1992. He also advised her that,

As well, under Article 31.5.14 of the collective agreement, it is my decision that you stand temporarily relieved of your duties in the College of Law effective upon you receipt of this letter.

The President's letter went on to state, "your performance of your duties fell below a standard that is considered acceptable in a number of respects during the academic year 1991-92". As the first of these, he then set out the quote from the student's letter to Dean MacKinnon which the Dean had quoted in his March 30 letter to the President.

The President's letter then set out each of the other grounds as follows:

> ... when the Dean asked you for your response to this statement, instead of replying to the merits you made contact with the student who authored the statement. I believe this too fell below the standard of what is considered acceptable when a student reports to the Dean's office about her treatment at the hands of a professor.
>
> I am also of the opinion that you failed to perform your duties at an acceptable level with respect to the Laskin Competition Moot. As the responsible faculty supervisor, your failure to attend the final practice moots and the competition in Fredericton is simply not acceptable.
>
> As well, in connection with the Laskin Moot, you failed to perform your duties to a standard that is acceptable by publishing an allegation of dishonesty against a student before the allegation was properly investigated. In this connection, I note that the Dean of Law had previously explained to you the proper procedure for bringing such complaints.
>
> I am further of the view that your absence from scheduled classes on a number of occasions throughout the year, without notifying and obtaining permission from the Dean, is not acceptable. I note, as well, that apparently you did not make satisfactory arrangements to compensate for your absences.

The President then concluded by mentioning Professor Vandervort's conduct at the "discussions" and reiterating his order;

> ... At our meeting of April 21st, you did not deny the allegations and yet I received no indication at the meeting that you harboured remorse, regrets, or even second thoughts, with respect to the matters that have been attributed to you by Dean

> MacKinnon.
>
> ... it is my intention to recommend to the Board of Governors that you be dismissed effective August 31st, 1992. In the interim, and pursuant to section 31.5.14 of the collective agreement you are forthwith temporarily relieved of your duties in the College of Law.

As applied by Dean MacKinnon, this meant that Professor Vandervort did not participate in end of term grading activities which remained and was evicted from her office in the College of Law, which was to be "reassigned to a person or persons with current and continuing duties in the College", although she was provided with another office on campus.

Within the fourteen day limitation period set out in Article 31.5.5, the Association, on Professor Vandervort's behalf, advised the President that it wished to contest his recommendation and requested the establishment of this Arbitration Committee.

After-added Grounds. An important preliminary issue is whether or not the matter of Professor Vandervort's cancellation and rescheduling of classes was an after-added ground of discipline upon which, either under this Collective Agreement or on general labour arbitration principles, the University was not entitled to base its discipline. We reserved our decision on that matter.

My conclusion is that in the procedure followed under this Collective Agreement the cancellation and rescheduling of classes was not, technically, an after-added ground of discipline. Article 31.5.4 describes the step in the procedure at which the decision that is the subject of this Arbitration Committee's determination is made by the President. What was contested before us was not the Dean's conviction that grounds for dismissal existed, or his written notice to the President. It was the President's recommendation. That recommendation was made in part on the basis of this allegedly "after-added" ground, and both Professor Vandervort and the Association knew that at the time they advised the President that they were contesting the recommendation and requested the establishment of this Committee. The general arbitration authorities with respect to after-added grounds for discharge or discipline therefore have no direct application.

The fact remains that Article 31.5.2, and perhaps Article 31.5.1, were not strictly complied with, in so far as the President never, in fact, forwarded the Dean's second letter adding this new ground to Professor Vandervort or the Association. What is the effect of this failure? Counsel for the Union submitted in the alternative that it should be the same as if the Dean's second letter to the President were an after-added ground, because the effective decision maker was the Dean. To allow him to buttress his case would be to allow the very unfairness the rule against after-added grounds has been established to prevent. Moreover, Professor Vandervort and the Faculty Association had not had notice of the full case they had to meet at the "discussions" of April 21.

I do not accept this. In fact Professor Vandervort knew of this ground of discipline from

the Dean, and both she and the Faculty Association representative heard about it at the meeting with the President. I do not interpret Articles 31.5.1, 31.5.2 and 31.5.3 as intended to necessarily invalidate every discipline decision taken without having followed the procedures set out there in scrupulous detail, regardless of the fact that there has been no real prejudice. In fact, the process set out in those provisions seems to contemplate a less than totally formal stage, at which there can be a mutual refining of the issues.

From a process point of view there is, in fact, something to be said for collecting all of the grounds of discipline and getting them on the table, thus avoiding the possibility of another complete procedure. In the normal dismissal procedure this is offset by the unfairness of allowing new grounds to be added after the employee/grievor has prepared his or her case for arbitration, but that is precisely what is avoided by the special nature of the process here. The dean's grounds are discussed and only then does the President state his grounds for dismissal, in the form of a recommendation which is arbitrated before it is acted upon.

These procedures cannot be treated as if they are other than the parties have set them up and characterized them. They have decided that the Dean neither dismisses nor makes the effective recommendation that the employee be dismissed. The employee reaps considerable benefit from the fact that he or she keeps his or her job, at least in the sense that he or she continues to be paid, until the President's recommendation has been arbitrated. The Association and its members cannot enjoy this advantage and then be heard to say that for process purposes we must treat the dean's notice to the President as if it were notice of dismissal.

in sum, under this Collective Agreement I cannot characterize the bringing in of the Dean's concern with the cancellation and rescheduling of classes as an after-added ground of discipline and neither is it appropriate to treat it as if it were.

Further, I am satisfied that Dean MacKinnon did not intentionally hold back this further ground of discipline. The evidence suggests that he had heard that there were student concerns about cancelled and re-scheduled classes, but he had not investigated when he wrote his letter of March 30. His actions presented no challenge to the integrity of the process.

Had they taken objection at an earlier stage to the "fifth ground", the most the Association might have got here would have been the right to have the discussions with the President re-scheduled; but neither the Association nor Professor Vandervort asked for that when the new grounds were specified at the meeting with the President or at any time before the hearing before us commenced. In addition, then, any procedural failure that could be said to have occurred was effectively waived.

Burden and Standard of Proof. Unquestionably the University bears the burden of proof in this matter. Article 31.5.10.2 provides that the Arbitration Committee,

> Shall rest the burden of proof for dismissal with the Employer.

It was not suggested that this changes as we consider whether the case is made out for any lesser form of discipline. Even without Article 31.5.10.2, the general principles of collective agreement arbitration are clear. The original and ultimate onus rests on the employer in all matters of discharge and discipline.

Counsel for the Association was vigorous in his assertion that the burden of proof on the University here is heavier than the normal civil burden of satisfying us on the balance of probabilities that the facts necessary to found its case are established. He submitted that we had to be satisfied by clear, cogent and convincing evidence that each of the necessary elements was established. This, he said, flowed from the fact that Professor Vandervort has very serious interests at stake here.

Arbitrators have held that where an employer alleges a crime against an employee as a ground for dismissal there is a higher standard of proof required, often characterized as a requirement for proof by clear, cogent and convincing evidence. Counsel drew from this the proposition that wherever the interests involved are "serious" a burden of proof higher than the ordinary civil burden is to apply. Counsel also cited a number of cases involving professional discipline in which boards and courts have said that the burden of proof is heavy where someone's livelihood is at stake, and he quoted from the awards of academic tenure panels to the same effect.

I have no hesitation in accepting the submission that academic tenure is a very important interest, and that it involves more than simply security of employment. I accept as well that simple security of employment is the mechanism by which the academic world, and the parties to this Collective Agreement, have chosen to protect the more complex values at stake. This relationship is stated clearly and with authority by LaForest J. in the majority judgement of the Supreme Court of Canada in **McKinney v. University of Guelph** (1990), 76 D.L.R. 545. While that case is about mandatory retirement, the following passage, at pp.649, has clear application here:

> ... members of a faculty ... continue on staff for some 30 to 35 years. During this period, they must have a great measure of security if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. Rigorous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like. But apart from this, and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause, but the level of interference with or evaluation of faculty is quite low. **The desire is to maximize academic freedom by minimizing interference and evaluation.** [emphasis added]

As indicated by our interim decision in this matter, even if the University's case were fully made out on the facts this Arbitration Committee would, by majority decision, not uphold the President's recommendation that Professor Vandervort be dismissed. Strictly speaking, therefore, the vital question of the standard of proof where tenure is at stake does not need to be answered here. What we are directly concerned with is the standard of proof where some lesser discipline of a tenured academic, up to and including suspension, is in issue.

Certainly, any one who bears the burden of proof in a matter of serious consequence must be able to prove it in a way and to a standard that is satisfying to the trier of fact aware of those consequences. Thus, if tenure were at stake the civil standard of proof would be rigorous, and might well be stated as a requirement that there be clear, cogent and convincing evidence. For the reasons quoted, this would be so even if, as here, the dismissal did not involve any apparent issues of academic freedom.

I also accept that, as Professor Vandervort and other witnesses testified, the imposition of any discipline would adversely affect her opportunities for advancement and her chances to find employment in another university law faculty or perhaps even in the practice of law. I do not accept, however, that where tenure is not at stake academics' employment interests are so inherently important that an equally high standard of proof is to be applied.

This is not to deny that discipline has more grave and serious consequences for some sorts of careers than others. As the cases cited by counsel for the Association indicate, courts and discipline bodies have made the point that professional people may have more cause for concern with blotted performance records than do those whose livelihoods are not so dependent on reputation. Also, in some collective agreements discipline is expunged from the record after a stated period, and that is not the case here.

I have approached the finding of facts here on the basis that the civil burden of proof applies. The University has had to prove the facts upon which any discipline can be justified on a balance of probabilities, bearing in mind the serious consequences for Professor Vandervort of any adverse findings.

Provisions of the Collective Agreement Under Which The Grounds of Discharge or Discipline Are to be Considered. This Committee's jurisdiction in this matter is clearly defined by Articles 31.5.6, 31.5.10.7 and 31.1.3, set out above. By Article 31.5.6. we are to "determine whether or not the grounds for the recommendation for dismissal are established and, if established, whether or not they constitute good and sufficient cause for dismissal". If, as we have already decided, they do not, by Article 31.5.10.7 we "have the power to substitute a more appropriate disciplinary action". Under Article 31.1.3 discipline short of dismissal normally takes the form of a reprimand, but

> when an Arbitration Committee decides not to uphold a recommendation for dismissal, the Committee shall have the power, under Article 31.5.10.7, to

> substitute whatever lesser form of discipline it considers appropriate, aside from change in academic rank or tenure.

By Article 31.1. "discipline" in this Collective Agreement is explicitly tied to failure to perform duties or to carry out proper instructions. Article 11.6 provides;

> Failure to Perform Duties. Failure to duties is subject to the discipline procedures set forth in Article 31.

Then Article 31.1 states;

> 31.1 Discipline is specific action taken by the Employer based on an allegation that the employee has not performed his duties at a standard that is considered acceptable or has failed to carry put a proper instruction given by a superior.

As noted above, Article 31.1.3 provides that normally discipline is either reprimand or dismissal, and Article 31.4 states that an employee "may not be dismissed except for good and sufficient cause".

Article 31.1.1 of the Collective Agreement is, in fact, very specific in limiting the grounds upon which discipline can be justified;

> 31.1.1 An allegation requiring disciplinary action can only be justified if the following conditions are determined to have existed: [the four conditions listed are considered below]

I have borne it in mind that in making out its case against Professor Vandervort the University must discharge the burden of proof with respect to these conditions on the imposition of any discipline.

Neither Article 31.1.3 nor Article 31.5.10.7 says anything about the appropriate bases for any other form of discipline the Arbitration Committee might choose to substitute. However, since Articles 31.1. and 31.2 speak of failure to perform "duties at a standard that is considered acceptable" or violation of "acceptable standards of performance of tasks, functions or responsibilities" it is evident that what we must be concerned with here is failure to perform to acceptable standards.

THE FACTS.

I now turn to the facts. After briefly setting the context I will set out the facts as I have found them which are relevant to each of the grounds upon which the dismissal of Professor Vandervort was based. Those grounds, as set out in the President's letter of May 6, 1992, are:

1. Professor Vandervort referred in class to "limp-wristed judges", the implicit

inference for students to draw being that limp-wristedness and stupidity are co-extensive, i.e. that lesbians and gays are dumb. Student B left her a letter objecting to this. She read B's letter in the class, which betrayed the privacy intended and caused B to feel obliged to explain why she had written the letter: because she is gay. Professor Vandevort's behaviour was both invasive of B's privacy and on act of humiliation toward her.

2. When Dean MacKinnon asked Professor Vandervort for her response to B's statement, instead of replying to the merits she made contact with B.

3. Professor Vandervort failed to perform her duties at an acceptable level with respect to the Laskin Competition Moot. As the responsible faculty supervisor, she failed to attend the final practice moots and the competition in Fredericton.

4. Professor Vandervort published an allegation of dishonesty against a student before the allegation was properly investigated; Dean MacKinnon having previously explained to her the proper procedure for bringing such complaints.

5. Professor Vandervort was absent from scheduled classes on a number of occasions throughout the year, without notifying and obtaining permission from the Dean, and made unsatisfactory arrangements to compensate for her absences.

I will also set out th efacts as I have found them relevant to the President's statement in the letter of May 6, 1992, that he received no indication at the meeting of April 21, 1992 that Professor Vandervort harboured remorse, regrets, or even second thoughts, with respect to these matters. I will also set out the facts as I have found them relevant to the submission by counsel for the University that

> while the individual incidents in and of themselves are serious enough to warrant dismissal, taken together they indicate a lack of judgement on the part of Professor Vandervort wherein she always places her own objectives or agenda ahead of any concern for the students or the objectives of the university as a learning institution,

Finally under this heading, I will set out the facts as I have found them relevent the submissions by counsel for the Union that any discipline of Professor Vandervort would be discriminatory.

The Context. Professor Vandervort joined the University of Saskatchewan College of Law in 1981-2, as tenure stream assistant professor. She was by then the single mother of two children, born in 1970 and 1973. According to her evidence the first two years were uneventful, but the following three were "hectic", and she was "shocked and dismayed" by the developments in connection with her promotion and tenure.

Professor Vandervort was considered for promotion to associate professor in December 1984 and December 1985. In respect of those considerations the College's "Promotion

Recommendation" forms are in evidence. On the first occasion the committee of the Faculty of the College of Law, which was made up of all tenured members of the Faculty above the rank of assistant professor, judged her "Teaching ability and performance" to be "competent", with some dissenting votes, and reported "Research, scholarly or artistic work" to be "unsatisfactory", although the form reveals that the Faculty split evenly on the vote; 7 for, 7 against, and 1 abstaining. A year later the Faculty's view was less favourable. By a narrow margin they judged her teaching to be "unsatisfactory" and, with only one dissent, reported her research to be "unsatisfactory".

Another year later, in the autumn of 1986, Professor Vandervort was considered for tenure, by a committee of all tenured members of the Faculty, and not recommended. This time they voted 18-0 that her research was competent but 11-7 that her teaching was unsatisfactory, mainly, according to the "Tenure or Renewal of Probation Recommendation" form in evidence, because her courses were "unstructured" and because she was not available to students outside the classroom. In December of that year she was again not recommended for promotion, for the same reasons.

Professor Vandervort had by then come to be seen by many of her colleagues as a committed scholar, of a bent unconventional by the standards of the Saskatchewan College of Law, who tended to work at home and who was not an integral part of the team when it came to teaching and the administrative tasks of the College.

Professor Vandervort appealed the denial of tenure. In April of 1987 the University Tenure Appeal Committee allowed her appeal by a vote of 6-0. She was then awarded both tenure and promotion to the rank of associate professor. She taught in the regular course of things for the academic year 1987-88, with no allegations of any kind being made against her.

In the academic year 1988-89 Professor Vandervort was on sabbatical leave and Peter MacKinnon became Dean. In the autumn of that year she received a call at his direction offering to buy out her tenure. She refused the offer, both initially and after a telephone conversation with Dean MacKinnon himself. Professor Vandervort testified that she found this approach disconcerting in light of the tenure appeal process. Dean MacKinnon testified that he had thought that she was not interested in returning to Saskatchewan, and did not regard the offer to buy out her tenure as hostile in any way.

At Professor Vandervort's request she was granted leave of absence without pay for 1989-90, which was extended for 1990-91. During that period she applied for and received research grant support from the SSHRC, with Dean MacKinnon's support.

When Professor Vandervort returned to the College of Law she was given a normal course load for the academic year 1991-2, which included First Year Criminal Law, an upper year seminar course in Critical Legal Studies Jurisprudence, Criminology and supervising the College's team in the Laskin Moot Competition.

I are not satisfied on the evidence that upon her return Professor Vandervort was

treated in any way adversely by Dean MacKinnon or her colleagues. On the other hand there was a history of which he and most of them were surely keenly aware. No conspiracy was alleged by counsel for the Faculty Association, but he did build his case around the submission that Dean MacKinnon's response to Professor Vandervort's alleged failings could only be understood and assessed in the context of what had gone before, and the role of a "dominant group" on the Faculty of the College.

In making my findings of fact with respect to each of the grounds for dismissal or lesser discipline put forward by the University I have taken account of the fact that Dean MacKinnon, the faculty of the College and, according to his own evidence, the President, had the past in mind, but I have found that there was no concerted or improperly motivated activity against Professor Vandervort.

This last finding is significant, because another theme in the submission of counsel for the Faculty Association was that Professor Vandervort was treated unfairly by Dean MacKinnon in the circumstances leading up to the President's recommendation for dismissal. As part of his final argument he provided us with a "SUMMARY OF DEAN MACKINNON'S FAILURE TO FOLLOW PROPER PROCEDURES". I have not addressed these allegations directly or in detail because this is not a grievance against Dean MacKinnon. It is a contesting of the President's recommendation for the dismissal of Professor Vandervort on specific grounds.

I now turn to my findings of fact relevant to the specific grounds for dismissal, or alternatively discipline, put forward by the University.

1. **B's Treatment in Class.** Subject to the exceptions set out below, I find the facts as stated in B's letter to Dean MacKinnon, which he quoted to the President and the President in turn incorporated in his letter of May 6, 1992, to have been established by the evidence. It is important, however, that counsel for the University made clear in his argument, at p. 34, that;

> Professor Vandervort is not being disciplined for use of the phrase "limp-wristed judges" but rather is subject to discipline for raising a private issue in a public forum, the subsequent class, without regard for the possible harmful consequences to the student of doing so.

Counsel also stated, at p 31 of his written argument:

> It is not contended that Professor Vandervort maliciously forced [B] to reveal that she was gay, but rather that she was grossly careless or unconcerning in her desire to achieve her own goals.

Those "goals" are said, at p. 33, to be revealed by Professor Vandervort's own testimony that she "didn't want to be regarded as homophobic or a bigot or one who would use a classroom for those views".

I am completely satisfied that Professor Vandervort is not in the least homophobic. In light of counsel's submission just quoted it is irrelevant whether or not there is anything offensive about the use of the phrase "limp-wristed judges", and it is therefore irrelevant whether Professor Vandervort ever actually apologized for using the term. This is important because it is clear from both B's frequently quoted letter and her testimony that the use of the phrase has been her main concern throughout. Her perspective on the whole matter is made clear by the closing paragraph of her letter to Dean MacKinnon. The Dean did not include this final paragraph in his letter to the President, because, he testified in cross-examination, he regarded the complaint as his, and it was not part of his complaint;

> In closing i [B uses the lower case "i" in all of her correspondence] want to qualify this whole letter by claiming that i'm sure these kind of incidents occur in other prof's classes as well; in this instance Professor Vandervort just had the bad luck of having me in the class (or was it i who had the bad luck of being in her class? i'm not sure). At any rate, i hope i have included the aspects of my verbal narrative which you thought significant.

Clearly, "these kind of incidents" does not refer to Professor Vandervort's attempt to explain herself and B's crying and self-revelation in the second class, but to the phrase "limp-wristed judges" which B took at the time to have homophobic implications. Indeed, B testified that when the Dean contacted her on March 22, nearly three weeks after she had written her letter to him about the incidents, she "still didn't understand his concern about the second day".

The fact that the University has not attempted to base discipline in any way on the use in class of the phrase "limp-wristed judges" means that there is no issue of academic freedom of expression here.

Professor Vandervort could have dealt with B in private, to discuss her note and attempt to assure her that the reference to "limp-wristed judges" was not homophobic. However, it is part of the academic approach to law to which she adheres that values and feelings should be confronted more openly by lawyers and the legal system. The very course she was teaching, Critical Legal Studies, and a feminist approach to law, stress these elements. It is quite possible, therefore, that in raising these matters directly in the next class after receiving B's note she saw herself as acting in a principled way.

Moreover, the evidence is that prior to that class Professor Vandervort discussed B's note with her colleagues, Professor Beth Bilson, Associate Dean at the time, and others. Their advice to her was to confront the matter directly in class, and apologize. The evidence does not suggest that Professor Vandervort's colleagues advised her one way or the other about personalizing the issue to B, although I doubt they expected she would.

Whether Professor Vandervort made B's letter "seem ungrounded in the eyes of [her] classmates", as B stated in her letter to the Dean, is not the issue in my mind. Rather,

the issue is whether Professor Vandervort either set out to attack B to protect her own image or reputation, or simply concerned herself so much with her own image or reputation that she did not treat B's situation with due sensitivity. Clearly, she was concerned about being seen by B, and perhaps by other members of the class, as homophobic.

Apparently for that reason, Professor Vandervort dwelt far too long on her own lack of understanding of the overtones of the phrase "limp-wristed". This suggests undue concern with her own image or reputation.

Professor Vandervort testified that she said at the outset of the second class "[B] do you object if I refer to the matter you raised?" or words to that effect. B said in her letter, and testified, that Professor Vandervort started off by saying "[B], what are we going to do with you?" The University called two other students from the class as witnesses, and neither of them was able to corroborate either B's or Professor Vandervort's testimony in this regard. Having regard to the burden of proof on the University, I am not prepared to find that is the way the conversation started.

Even assuming the conversation started as Professor Vandervort testified, it was still personal to B. Whether or not B eventually consented to a reading of the note does not change this. I do not find that Professor Vandervort set out to attack B to protect her own image or reputation. I do find, however, that she concerned herself so much with her own image or reputation that she did not treat B's situation with due sensitivity.

There was a good deal of evidence about whether or not B was already "out" on the University of Saskatchewan campus. Certainly, if she had not revealed her sexuality at the time of the end of September class, she did so shortly thereafter. Indeed she ran, and was elected, as president of the law student council after it had become widely know that she was a lesbian.

There was no evidence that Professor Vandervort knew anything about that aspect of B's life, so, whatever the facts are relating to those surrounding circumstances, they are not relevant to any conclusion I have reached with respect to the judgement shown by Professor Vandervort in the way she dealt with B's note in that second class.

There is no doubt on the evidence that Professor Vandervort said something to the effect that B should "develop a tougher skin". Notwithstanding my conclusion that Professor Vandervort was concerned with her own image and reputation and not duly sensitive to B's situation, I find that this was said in the spirit of passing on advice that Professor Vandervort genuinely felt had served her well.

2. **When Dean MacKinnon asked Professor Vandervort for her response to B's statement, instead of replying to the merits she made contact with B.** Dean MacKinnon knew nothing of the incident in the jurisprudence class in the autumn until Professor Bilson, Associate Dean, mentioned it to him at the end of February, in the context of his concern about Professor Vandervort missing the Laskin Moot Competition

in Fredericton. B had not complained; Professor Bilson had apparently heard about the matter from another faculty member. Dean MacKinnon sent B a note asking her to see him. After discussing the matter, the Dean asked B to recount the situation in writing, which she did in her March 4 letter, subsequently quoted from in the Dean's letter to the President and in the President's letter setting out the grounds for his recommendation of dismissal.

The Dean was very busy and some time passed before he turned his attention to B's March 4 letter. In the interval the events surrounding the Laskin Moot Competition, including Professor Vandervort's dealing with the allegations of a student's dishonesty, had been worked through. When Dean MacKinnon did turn back to the letter, he called B on the evening of Sunday, March 22. Following that conversation, on March 23, he wrote to Professor Vandervort, quoting the same large part of B's March 4 letter as he did in his subsequent letter to the President and requesting a reply in 48 hours. On this same morning the Dean had discussed possible discipline of Professor Vandervort with the President and had consulted legal counsel.

Professor Vandervort replied by memo of March 23, asking for a photocopy of the entire statement by B, asking specific questions about the circumstances in which the Dean had solicited it and noting "for the record that I regard your letter and demand for a response within 48 hours as yet further acts in a pattern of harassment". That exchange of correspondence ended there. Thereafter Professor Vandervort and Dean MacKinnon only responded to one another in the course of these proceedings.

Also on March 23, according to B's testimony Professor Vandervort saw B in the hall way and invited her into her office. She did not seek B out. She showed B the letter just received from Dean MacKinnon but, again according to B's testimony on direct examination, did not ask her to do anything in particular. B testified she felt bad that she had "been there when Professor Vandervort made the "limp-wristed" comment; that she felt "guilty", and commented wryly in her testimony, "When in guilt, write a letter to the Dean". Her purpose, she testified, was to "express concern that this whole thing not be taken too seriously".

In the result, B wrote a letter to Dean MacKinnon dated March 24, the essence of which is in the following passages;

> i feel quite uncomfortable with events as they have unfolded regarding Professor Vandervort in the last week, and am writing you to explain.
>
> The college of law at this university is dealing with lesbian and gay issues with a new degree of seriousness. ... every week i'm challenging someone's views or their language; ... i want to urge that when a professor makes an inappropriate comment or misjudges a situation i would rather see her/him educated than see her status on faculty reviewed, especially when she is a good teacher and did not mean anything malicious.

> ... i am afraid that if the current "calling to account" continues, and if other incidents of unintentional homophobia or racism are treated similarly that other profs will lecture in constant fear of professional review and that students will stop talking in class or revolt. In order to maintain an atmosphere of mutual respect and learning with and from one another, i ask you to reconsider this calling to account.
>
> Again, with regard to my letter of March 4, i did not intend it as a formal complaint; i only wanted to provide you with the written account which you requested, for your information.

This letter was never shown to Professor Vandervort until it was produced in response to procedures connected with the hearing. B's testimony as well as Professor Vandervort's about the circumstances in which it was written, and B's explicit testimony on the point, satisfy me that she did not feel at all intimidated by Professor Vandervort in this context. Indeed, it is clear that if B was "influenced" in her attitude toward what went on in Professor Vandervort's classes and in the writing of the letters that are before me in evidence it was by Dean MacKinnon, not by Professor Vandervort. That is not to suggest that the Dean attempted in any way improperly to influence B. The point is simply that Professor Vandervort did everything she could not to improperly influence B, while at the same time approaching her in this matter.

I will consider below whether any approach by Professor Vandervort to B in these circumstances was per se improper. As Dean MacKinnon acknowledged in his testimony, there is no explicit College or University "rule" against such an approach.

3. **Professor Vandervort failed to perform her duties at an acceptable level with respect to the Laskin Competition Moot. As the responsible faculty supervisor, she failed to attend the final practice moots and the competition in Fredericton.** Professor Vandervort's failure to attend the Laskin Moot Competition in Fredericton on February 21 and 22 was the occurrence that triggered Dean MacKinnon's recommendation for dismissal. The evidence about this, and the preceding exercise by Professor Vandervort of her responsibilities in this connection, was far too intensely detailed to be set out in full here. The directly relevant facts as I have found them must suffice.

Professor Vandervort had been assigned the supervision of the Laskin Moot team as a regular teaching duty. She understood that part of that duty was to accompany the team to Fredericton. She had been provided with her ticket and information about her flight on the morning of February 20, which would have got her to Fredericton in time for the meeting of teams and coaches with the competition officials on the evening before the competition. Her testimony was that she quite unintentionally slept in and missed her flight, and ended up not going. She did not contact the students until after they had contacted the College of Law. Clearly this was a breach of duty. The seriousness of the breach depends on why she decided not to go, on her understanding of the nature of her obligation to go to Fredericton was and on what in fact her obligation was.

Counsel for the University submitted that Professor Vandervort "intentionally failed to attend the Fredericton Moot competition". I find on the facts that, as Professor Vandervort testified, she quite unintentionally slept in and missed her flight on the day before the competition. I find, further, however, that she then made the judgement not to take the next available flight on the basis of a set of considerations which did not accord sufficient weight to her obligation to go to Fredericton.

Clearly, even having slept in, Professor Vandervort could have travelled to Fredericton in time to discharge much of her obligation to the team. There was detailed evidence about whether, in fact, there was an available flight that would have enabled her to get to Fredericton that evening, or the next morning, and what she would have been able to do for the students had she in fact gone. I find that if she had decided to go Professor Vandervort could have got to Fredericton no later than the following day, in time to see something of each of the students mooting. Any conflict in their mooting times would have been the case even if she had gone when she should have, and her putting it forward as a reason not to have gone is simply rationalization.

There is serious issue here of fact and credibility. Rick Lee, the travel agent, testified that when Professor Vandervort called him at 9:45 or so in the morning she said "she saw no point in going at this time" and did not even ask about alternate travel times. She said she did. Professor Vandervort may now honestly think she recalls having made this inquiry; she may well have thought about alternate arrangements at the time. But on all of the evidence I find that she did not ask Rick Lee about alternate arrangements. Her having done so is inconsistent with her own evidence about the rest of the conversation with Mr. Lee and with her subsequent conversations with the Dean, the students and Faculty colleagues.

Professor Vandervort did not call the students in Fredericton because, she said, she was waiting for cheaper evening rates. No doubt such is her habit, but, even accepting that explanation, the failure to call demonstrates that she did not take this duty as seriously has she should have.

All of the evidence convinces me that, once she had missed her scheduled flight, Professor Vandervort's thoughts were all directed to rationalizing her breach of duty, not fulfilling it. She had a paper to do, Professor Zlotkin had told her that the best a coach could do was to keep out of the students' way, she could not have seen all the moots anyway, the Dean had not treated it very seriously when he called her the following morning, and so on.

I find that the expectation of the Dean and faculty members generally at the University of Saskatchewan was that a faculty member assigned a competitive moot as a teaching duty would travel with the team, and Professor Vandervort knew that. Part of the marking of the students was to be based on observation of their performances in the competition itself, and she knew that too. This was not, therefore, something that a Faculty member had discretion not to do. Having overslept, Professor Vandervort had to exercise her judgement about what to do and in my opinion she exercised it wrongly.

If this was a coolly rational calculation, it brought her to the wrong result. She did not attach as much importance to travelling with the team as others did, and as she should have, and she attached too much importance, relatively, to her "research" obligation to get her paper done. If, as seems more likely, it was more of an instinctive reaction, rationalized after the fact, Professor Vandervort made a wrong judgement which she has either never recognized or has not been willing to acknowledge.

Failure to attend the Laskin Moot Competition in Fredericton was not the only basis for the University's allegation that Professor Vandervort failed to fulfil her obligations as the faculty member assigned to coach the team. Again, the evidence was excruciatingly detailed. There is no question that the team members were contentious among themselves, largely because several other members of the team thought E was not pulling his weight, and there is no doubt that he was rude to Professor Vandervort.

There is, and was, no clear direction to the coach of the Laskin Moot just how the role is to be fulfilled, although it is generally understood that the coach will get the team working on their facta in good time and will arrange for them to do several practice moots. Because the Laskin Moot is partly in French, practice is particularly important if any of the mooters are going to be using what for them is a second language.

Any faculty member who takes the easy road of doing the work for students, rather than pushing them to learn, is not doing the job properly, although he or she may be popular as a result. In the role of competitive moot coach there is the added inherent difficulty that by the rules the students have to do the research work themselves, although "guidance" may be acceptable.

Having considered the students' evidence, that of faculty members and others involved with the preparation for the moot, and Professor Vandervort's own, I find that Professor Vandervort's work with the Laskin Moot team was satisfactory and does not require further comment in this context, except for the fact that she missed the last two practice moots.

Those two practice moots were scheduled from 2:00 to 3:30 on Tuesday, February 11 and from 12:30 to 2:30 on Thursday, February 13. Professor Vandervort had a scheduled Criminology class from 3:00 to 5:00 on Tuesdays and a scheduled Criminal Law class from 11:30 to 1:00 on Thursdays, and did not attend either moot. Both were videotaped and the understanding was that Professor Vandervort would review the tapes with the students. In the case of the final practice moot this did not happen, but it was through no fault of hers and is therefore irrelevant.

The practice moots were presided over, in the first case, by Professor Norman Zlotkin, a very experienced faculty colleague who had previously coached Laskin teams, and, in the second, by Rupert Baudais, a francophone lawyer. Professor Zlotkin did not consider it aberrational that Professor Vandervort was not in attendance. He did express surprise that she had not asked him for his marks, although he did give her his comments on the performances. In the case of this practice moot she did review the

tapes with the students.

Professor Vandervort testified that these moots were scheduled at times when it was impossible for her to attend the whole session, and inconvenient to get there at all, because those times suited the students and the people acting as judges. The moots were held in the Education Building, across the road from the College of Law building where she taught her classes. Counsel for the University submitted that "this is simply one further instance or indicator that Professor Vandervort did not take her professional responsibilities seriously and placed her own timetable or schedule above the needs of her students in the Laskin Moot class".

There is no evidence that Professor Vandervort made any very serious attempt to schedule the practice moots so that she could be there, but, on the other hand, there is nothing to refute her testimony that the times were set to suit the other participants. In the context of a disciplinary proceeding, given the burden of proof, I cannot conclude that it has been proven that the scheduling of the practice moots and Professor Vandervort's failure to attend show that she "did not take her professional responsibilities seriously".

4. Professor Vandervort published an allegation of dishonesty against a student before the allegation was properly investigated; Dean MacKinnon having previously explained to her the proper procedure for bringing such complaints. The facts relevant to the "E incident", as I have found them, are the following. At the Laskin Moot competition in Fredericton E responded to a question by one of the moot court judges in a way that his team mate, L, considered dishonest. She alleged that he purported to distinguish a case that he had not in fact read, and afterwards bragged about having done so. Under oath in these proceedings E denied having done so.

For purposes of this proceeding I need not reach any conclusion either as to just what happened in Fredericton or as to the proper academic response to what E allegedly did. Those are matters for the Faculty of the College of Law. I do find that L was upset by what happened and that it was not unreasonable for Professor Vandervort to treat her allegations seriously in an academic environment.

In the week after the Laskin Team returned to Saskatoon they dropped in one by one to speak to Professor Vandervort. After she had heard the allegations against E and mulled them over Professor Vandervort consulted Professor Russell Buglass, who teaches in the area of legal ethics. They both considered this to be a matter of academic dishonesty, covered by the **University council and College Regulations on Examinations,** which state at p. 39, under the heading **Academic Dishonesty and Other General Offenses** and the sub-heading **1. General,** "Academic dishonesty, like other forms of dishonesty, is misrepresentation with intent to deceive...". Under the sub-heading iii. **Reporting of Offenses (a) cases involving academic dishonesty related to work in a course, including examinations** the following appears:

> Except in cases in connection with University administered examinations,

> proceedings in connection with the work in a course will be initiated by the instructor in charge of the class... . The person initiating proceedings in a case of academic dishonesty of this kind shall report the case to the Head of the Department offering the course and to the Committee on Academic Dishonesty of the student's college through the office of the Dean of the student's college.

There is no committee on academic dishonesty in the College of Law, so **de facto** it is the Faculty Council.

Professor Vandervort also consulted three other colleagues experienced in moots and found that they were collectively equivocal about the seriousness of the allegations. On March 9 she spoke to Associate Dean Beth Bilson about the matter, who gave her a number of options and told her to ask Dean MacKinnon what to do. She spoke to him on March 12. In his evidence Dean MacKinnon said he told Professor Vandervort to put her complaint against E in writing, and explained that the matter should be investigated. He testified that at that point he did not say how or by whom. Specifically, Dean MacKinnon testified under cross-examination that he did not tell her to confront E with the allegations or to report the results of the investigation to the Dean before taking them to Faculty Council, although he testified that that was his understanding of the normal procedure.

in Dean MacKinnon's notes to "File: Laskin Moot and Lucinda Vandervort" of March 17, 1992, which were entered in evidence, he states in the final paragraph that he sought the advice of Faculty colleagues late on March 16, and contemplated having someone else investigate the E matter, and then concludes:

> I set this idea aside on the advice of Professor Smith who suggested that in an allegation of this kind, I normally act upon the report of the faculty member, and that I should simply ensure that the faculty member has made the necessary inquiries to support a complaint which can go forward if faculty believes it is serious enough.

Professor Vandervort then posted a notice asking the students on the team to come and see her. L contacted her over the weekend and, upon being advised what the purpose of the meeting was to be, declined to get involved. Professor Vandervort testified that she then concluded that she would not learn much more from the students than she had already heard, and prepared a memo to Dean MacKinnon, dated the Monday following, setting out the allegations she had heard against E and her reasons for taking them seriously.

On that Monday, March 16, at about noon, Professor Vandervort was in the Dean's office printing her memo to the Dean when she encountered J, another of the Laskin team members. After returning to Professor Vandervort's office at J's request, J read the memo Professor Vandervort had prepared over the weekend and confirmed its accuracy.

J then told Professor Vandervort that the Dean was interviewing students about Professor Vandervort's performance in teaching the Laskin Moot course. According to Professor Vandervort, this came as a shocking revelation. She almost immediately went to see the Dean but learned from his secretary that he would not be back until later in the afternoon.

Professor Vandervort then placed a copy of her memo to the Dean about E's behaviour at the Laskin Moot Competition in each Faculty member's mailbox. The faculty mailboxes are of a common type, with key access from the front and open in the back. The back of the boxes are in part of the administrative offices of the College of Law. It is not a public area but one that is entered quite freely by faculty and staff, and even by students. Dean MacKinnon and others expressed concern that this memo was not put in an envelope. There was, however, no evidence or suggestion that anyone other than the faculty member to whom a mailbox was assigned would have had any authority to read material in a mailbox. Indeed, there was no evidence that this was a problem at the College of Law, or had ever happened.

I note that R, another member of the Laskin Moot Competition team, testified that when he was discussing events in Fredericton with Professor Vandervort in her office he read a memo making allegations against E as it lay on her desk. He did not suggest that he had any right or authority to do so.

Professor Vandervort testified that she sent her memo direct to all members of the Faculty Council because she had concluded that Dean MacKinnon might simply ignore the memo. She also thought that she could not effectively investigate the matter further with the students, as her position with them had been undermined by the Dean's discussions with them about the course.

Later that afternoon, after discussing the matter with several other colleagues, Professor Vandervort did get to meet with Dean MacKinnon. She was very angry and accused him of coordinating a campaign against her. He explained that he was following normal procedure in investigating a complaint against a Faculty member, but she was not in the least mollified, and made further accusations that he was mounting a campaign against her.

5. **Professor Vandervort was absent from scheduled classes on a number of occasions throughout the year, without notifying and obtaining permission from the Dean and made unsatisfactory arrangements to compensate for her absences.** Eight classes in the First Year Criminal Law course are the basis of this ground of discipline put forward by the University; two in September, two in October, two at the beginning of January and two at the beginning of February. It became clear in the course of the hearing that Dean MacKinnon had, in fact, been notified and given permission in respect of the first four of these. In his written argument counsel for the University states, at p 54;

> The University takes particular issue with those classes missed in the second

term and the manner in which make-up classes were scheduled for the second term.

With respect to the autumn classes I note only that Dean MacKinnon had been notified even before Professor Vandervort's return to Saskatoon that she would miss the September classes, one of which was the first of the term and which he kindly offered to, and did, conduct on her behalf. His recollection was that she only told him that she would miss the first class. Her testimony was that she told him she would miss the first week. I find that the University has not discharged its burden of proving that the Dean was not advised of the second absence in the first week.

In August Professor Vandervort advised the Dean with respect to the October classes and on October 18 sent him a memo with respect to them. During the days that he was on the witness stand Dean MacKinnon rediscovered this memo and brought it to the attention of counsel, who introduced it into evidence.

With respect to the first two classes in January, I am satisfied that the Dean was never told clearly and directly that Professor Vandervort would be absent. The only evidence I have is her own, that she advised him the previous summer that she would be away over Christmas and again for "ski week" on the same personal business that would take her away in the autumn. She did nothing similar to her October 18 memo about the January absence.

However, when she made the decision to return late to Saskatoon from her Christmas holiday Professor Vandervort called Marie McMunn, the Dean's assistant, to arrange for reading lists to be posted and the students notified. She did not ask specifically that Dean MacKinnon be notified and apparently he was not, but the requested arrangements were made. Professor Vandervort's testimony in this connection was not challenged.

There was some suggestion by Professor Vandervort that the two January classes were to be made up at the end of that month of in the first week of February, but the evidence is that she never carried through with this to the point of advising the students.

The two classes in February were cancelled in quite different circumstances. On Tuesday, February 4, Professor Vandervort found the students in her small First Year Criminal Law class unprepared. First Year moots were on that week and, as was apparently often the case, many of the students had given priority to moot preparation. Also, the law student variety show, the Follies, had just been held the preceding weekend, and that too had taken student attention away from Criminal Law.

According to the testimony of C, a student in the class called as a witness by counsel for the University, in the February 4 class session Professor Vandervort simply looked around, found the class generally unprepared and announced that that session and the other one that week were cancelled. C testified that it was only at the end of February, when Professor Vandervort posted a list of end of term classes, which is in evidence,

that the students knew that the two cancelled February classes would be made up on March 18 and 25.

The University also called H, a mature student in the Criminal Law class, who testified to the difficulty the second term cancellations and make-ups in Criminal Law had caused her. H did not testify about the circumstances of the February cancellations. Professor Vandervort's evidence with respect to the February 4 class was much more extensive. She testified that when it became evident that the class was badly prepared she took a vote on whether the students wanted to cancel classes that week because of the moots, and, when they voted strongly in favour, she did so. Professor Vandervort testified that there was no explicit discussion of the dates of the make-ups but, because of the fact that the week after the moots was study break, it was understood that the make-ups would be in March.

K, a student in the class called as a witness by counsel for the Faculty Association, corroborated Professor Vandervort's testimony that there had been a vote on cancelling classes for the first week of February. S, another student called by counsel for the Faculty Association, had not been in the Criminal Law class but had taken other courses from Profe ssor Vandervort. He testified that her practice was to consult students closely on the conduct of classes. indeed, he thought that if Professor Vandervort had a fault as a teacher it was her tendency to be too concerned about student wishes.

On the basis of the testimony I heard I are not satisfied that the University has proved that Professor Vandervort simply cancelled the February classes because of lack of preparation. I find that she discussed the matter with the class, took a vote and announced that the class of February 4 and the other class that week, on February 6, were cancelled. I have concluded that C simply forgot the full circumstances. Not only is her testimony outweighed, it is highly unlikely that Professor Vandervort would have cancelled not only the class of the 4th but also the one of the 6th without consulting the class and explaining her actions.

The January classes were made up in the first week of March, so the result was a very heavy end-of-term schedule in Criminal Law. There was also a regularly scheduled assignment due in March. This heavy work-load understandably upset both C and H, who had commitments outside the College of Law, and undoubtedly other students as well.

C told Marie McMunn, the Dean's assistant, about her concerns at the end of February in the course of discussion of another matter. Ms. McMunn asked her if she would talk to the Dean about this matter. The result was that she collected some notes about the classes cancelled and rescheduled in Criminal Law and took them to the Dean's office just before exams, and he called her to discuss this matter on April 10. H had discussed her concerns about the course with Associate Dean Beth Bilson, but did not do anything about it except keep a record until the course was over, and then found it unnecessary to take any action because she learned that her friend and classmate, C, had discussed

her concerns with the Dean.

This evidence is significant not only with respect to the timing of the make-up classes but also with respect to when Dean MacKinnon learned the facts about this ground of discipline, as discussed above under the heading **"PRELIMINARY RULINGS" "After-added Grounds".**

Professor Vandervort was aware of a motion discussed and passed by the Faculty Council of the College of Law on April 6 and May 5, 1983, as follows:

> As well as continuing the current rule against make-up classes during the last two weeks of the course, Faculty Council adopt the following statement of policy: that the workload (in terms of time expected of students) during that last two weeks of a course should not exceed the average workload experienced during the earlier part of the course.

There is no doubt that in scheduling a make-up class for March 25, 1992 she broke "the current rule". The student testimony made it clear that this caused considerable distress.

Remorse, regrets and second thoughts. Professor Vandervort's testimony was that on April 19 she contacted the Faculty Association. From that point on, and certainly from the time she received notice from the President's office of Dean MacKinnon's recommendations, she felt herself to be fighting for her job, in circumstances in which she did not think warranted any discipline at all. She was advised by legal counsel not to say anything at the Article 31.5.3 "discussions" and followed that advice.

The University's submission is that the Professor Vandervort was unresponsive to Dean MacKinnon's request for an explanation of the B incidents. Her memorandum of March 23 is very wary and combatative, but it is responsive and, of course, it has to be understood in context. By this time Professor Vandervort had already gone to the Faculty Association for representation in connection with the Laskin Moot and E matters.

Throughout her cross-examination Professor Vandervort was asked if she felt any remorse, regretted her various actions or had apologized. In one or two instances, including the B matter, she said that if she were doing things over again she might do them differently but otherwise she said she had no such feelings. I do not take this as evidence that in so far as Professor Vandervort is found to have made errors of judgement she is incapable of recognizing them and acting differently in the future. She was on the witness stand as one putting her employer to the proof of its case, as she had every right to do. In those circumstances it is natural that she would concern herself with getting her perspective across, not with soul searching and equivocation.

Counsel for the University submitted that Professor Vandervort's testimony was evasive, contradictory and unresponsive, which in itself showed a lack of remorse that would

make successful reinstatement unlikely. I do not accept that characterization. Professor Vandervort is an intense person, regularly involved in the full articulation of ideas, both in the classroom and in her writing. Her testimony was marked by lengthy and often repetitive responses which conveyed a sense of having been carefully thought through in advance. Undoubtedly they had been, but that would appear to be her way of doing things and it did not destroy her credibility.

Her testimony was not in general "evasive" or "unresponsive", although it was often unduly long and detailed. It was, however, her way of presenting her side of the story, from which she was unwilling to be diverted in cross-examination, or indeed by her own counsel. Given the length of her testimony and the passage of time neither can it be described as "contradictory". Counsel for the University did not highlight any specific examples of internal contradiction, but referred to "the B incident" and her explanation of the telephone conversation she had with Rick Lee, the travel agent.

With respect to the "B incident", I have not found that the University has discharged its burden of proof on the aspect of the matter where Professor Vandervort's testimony differed directly from B's; the words with which she opened the second class. I have not, therefore, concluded that Professor Vandervort's testimony was "contradictory" in that respect.

With respect to the conversation with Rick Lee, counsel for the University, not inappropriately, devoted a good deal of energy to producing evidence of just what the schedules and airplane loadings were to demonstrate the unlikeliness of Professor Vandervort's testimony and to corroborate that of Rick Lee. I have accepted Mr. Lee's testimony and rejected Professor Vandervort's on the point of whether she asked him if he could make alternate arrangements. I have not, however, concluded that she was deliberately lying on the witness stand, because it is quite possible that she thought about the possibility of alternate arrangements at the time and that, when she testified, she genuinely thought she had made the inquiry.

The submission by counsel for the University that Professor Vandervort always places her own objectives or agenda ahead of any concern for the students or the objectives of the university as a learning institution. This is not, by itself, a ground for dismissal or discipline advanced by the President in his letter of May 6 advising Professor Vandervort that he is recommending her dismissal. Evidence relating only generally to this submission is, therefore, irrelevant. On this basis we declined to hear the final witness the University sought to call and have disregarded the testimony of Professor Anne MacGillivray relevant only to that submission. On the other hand, in so far as this submission amounts to saying that there is a common theme to the five grounds specified by the President, so that they can be weighed together in our determination of the appropriate discipline, it is a legitimate argument.

The submission by counsel for the Union that any discipline of Professor Vandervort would be discriminatory. At about the same time as he was dealing with the matters leading to the recommendation for Professor Vandervort's dismissal Dean

MacKinnon received written complaints from students about the behaviour of another, senior male, member of the Faculty. On February 18, 1992, the Dean wrote to the professor complained about summarizing the complaints "in anticipation that you will want to take them into account".

The complaints were that the professor complained about had (i) asked the women in his class whether they wished to be addressed by Miss, Mrs. or Miss [that is how the matter is stated in Dean MacKinnon's letter quoting the student's letter. It is not clear whether this should have been "Miss, Mrs. or Ms."], (ii) asked two women to change their child care arrangements to suit a change in the class schedule, (iii) made comments in class critical of the government's constitutional conferences, (iv) criticised proposed senate reform in a way that deprecated the possibility of representation in the Senate of racial minorities (v) used the words "bitch and "shit" in class, and referred to the class as a bunch of "clods", (vi) prohibited the taping of his lectures and (vii) covered irregular amounts of reading material in class and refused to tell the students in advance how much was contemplated.

By letter dated February 26 the professor complained about replied, responding directly to each of the allegations, both with respect to the facts and his justification for doing what he did. In relation to (ii) he responded that as a result of the discussion the scheduled class time had not changed and in relation to (v) his response put a quite different cast on the facts. In respect of (iii) and (iv) he suggested quite strongly that the Dean MacKinnon's questioning of him trespassed on academic freedom.

After that, according to Dean MacKinnon's testimony, he discussed the complaints with the professor complained about, in his office, on the basis that these were points of view that he should know about. There was no disciplinary action and no monitoring of the professor complained about.

There is no issue before us of the propriety or desirability of what the professor complained about did, or indeed of whether he in fact did what was alleged to the Dean. Nor is there any issue of whether the Dean infringed academic freedom. The only issue is whether Dean MacKinnon's reaction to the allegations against the professor complained about differed from his treatment of Professor Vandervort sufficiently to justify a conclusion of discrimination against her, as a basis for us to find that the recommended dismissal, or any discipline, was not justified.

THE ISSUES.

The issues are: (i) Under Article 31.5.6, whether the facts as we have found them constitute good and sufficient grounds for the President's recommendation for the dismissal of Lucinda Vandervort, a tenured Associate Professor, and (ii) having found that they do hot, whether under Articles 31.1.3 and 31.5.10.7 there is good and sufficient cause for any discipline, and (iii) if so, what discipline is appropriate. In this connection we must consider the submission of counsel for the Faculty Association that Dean MacKinnon discriminated against Professor Vandervort and ask whether any

discipline of Professor Vandervort would be discriminatory.

For there to be any discipline the conditions set out in Article 31.1.1 must be found to have existed. I will consider whether this is the case on the facts as I have found them.

DECISION.

(i) **Under Article 31.5.6, do the facts as I have found them constitute good and sufficient grounds for the President's recommendation for the dismissal of Lucinda Vandervort, a tenured Associate Professor?** The Committee has already issued the Interim Decision set out above stating that, even if established, the grounds for the President's recommendation for dismissal would not constitute good and sufficient cause for dismissal. It goes without saying that in our opinion the facts as I have found them do not constitute good and sufficient grounds for the dismissal of a tenured professor. **What is my standard for those judgements?** Article 31.1 of the Collective Agreement provides:

> 31.1 Discipline is specific action taken by the Employer based on an allegation that the employee has not performed his duties at a standard that is considered acceptable or has failed to carry out a proper instruction given by a superior.

It is evident therefore that what I must be concerned here with failure to perform to acceptable standards. To define those standards Counsel for the University invoked the Preamble to the Collective Agreement, which states in part;

> 1.1 The parties recognize that the goal of the University is the attainment of the highest possible standards of academic excellence in the pursuit and dissemination of knowledge, to be achieved principally through teaching, scholarship, research and public service. ...

While the decision of the Arbitration Committee "Respecting the Dismissal of Dr. R.J.L. Paulton" in 1978 states at p. 2 that "The University and the Faculty Association have defined the standards expected by stating Article 1.1", that decision is certainly no precedent for the proposition that failure to attain "the highest possible standards of academic excellence" is grounds for dismissal. The person dismissed there, according to the Committee, "virtually ceased doing any research work and did no bench type research after January 1976" (at p.3) and in 1978 "declined to teach 414A" (at p.4), a course properly assigned to him.

I must read that Arbitration Committee as suggesting that the standard of performance relevant to dismissal is that the faculty member share the goals stated in Article, not that he achieve them. Who among us would think it fair to lose our jobs if we did not attain, in literal sense, the "highest possible standards" in our respective professions or employments. The hyperbole of motivational mission statements serves a useful function but it cannot be brought, unmodified by intelligent understanding of its role, into

the hard real world of employee discipline.

Counsel for the University invoked the University of Saskatchewan, College of Law Criteria and Standards for Promotion and Tenure, Approved September 1989, as a source from which to draw the standards applicable here. Understandably, he spoke only of the standards with respect to teaching, because it is failures in that connection that are alleged here. Counsel stressed that in the acquisition of tenure importance is attached to:

> ability to foster an instructional climate which is conducive to learning
>
> ability fairly and objectively to assess and grade student performance; and
>
> availability to students outside the classroom, for guidance and assistance in their studies.

While it is not directly relevant, it seems clear on the evidence that Professor Vandervort not only met the academic research standards to become tenured, she continues to perform effectively in that aspect of her work.

Counsel also relied for an articulation of the applicable standards upon the 1974 decision of a hearing committee convened to hear dismissal charges against Dr. L.W. Chamberlain, a tenured faculty member at the University of Western Ontario. I attach no precedential weight to this decision, but I do agree with the statement of the committee at p. 14 that,

> A distinction must be drawn between the standards appropriate to awarding tenure and those appropriate to dismissal after tenure has been awarded.
>
> ... Once tenure is awarded ... the professor has proved [her]self and is now free to pursue [her] work and development in [her] field as [she] chooses, subject, of course to the practical accommodations necessary in connection with teaching and other specific duties. The University must therefore give [her] wide latitude, trusting to the judgement of the professor as a proven professional that [her] performance is appropriate.
>
> It is possible to envisage circumstances in which the trust involved in tenure might be abused. This is the point at which the question of dismissal of a tenured professor arises. ... the University is trusting the professor to devote [her]self to carrying forward this function in ways appropriate to [her] place in the University.

I agree that in so far as failures of duty demonstrate that a tenured professor is no longer exercising his or her judgement and acting in pursuit of the goals of the University, discipline, and even dismissal, may be indicated.

However, it is very important that even where, as here, academic freedom is not directly

in issue, and what is involved are the "practical accommodations necessary in connection with teaching and other specific duties", the purpose and importance of tenure not be forgotten. Academic freedom can too easily be the victim of either a direct attack cloaked in the "practical accommodations necessary" or a careless flailing at normal professorial shortcomings.

Reference should be made back to my quote, under the heading **"Standard of Proof",** from the Supreme Court of Canada judgement of LaForest J. in **McKinney v. University of Guelph** (1990), 76 D.L.R. 545:

> Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. ... the level of interference with or evaluation of faculty is quite low. **The desire is to maximize academic freedom by minimizing interference and evaluation.** [emphasis added]

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

More on point here, the University must justify discipline short of dismissal by proving that Professor Vandervort has been guilty of misconduct relevant to her academic role, or that she has acted inconsistently with the pursuit of the goals of the University as demonstrated by misconduct, incompetence or failure to discharge academic responsibilities which, if repeated or continued, would justify dismissal.

Moreover, as I mentioned earlier in this award, Article 31.1.1 of the Collective Agreement is very specific in limiting the grounds upon which any discipline can be justified;

> 31.1.1 An allegation requiring disciplinary action can only be justified if the following conditions are determined to have existed:
>
> (i) the tasks or functions or responsibilities that are expected of an employee have been made clear to him through specific instruction, or if it could reasonably be expected that such tasks or functions or responsibilities would be specifically known to an employee on the basis of his rank and current terms of employment;
>
> (ii) through specific and proper instruction, or on the basis of rank and current terms of appointment, the employee must have had a reasonable opportunity to know and understand the standard of performance that is expected, and specifically the standard of performance that is not

acceptable;

(iii) if the disciplinary action is to be taken on the basis of a cumulation of allegedly censurable events, it is required that, in the course of the cumulation of allegedly censurable events, the employee will have been properly informed that his performance was not at an acceptable level;

(iv) in the case of an alleged refusal to carry out an instruction, such instruction will have been provided to the employee in written form, unless circumstances precluded the opportunity for written instructions to be received by the employee.

In reviewing my findings of fact to determine whether the University has made its case for the imposition of discipline I will refer to these requirements. It also bears repeating that the University can make its case for dismissal, or discipline, here **only on the grounds set out in the President's letter of May 6, 1992.**

Rather than review those grounds against the standard for dismissal and again against the standard for discipline I will do both at once, because my serious concern here is only with the appropriateness of discipline short of dismissal. If there is not good and sufficient cause for discipline, dismissal is obviously not justified.

(ii) **Has the University proved good and sufficient cause for any discipline?**

(1) With respect to **the B incident** I have concluded that clear thinking would have dictated not personalizing the matter at all. Better judgement on Professor Vandervort's part would have dictated that she be more careful about preempting B's personal decision about when and if she wanted to come out. Professor Vandervort should have exercised more careful judgement in the way she dealt with B's note in that second class. What Professor Vandervort said to the effect that B should "develop a tougher skin" was said in the spirit of passing on advice that Professor Vandervort genuinely felt had served her well, but it did not show good judgement to say it in class in the circumstances.

Professor Vandervort behaved in a way which suggests that she was more concerned about her own reputation than she was sensitive to B's situation. Had she been more sensitive to B's situation and less concerned about her own reputation she would have dealt with the matter in private or taken greater care not to personalize the matter to B. I have not, however, found that Professor Vandervort was "grossly careless or unconcern[ed] in her desire to achieve her own goals".

It could reasonably be expected on the basis of Professor Vandervort's rank and current general terms of employment that she would have known her responsibilities toward a student in B's position, and on the same basis she had a reasonable opportunity to know and understand what was not acceptable, but I cannot say that she must have

known that she was not exercising good situational judgement. The most I can say is that she should have known that, and a failure of judgement such as this does not by itself demonstrate incompetence.

Nothing in this demonstrates that Professor Vandervort was no longer exercising her judgement and acting in pursuit of the goals of the University. On the contrary, the evidence is that in difficult circumstances she tried to do her job properly but made errors of judgement. Cumulative errors of judgement, depending on how serious they are, may constitute incompetence, but the B incident taken alone certainly does not. Neither did it amount to "misconduct" on Professor Vandervort's part.

(2) With respect to **approaching B after she heard from Dean MacKinnon** about his concerns over the incident, I have found that Professor Vandervort did everything she could not to improperly influence B, while at the same time approaching her in this matter. As Dean MacKinnon acknowledged in his testimony, there is no explicit College or University "rule" against such an approach.

I am not satisfied that it could reasonably be expected on the basis of Professor Vandervort's rank and current general terms of employment that she would have known that she should not approach B in these circumstances. In the terms used by the Collective Agreement, she had no "reasonable opportunity to know and understand" that it was not acceptable to do so. Counsel for the University submitted that;

> Such conduct is entirely inappropriate and unless severely sanctioned by this Committee would prevent students from bringing problems to the attention of the Dean or appropriate University authorities for fear of reprisals from the professors.

This amounts to saying that any such approach as Professor Vandervort made to B is per se unacceptable. I do not agree. University faculty who are the subject of student complaints not thereby insulated from the students involved. In such circumstances they must, of course, be very sensitive to the dangers of undue influence. Indeed, they may be well advised not to contact the students, but I think they are generally within their rights to do so. Deans and other administrators must also be sensitive to those dangers, but they have not only the right but also the obligation to investigate.

Any attempt to influence a student complainant by a threat of the use of power would be misconduct. De facto influence, even if unintentional, will colour the student's evidence in subsequent proceedings such as these. Here both parties argued that the other had led B to take positions she did not really hold. Thus, depending on the circumstances, the wise course might well be to avoid contact, but it might also be to talk very carefully to the student, perhaps in the presence of a third party of the student's choice, to review the facts and clarify misunderstandings.

Here I have concluded on the evidence that Professor Vandervort's approach to B was acceptable. As I have explained, she had to be very careful not to intimidate B, given

their faculty-student relationship, even though at the time B was not enrolled in one of her classes and dependent on her for grades. I find she was careful about these concerns. She knew B and did not deal with her in an inappropriate way.

(3) With respect to the allegation that Professor Vandervort failed to perform her duties with respect to the **Laskin Competition Moot** at an acceptable level I have found that Professor Vandervort unintentionally slept in and missed her flight, decided not to take the next available flight to Fredericton and did not contact the students until after they had contacted the College of Law. Clearly this was a breach of duty; a failure to discharge academic responsibilities, but I am not satisfied that missing the flight in and of itself was very serious in a disciplinary context. Failing to contact the students was poor judgement. Even if I accept that Professor Vandervort's conditioned response was to wait for the cheaper evening telephone rates, it too was still poor judgement.

Continued carelessness of the sort involved in being late for her scheduled flight might justify discipline, but a single instance did not. The same can be said with respect to the poor judgement she displayed in not making the call. I have also found, however, that she made the judgement not to take the next available flight on the basis of a set of considerations which did not accord sufficient weight to her obligation to go to Fredericton. **This was considerably more serious.**

It could reasonably be expected on the basis of Professor Vandervort's rank and current general terms of employment that she would have known her responsibilities toward the moot team. I do not accept that, all arrangements having been made to fly to Fredericton, and knowing what her colleagues did as coaches of moot teams, she really thought that she did not have a duty, which the College of Law took seriously, to go to Fredericton. In other words, she had a reasonable opportunity to know and understand that it was not acceptable to simply give up on trying to get to Fredericton.

This was an instance of Professor Vandervort not exercising her judgement properly, and behaving badly, in pursuit of the goals of the University. It did not demonstrate incompetence, it was not "gross misconduct", but it was a clear failure to discharge academic responsibilities and in that sense constituted misconduct. In my opinion, even standing alone it warranted a reaction with disciplinary consequences from the Dean, although certainly not dismissal. I turn below to the appropriate lesser form of discipline to be substituted.

In all other respects I have found Professor Vandervort's work on the Laskin Moot Competition satisfactory. The scheduling of the practice moots and Professor Vandervort's failure to attend them cannot be taken to show that she "did not take her professional responsibilities seriously" in the context of discipline. It did not constitute misconduct, incompetence or failure to discharge academic responsibilities upon which discipline could be based in accordance with Article 31.1.1.

4. With respect to **"the E incident"** I have found that it was not unreasonable for Professor Vandervort to treat seriously the student allegations about what E did. The

basis of the President's recommendation is that she "published an allegation of dishonesty against a student before the allegation was properly investigated", but I have found that **she did not, in any sense justifying discipline, "publish" her memo of March 16.** Having shown it to one of the students with whom she properly investigated the matter, she put it in her Faculty colleagues' private mail boxes.

The University relied explicitly on the allegation that Dean MacKinnon had previously explained to Professor Vandervort the proper procedure for dealing with the matter. I have found, however, that the Dean did not tell her to report the results of the investigation to him before taking them to Faculty Council, although it was his expectation that she would.

Finally, on this matter, I am not satisfied that there was any specific instruction or reasonably expected understanding of what constituted a proper investigation in the circumstances of the case. It is not clear to me, and might well not have been clear to Professor Vandervort, under what circumstances, having reported such a matter to the Dean, the faculty member, rather than the Dean, does the investigating prior to putting a matter of academic discipline before Faculty Council. Nor is it clear how much investigating is to be done before a matter comes to Faculty Council and how much is done by whomever is assigned the task following discussion.

I do not think that Professor Vandervort was justified in thinking that Dean MacKinnon would not act responsibly on her allegations against E. Putting her memo to him in each of the Faculty mailboxes was an ill-considered act, **but she did not "publish" the memo,** nor did she fail to follow the Dean's specific instructions. On the facts, therefore, the University has not established the stated ground for discipline, and in this connection as well it has not satisfied the requirements of Article 31.1.1(i).

5. With respect to Professor Vandervort's alleged **absence from scheduled classes** without notifying and obtaining permission from the Dean and making **unsatisfactory arrangements to compensate for her absences** I have found that Dean MacKinnon had, in fact been notified and given permission in respect of the autumn classes. More precisely, I have not found that the University has discharged its burden of proving that the Dean was not advised of the second absence in the first week. With respect to her absence in January Professor Vandervort called Marie McMunn, the Dean's assistant, to arrange for reading lists to be posted and the students notified. She did not ask specifically that Dean MacKinnon be notified and apparently he was not, but I do not find that this was a disciplinable failure to discharge academic responsibilities.

I am not satisfied that the University has proved that Professor Vandervort simply cancelled the February classes because of lack of preparation. I have found that she discussed the matter with the class, took a vote and announced that the class of February 4 and the other class that week, on February 6, were cancelled. This was another instance of poor judgement in that it resulted in scheduling four make-up classes in March. Professor Vandervort should not have allowed herself and the

students, whatever the wishes of the majority at the time, to be put in the position they were in March. Again, however, I do not find that this was a disciplinable failure to discharge academic responsibilities.

Scheduling a make-up class for March 25, 1992, was a different matter. In doing so Professor Vandervort broke a rule of some significance. This was an instance of Professor Vandervort not exercising judgement properly in pursuit of the goals of the University. It did not demonstrate incompetence, it was not "gross misconduct", but it was a clear failure to discharge academic responsibilities and in that sense constituted misconduct of a minor sort. Standing alone it warranted a reaction with some disciplinary consequences from the Dean, but, again, certainly not dismissal. In this connection as well, I turn below to the appropriate lesser form of discipline to be substituted.

With respect to the President's statement in the letter of May 6, 1992 that he received **no indication** at the meeting of April 21, 1992 **that Professor Vandervort harboured remorse, regrets, or even second thoughts,** I have stated that I do not take this as evidence that in so far as Professor Vandervort is to be found to have made errors of judgement she is incapable of recognizing them and acting differently in the future. Thus I reject the submission by counsel for the University that Professor Vandervort has been shown to "lack rehabilitative potential". As this review of our findings of fact indicates, compared to the allegations against her, she has relatively little to "rehabilitate" from. She was accused of a number of things which I have found not to have been proven or not to have been properly the subject of discipline. In that context that fact that Professor Vandervort was less than becomingly contrite in the view of the President is not something that can concern us.

I agree that the Article 31.5.3 "discussions" of April 21 in the President's office were far from satisfactory, but the problem lay in the procedure under this Collective Agreement, not with Professor Vandervort. As I have pointed out above, she was advised by the lawyer acting for the Association at that stage of the proceedings not to say anything and she followed his advice.

There is nothing in the Collective Agreement putting those discussions off the record or allowing things to be said there without prejudice, and I think it important to note that this is different from the procedure found in most collective agreements.

Normally, the employer conducts whatever investigation it thinks necessary and then makes its disciplinary decision. If a grievance is filed there is then a grievance procedure in the course of which the parties' exchanges are completely off the record and without prejudice. No arbitrator will admit evidence of anything said there. It is generally accepted that otherwise the process of settlement will be seriously hampered.

This Collective Agreement provides for arbitration after the President has made his recommendation for discipline but before the Board makes its decision, with no obvious provision for a grievance procedure. The Article 31.5.3 "discussions" are, therefore, part

of what appears to be the investigation stage and, consequently, on the record. This means there is no real opportunity for the kind of give and take that normally occurs in a grievance procedure.

At a minimum, the parties should make it clear that the Article 31.5.3 "discussions" are off the record and without prejudice. Such an assurance might enhance the usefulness of the process as a way of avoiding "most lengthy and costly" arbitrations such as this one.

Counsel for the University stressed that I must view Professor Vandervort's **transgressions and errors of judgement collectively.** As set out above, he submitted;

> while the individual incidents in and of themselves are serious enough to warrant dismissal, taken together they indicate a lack of judgement on the part of Professor Vandervort wherein she always places her own objectives or agenda ahead of any concern for the students or the objectives of the university as a learning institution.

While we declined to hear free-standing evidence to support this theme I do agree, of course, that the questions of whether any discipline was justified and, if so, what discipline I should substitute, must be answered on the basis of all of the evidence.

What have I found on the evidence? I have concluded that Professor Vandervort exercised poor judgement in dealing with the B matter in class in the way she did; she failed to discharge her academic responsibilities in respect of the Laskin Moot by carelessly oversleeping, by failing to call the students and, more importantly, by failing to take the next available flight to Fredericton; she broke a rule by scheduling a make-up in the last two weeks of classes and she showed poor judgement in jamming four Criminal Law make-ups into March. But does this show that Professor Vandervort "always places her own objectives or agenda ahead of any concern for the students or the objectives of the university as a learning institution"?

Even taking the question on less rhetorical plane, I do not think the evidence shows that Professor Vandervort is generally unconcerned with the students or the objectives of the University.

I do not accept that a single theme runs through the failings established by the evidence. The poor scheduling of make-ups, including the breach of the rule against make-ups in the last two weeks of term, demonstrates poor course planning. If Professor Vandervort had been "unconcerned" she would have done as, according to the evidence, others have and simply not made up the missed classes and not covered the material for the course. Whether that would have been better or worse is not the point. The point is that her failing in this respect was not one of unconcern with the objectives of the University, or with the students, although she may have misjudged what concerned the students most.

Professor Vandervort's oversleeping and failure to take the next plane to Fredericton to be with the Laskin Moot team was a failure to treat as important something for which she had a clearly assigned responsibility. This more probably demonstrates a different assessment of what is important to the University and the students than it does unconcern. That does not excuse Professor Vandervort's failure to discharge her responsibility, but neither does it support the submission that there was here a pattern of behaviour that was more serious than the sum of the parts.

In my opinion Professor Vandervort's handling of the B incident showed poor judgement, but I am not satisfied that it showed unconcern. She did, after all, think about it and consult her colleagues about how to handle the situation. This was a quite different sort of error of judgement than those involved with not taking the Laskin Moot trip or improperly scheduling make-ups.

In considering Professor Vandervort's transgressions and errors of judgement collectively I must bear in mind Article 31.1.1 (iii), which Counsel for the Faculty Association submitted is relevant here;

> 31.1.1 An allegation requiring disciplinary action can only be justified if the following conditions are determined to have existed:
>
> (iii) if the disciplinary action is to be taken on the basis of a cumulation of allegedly censurable events, it is required that, in the course of the cumulation of allegedly censurable events, the employee will have been properly informed that his performance was not at an acceptable level;

Counsel for the University submitted in reply that, although the incidents relied upon did not all happen at once, Dean MacKinnon learned of them virtually all at once, so that he had no opportunity to warn Professor Vandervort, and apply progressive discipline, as is contemplated by this provision.

I agree that, because of the way events unfolded, Dean MacKinnon cannot be faulted for not complying with Article 31.1.1(iii). But, by the same token, Professor Vandervort cannot be judged as harshly as would be one who was disciplined for a "cumulation", in the sense of chronological succession, of transgressions for each of which she had been warned.

As we stated in our Interim Decision and as I have already reiterated, there was not good and sufficient cause for dismissal of a tenured academic, even on the face of the grounds for put forward here. It is obvious therefore that there **certainly was not good and sufficient cause for dismissal on the grounds which I have found to have been established here. There was, however, cause for some discipline;** so I must now turn to the issue of what discipline we should substitute under Articles 31.1.3 and 31.5.10.7 as appropriate.

(iii) **What Discipline is Appropriate?** This question must be answered in light of the provisions of the Collective Agreement and the submission of counsel for the Faculty Association that Dean MacKinnon discriminated against Professor Vandervort.

Turning first to **the allegation of discrimination;** I have concluded that the allegations against the other professor complained against were not sufficiently similar to those against Professor Vandervort, and in that context Dean MacKinnon's treatment of him did not differ from his treatment of Professor Vandervort sufficiently, to justify a conclusion of discrimination against her. I am satisfied that the imposition of some discipline on her would not constitute discrimination.

The Laskin Moot incidents and the improper scheduling of classes are simply different from the kinds of things complained about in relation to the other professor. They involved a failure to discharge academic responsibilities and the breach of a College rule. Such allegations were not part of the other case, and Professor Vandervort's errors of judgement were of a quite different nature than those alleged in the other case.

The B incident bore some resemblance to the sort of errors of judgement alleged against the other professor. Both were alleged to involve insensitivity to student concerns, although they were quite different concerns, and in the other case no single student suffered. Had it proved to be the case that the mothers in the other class had suffered there might have been some significant similarity, but in fact the class in question in the other case was not rescheduled. Also, perhaps because the circumstances were so different, the other professor responded fully, although he stood his ground, whereas Professor Vandervort responded only with questions, not with her version of the facts.

The available remedies. Counsel for the University submitted that Articles 31.1.3 and 31.5.10.7 empower this Committee to substitute any discipline, and he instanced "damages, suspension, probation, reprimand and written apologies". Counsel for the Faculty Association submitted that these provisions of the Collective Agreement allow us to interpose something between a reprimand and a dismissal or something less than a reprimand, such as a caution. They do not, in his submission, empower us to impose a suspension.

Repeating for convenience of reference, Articles 31.1.3 and 31.5.10.7 provide:

> 31.1.3 Discipline shall take the form of (i) reprimand, or (ii) dismissal, except that when an Arbitration Committee decides not to uphold a recommendation for dismissal, the Committee shall have the power, under Article 31.5.10.7, to substitute whatever lesser form of discipline it considers appropriate, aside from change in academic rank or tenure".
>
> 31.1.10 At any hearing to consider the case for dismissal of an employee, the Arbitration Committee: ...

31.5.10.7 Shall have the power to substitute a more appropriate disciplinary action.

I do not think that anything Professor Vandervort did, or everything she did taken together, calls for more than a reprimand at most, so strictly speaking it is unnecessary for me to consider the availability of suspension as a remedy. Nevertheless, on the face of Article 31.1.3 suspension would appear to be available, because it is a lesser form of discipline than dismissal, and is not "change in academic rank or tenure". The specific mention that those two forms of discipline are unavailable would lead us, in the application of the standard principles of the interpretation of legal documents, to conclude that suspension is available. It is a form of discipline generally available under collective agreements so the failure to mention it would lead to the conclusion that the parties intended that it should be available. However, as I have already said, I do not consider it appropriate here.

Probation is not available as a form of discipline because to impose it would be a clear change in tenure, contrary to Article 31.1.3.

Counsel for the University submitted that the Committee could refuse reinstatement and order damages as an alternate remedy. Even more obviously than imposing probation, this would be a clear infringement on tenure, and is not available as a lesser form of discipline.

Counsel for the University submitted alternatively that, as a condition of reinstatement, Professor Vandervort should be ordered to make a written apology to each to the students involved. I see no useful purpose to be served by this. Professor Vandervort has long since discussed the classroom incident with B. B's real concern did not appear to be Dean MacKinnon's. She continued to be concerned primarily with the use of the phrase "limp-wristed judges" whereas the Dean's concern was with Professor Vandervort's insensitivity in the subsequent class, and it was in that respect that I have concluded that Professor Vandervort made an error of judgement.

To order Professor Vandervort to apologize for that, for breaking the "no make-ups in the last two weeks" rule and misjudging the scheduling of classes in the second term of her Criminal Law course class, or for not trying harder to get to Fredericton for the Laskin Moot Competition would be silly. Genuine apologies have an important role in enabling people to forgive, and perhaps forget, in many aspects of life in our necessarily interdependent society, but forced apologies cheapen the currency, serving only to humiliate.

Those injured in intangible ways may well have a claim to be vindicated, but surely it is the impartial finding that a wrong was done, not any resultant hollow apology which serves that end. As Beetz J. has stated for the Supreme Court of Canada, either a forced apology states why it is being made, in which case it is no apology at all, or it offends the **Canadian Charter of Rights and** Freedoms which "must prohibit compelling anyone to utter opinions that are not [her] own". **(Re National Bank of**

Canada and Retail Clerks international Union (1984), 9 D.L.R. (4th) 10, at p 31)

Reprimand is the only form of disciplinary action short of dismissal that can be taken by the University itself as well as being available to committees such as us. Article 31.2 states explicitly just what a reprimand is under this Collective Agreement and what justifies it:

> 31.2 Reprimand. Reprimand shall be a written statement issued by the President to an employee stating that the employee's activities have been such as to violate acceptable standards of performance of tasks, functions or responsibilities appropriate to the employee's present rank and current terms of appointment, or that the employee has failed to carry out a proper instruction. ...

It is to be noted that by Article 31.2.1 a reprimand entitles the employer to withhold a Career Development increase in the following year.

I have found that in three respects Professor Vandervort showed poor judgement and in two situations she did not fulfil clear responsibilities. Thus she did "violate acceptable standards of performance of tasks, functions and responsibilities". But the seriousness of a reprimand for any academic must be taken carefully in to consideration. In a professional world where credibility, advancement and the opportunity to change employment are dependent on reputation the formality of the reprimand sanction counts heavily. All the complexity of this case, and all the careful analysis required to determine the facts which support some of the University's allegations here, would be swallowed up for many purposes in the one phrase "Professor Vandervort was formally reprimanded by the University of Saskatchewan".

From a disciplinary point of view Professor Vandervort has a clean record. There was no evidence whatever of any prior instance of failure to fulfil her responsibilities, or any other indication of lack of commitment to the goals of the University. Nor was there any evidence of prior poor judgement, let alone gross misconduct or incompetence.

There is no reason to think that progressive discipline is not appropriate in an academic setting. Indeed, Article 31.1.1 requires it. I agree that Article 31.1.1 does not mean that a single very serious transgression, or collection of them coming all at once, as seemed to Dean MacKinnon to be the case here, could never justify a reprimand, or even dismissal. But the normal course to be followed with a member of Faculty who is not performing up to standards should be for the dean to advise him or her of why that is thought to be the case, in writing if the concerns are serious enough. If the allegations are contested that too should be documented, along with any resolution of the matter. This material may then be relied upon for disciplinary purposes. Articles 12.3, 12.5 and 12.8 of the Collective Agreement contemplate just such a process. All of this becomes part of the personal file, accessible to the faculty member as contemplated by Article 12.2.

I have concluded that this is all that should have happened here.

The fact that Professor Vandervort accidentally missed the plane and then failed to take seriously enough her responsibility to go to Fredericton for the Laskin Moot competition may be made part of her file, with a warning that failures of similar nature in the future will have disciplinary consequences. Similarly, she may be warned that future disregard of College of Law rules like the one against scheduling make-ups in the last two weeks of class will have disciplinary consequences.

Professor Vandervort may also be counselled in writing not to allow the cancellation of classes, even with permission, to jam too many make-ups into the last part of the term. The B incident, in terms of the facts found here, may now be part of her personal file.

Obviously, this decision will itself now be part of Professor Vandervort's personal file. It should go without saying that any written record in the files of the University of the events considered here, any written warning and any reference to these matters by the University in the context of her employment must refer to this decision.

CONCLUSION: 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 judgement.

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 counselled 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.

Innis Christie, Chair

DISSENT

While I agree with the Chair on many points, I must record my dissent on the following issues:

1. The incident involving Student B;

2. The penalty for failing to attend the Fredericton moot;

3. The issue of publication involving Student E;

4. Cumulative discipline and the standard of conduct.

Dealing with each of these in turn:

1. Student B

In the fall of 1991, while teaching a small seminar class, Professor Vandervort used the phrase "limp-wristed", in a perjorative sense. B, a student in the class, wrote a note to Professor Vandervort objecting to the phrase, and asking for an apology.

Professor Vandervort's original reaction was that Student B must have a physical disability involving her wrist, and that this was the reason for B's objection to use of the phrase. She sought information from other members of faculty, and found, rather, that the phrase "limp-wristed" was used to describe homosexuals.

The next time the class met, Professor Vandervort raised the issue in class, resulting in a 25 to 30 minute session through much of which B was in tears and during which she broke down in sobs several times. B at one point said to the class that the reason she was upset was that she herself was a homosexual. Professor Vandervort and the other student witnesses had not previously been told B's sexual orientation.

These facts are not in dispute. Nor is there any allegation that Lucinda Vandervort is homophobic. However, the nuances of and motivations behind these events were the subject of conflicting testimony. We heard evidence from Student B, two other students in the class (Z and K), and Lucinda Vandervort, on the events that occurred on the second day - the day the note was raised in class. We also heard from Professors Bilson and Smith on advice they gave to Lucinda Vandervort on how to deal with the note. It is worth pointing out that Lucinda Vandervort testified on these incidents after hearing the testimony of all the other individuals.

Advice from Bilson and Smith

In the course of seeking advice on what the phrase "limp-wristed" meant, Professor Vandervort had occasion to go to Professor Bilson's office and talk to her and another female professor. Professor Bilson testified that this other professor left during the course of the conversation, and Professor Smith joined them. Lucinda Vandervort denied that Professor Smith joined the conversation, but given the testimony of Professors Bilson and Smith there can be no conclusion other than that Professor Smith did indeed join the discussion.

According to Professors Bilson and Smith, their advice to Lucinda Vandervort was for her to raise the matter in class in a way that would not cause embarrassment to the student, apologize, and carry on. Much was attempted to be made that either:

(a) this advice was wrong and the professors should instead have advised her to raise the issue in private; or

(b) Lucinda Vandervort took the advice, raised the matter in class, and that was the cause of the ultimate problem.

My understanding of the advice given was for Professor Vandervort to state in class something along the following lines:

> "In the last class I used the phrase "limp-wristed" in a perjorative sense. It has been brought to my attention that this phrase is used to describe homosexuals. I did not know that at the time I used it. My intention was to use it as a synonym for indecisive. I did not intend to imply that homosexuals are indecisive, and that is not my view. I apologize for any offence."

The advice given seems obvious, logical and sound. Had Lucinda Vandervort done that, we most likely would not have gone through this dismissal process. However, she did not.

Even though the evidence is clear that she did not follow this recommended course, there was considerable disagreement on what did in fact happen. In my analysis of what did occur, I will start with the motivations of Lucinda Vandervort and student B going into the class.

Motivation

B stated in evidence that she was constantly vigilant about language. Her "antennae were always up", in her own words. However, she stated that she did not know if Professor Vandervort's use of the phrase "limp-wristed" was from malice or lack of knowledge.

B was unsure how safe homosexuals were in the College of Law. Counsel for Lucinda Vandervort raised the presence of anti-gay graffiti on campus at that time. B's evidence was that she did not recall such graffiti from that time frame. However, it is

clear that B was afraid for her safety as a homosexual, not just around this time but on a regular, ongoing basis. B was keenly aware that there was no law then in place in Saskatchewan prohibiting discrimination on the ground of sexual orientation. As a result she was concerned about the possibility of being evicted from her residence, her ability to get an articling position, and many other matters, if her sexual orientation were known to the individuals involved in those decisions.

Turning then to Lucinda Vandervort's motivations going into this class, she testified in chief that as a result of looking through a slang dictionary, she became aware of the perjorative connotation of the phrase "limp-wristed", but found that a number of other innocent phrases could also have negative connotations. She felt that she had to deal with this. She also felt that the note accused her of homophobia and being a bigot, and she wanted to put an end to that inference. She stated that she did not care to be regarded that way. As indicated earlier, this was in her evidence in chief, not in cross-examination. This approach was repeated in cross-examination, where Professor Vandervort stated that she felt it was important to address the issue in class, rather than simply privately with student B, as others might have drawn the inference that she (Lucinda Vandervort) was a bigot and was using the classroom to vent homophobic views. There was nothing in her evidence to suggest that she dealt with the matter in the way she did because, as was suggested by the Chair, she wanted to openly address values or feelings.

Events on the Second Day

I will now look at what occurred in the second class. Student B testified that Professor Vandervort started out the class by saying "[B] what are we going to do with you". This phrase was in the letter B wrote to Dean MacKinnon on the issue, and she testified in front of the Arbitration Committee that it was "burned into her brain". The other student witnesses, not surprisingly, were not definitive on how the matter started (my experience is that until a professor says a few phrases and students seriously believe the class has started, they do not give their full attention to what the professor is saying). Professor Vandervort, on the other hand, testified that the class began with her asking B if Professor Vandervort could raise B's concern with the rest of the class.

The difference between these two openings is enormous. That to which B testified indicates a professor who states that the student is a problem. Professor Vandervort's version would simply indicate a professor who made an error in judgment in identifying the student who raised the concern. The Chair of this Arbitration Committee evidently believes Professor Vandervort's version of the opening; I disagree, for reasons outlined in more detail below.

Looking then to the remainder of the first portion of this class, B testified that she and Professor Vandervort were the only ones involved in any discussion in the class. B's evidence was that she was initially in a state of shock at Professor Vandervort's raising of the issue in the way she did. She testified that Professor Vandervort went on at length about how her (that is Professor Vandervort's) language was a product of her

upbringing and that she was entitled to use the language she chose in class. Professor Vandervort stated that she had a lawful excuse to use this language. B also specifically testified that the other students in the class were not involved in the discussion, and that they stared at their shoes or at the ceiling and in general appeared very uncomfortable about and mystified by what was happening. B was in tears and sobbing (or more) through this period.

B testified that the reason she objected to this statement, persisted in her objection, and became so upset in class, was because she herself was homosexual. She remained in the class because she was concerned about her grade. She also testified that the class proceeded to ordinary business when she herself pleaded with Professor Vandervort to do so.

Lucinda Vandervort, on the other hand, testified that she asked B if she could deal with the note in class. B did not object (and in fact according to Professor Vandervort said nothing), and accordingly Professor Vandervort proceeded to do so. (This is one area of inconsistency in Professor Vandervort's testimony. At one point in cross-examination she indicated that at the commencement of the class she gave B an opportunity to object to dealing with the issue in class and B did not object; at a later point in cross-examination she stated that she asked B's permission to deal with the issue in class, and obtained that permission.) Professor Vandervort's version was that very shortly after this B blurted out that she raised the issue because she was a lesbian. Professor Vandervort then continued with her discussion on language. B then interrupted again and raised her fears from anti-gay graffiti. B became very upset, and Professor Vandervort and the other students (and particularly K) attempted to be supportive and offer advice and assistance in her difficulty. It was in this context, according to Professor Vandervort, that she suggested that B get a tougher skin.

The student witnesses testified that only Professor Vandervort and B were involved in the exchange. Even though Lucinda Vandervort said K in particular participated in providing solace and advice to B, K's evidence was that none of the other students (including her) participated in this portion of the class. They also testified that B was very upset and that they were flabbergasted by the approach taken by Lucinda Vandervort. Neither recalled an apology by Professor Vandervort.

Preferred Evidence

Where the evidence of B conflicts with the evidence of Professor Vandervort, I prefer the evidence of B, for a number of reasons:

(a) B was a particularly clear, forthright witness. She was not in the slightest evasive. Where she was not certain of events, she forthrightly admitted it. For example, she could not recall, under cross-examination, if she had left the note in Professor Vandervort's box or on her desk in her office. Her initial evidence was she left it in her mail box, but on cross-examination she admitted that it was possible she left it on the desk. However on the

matters which are relevant to my findings of fact, and especially on how the incident started and the phrase "[B] what are we going to do with you", she was definite in her testimony and unswayed in cross-examination;

(b) she had no motive to mislead this panel, notwithstanding the efforts of counsel for Professor Vandervort to show influence or bias;

(c) the testimony of the other students was more consistent with B's version of events than with that put forward by Professor Vandervort, and in particular was quite consistent with B's version of the tenor of the exchange and quite inconsistent with that suggested by Lucinda Vandervort;

(d) Professor Vandervort in her testimony on this incident was evasive. While her manner of giving evidence throughout was less than direct, her answers to questions in cross-examination on this incident were particularly unresponsive. For many other incidents on which we heard evidence, her memory was remarkably detailed and clear, but her testimony on the events in the second class stood in marked contrast.

Findings

I find that Lucinda Vandervort entered the second class focused on convincing the class that she was not homophobic or a bigot. She admitted in her own evidence that this was her goal. She testified that she felt that B was implying, in the note, that Lucinda Vandervort was homophobic or a bigot. She felt accused by B. Her opening remark "[B] what are we going to do with you" follows logically from that frame of mind. I find that Lucinda Vandervort then followed in that same vein, that is, from the point of view that B was a problem. This process continued through B breaking into tears several times and eventually stating, in an attempt to explain her actions, her concerns and her distress to her classmates, that she was a homosexual.

It is not logical to believe, as was asserted by Professor Vandervort, that B simply blurted out the fact of her homosexuality for no apparent reason. Lucinda Vandervort attempted to support this version of events by saying that there was considerable anti-gay activity on campus at that time, which bothered B and caused her to disclose her sexual orientation. Again, this is not a reasonable proposition. Fear of homophobes would cause B to be less likely, in the interest of self-preservation, to disclose her sexual orientation.

There was also some evidence that B had, in a very different setting and some years before, disclosed her sexual orientation on campus. B denied that she had and testified that at the time she was only recently aware of her sexual orientation and certainly would not have disclosed it. She came "out" to the College of Law the February following this class, but we do not know to what extent the unplanned disclosure in this class propelled forward that general disclosure.

Professor Vandervort's opening remarks implied wrongdoing on the part of B. Her conduct in the ensuing 25 to 30 minutes continued to justify her own actions, and imply that it was unreasonable for B to object to this use of language. Professor Vandervort testified that her initial assumption from B's note was that B objected to the phrase "limp-wristed" because she (B) had a physical problem with her wrist. Knowing the phrase connoted homosexuality, Lucinda Vandervort must have been able to make the logical equivalent connection - that is, that B objected because she was homosexual. If she did not make this connection, it would only be because her focus was so on protecting her own reputation that she completely ignored the consequences to or implications for B.

And what are those potential consequences? Starting at the beginning, this was a note delivered to Professor Vandervort. Accepting Professor Vandervort's evidence in this regard, it was put on her desk in her private office. B did not raise the issue in class. It was a private communication. Once the students became aware of the note, they would of course be able to make the same connection that Professor Vandervort should have made - that is, that B might be homosexual. But the situation in class extended much beyond this. B testified that she felt compelled to disclose her sexual orientation because of the consternation on the part of the other students in the class surrounding B's concern with the use of the phrase and her repetition of her concern, through tears and sobs, when pressed on the issue by Professor Vandervort. We also must consider that, on B's evidence, which I have accepted, Professor Vandervort continued to press the issue of her right to use the language she chose, through B's intense emotional objections.

Professor Vandervort acknowledged in cross-examination that she knew that there were significant potential negative consequences to homosexuals who were "out". She testified that she would have to conduct research before being able to say if, for example, homosexuals experienced a higher rate of suicide. But she was aware of physical violence against homosexuals and discrimination on many fronts.

The actions of Professor Vandervort in connection with the "second day" of this class are astounding in their disregard for B. She raised the issue in a way that both identified B personally with the issue, and implied wrongdoing or inappropriate behaviour on the part of B. She asserted her right to use the language she chose, and continued the implication that B was at fault, through B's obvious and significant upset. (Indeed, Professor Vandervort at one point in her evidence described B as an emotional basketcase during this part of the class.)

It is a logical consequence of this approach that B would feel impelled to explain her actions to her peers, by advising of her personal concern. Professor Vandervort was in a position of power and influence respecting B. Her actions in the second class were either gross misconduct or wilful and wanton disregard for the interests of B, one of Professor Vandervort's students. We do not know the final implications of this incident to B, but there is no question that the potential consequences are very serious indeed.

I would accordingly uphold the dismissal of Professor Vandervort on this ground.

2. Penalty on the Fredericton Moot

I agree with the conclusions of fact drawn by the Chair on this incident. The relevant findings of fact were that Lucinda Vandervort accidentally slept in, but then made a conscious decision not to attempt to attend the moot in Fredericton. The Chair found that she made no attempt to secure alternate flights. In this regard, he accepted the testimony of Rick Lee that she did not inquire about alternate flights. Also, of course, evidence was filed with the Arbitration Committee that subsequent flights were available which would have permitted her to arrive in Fredericton in time for the moot program. Professor Vandervort's testimony before us was that she tried to get alternate flights but there were none available.

I recognize that humans can twist the facts in their own minds to justify their own behaviour, and I believe this is what the Chair refers to as rationalization. But the fact is that on the issue of alternate flights, Lucinda Vandervort was not truthful to Dean MacKinnon when she advised him what had happened, and was not truthful in her evidence under oath before this panel. Professor Vandervort may well have thought, without investigating the situation, that she would not be able to get to Fredericton in time to see all of the moots. However, that is not what she told Dean MacKinnon or this panel; instead she said she inquired about alternate flights and found that none were available. The Chair's findings of fact are that this evidence is not true.

I agree that a warning is the appropriate consequence had the facts been confined to accidental oversleeping and then making no serious effort to get to Fredericton. But lying to one's supervisor and under oath must have more serious repercussions. I do not accept the proposition that one can escape these consequences if one can delude oneself into believing that a different set of events occurred. It is misconduct and is deserving, at a minimum and taken by itself, of a reprimand.

3. "Publication" in Relation to Student E

Clearly, Lucinda Vandervort did "publish", as that term is used in the law of defamation, allegations against E. The publication was not confined to the allegations raised by Student L, but went on to raise Lucinda Vandervort's own allegations of general dishonesty on the part of this student. This publication was likely done on an occasion of qualified privilege which is a special defence to a claim in defamation.

The allegations may or may not be true. They were certainly denied vehemently by E, and the allegation by L was not supported, even by L, in strong terms in front of us. However, we are not required to decide whether the allegations are true or not; our goal is to simply address Professor Vandervort's handling of these allegations in light of the University's reasonable expectations on the conduct of law professors dealing with defamatory allegations against students.

University professors must on occasion raise issues that are defamatory to students - plagiarism being an obvious example. The question in a discipline context is when it is appropriate to do so, and when it is not. The position taken by the University was that a publication of this sort is appropriate only when the allegation has been reasonably investigated and has been borne out by investigation.

This is in my view the correct approach. A faculty member should not publish a defamatory allegation without first checking the truth of the allegation. The reason for requiring the investigation is the harm that can arise to the student by the mere fact of the defamatory allegation being raised to other professors in the student's college. The University's approach should not change depending on whether or not the allegation is true, as "truth" is something that is only ascertained after the fact, and on most occasions would not be known to the professor at the time the investigation starts. However, the amount of investigation that it is reasonable to require would depend on the facts. An obvious example of plagiarism from a book would require much less investigation than this situation demands.

What investigation did Lucinda Vandervort do? She heard initially from L, but that was the initial complaint. She had J review the memo for accuracy, but J was not present when the alleged incident took place. J's knowledge was, in all significant respects, hearsay. Professor Vandervort would be well acquainted, given the area of law she teaches and her experience in the practise of law, with the dangers of relying on hearsay information.

She also had a notice posted on the student bulletin board asking the Laskin students to come to see her. The note was posted on Thursday during a very busy time of year for students, and gave up on the task of obtaining information from students as hopeless, on the basis of one conversation with L, by the weekend. She did not speak to E, who was the student involved. It is such an obvious proposition that one would speak to the student whose actions are at issue as to be trite, but her only attempt to speak to E was the general note directed to all the students in the class (and it is not clear on the evidence if it was directed to E). She made no serious attempt (if any) to contact faculty or students on the opposing team (who would of course have been present and keenly interested in the event) or the judges who sat on the panel in question.

This was not a sufficient (or really any) investigation.

Having concluded that she did publish this memo contrary to the University's reasonable expectations, can it then be said that Lucinda Vandervort would reasonably be expected to know this requirement, on the basis of her rank and employment, as required by the Collective Agreement? It was clear on the evidence that she was not specifically instructed on this issue to the extent of the detail set out above, though Dean MacKinnon did tell her to get information from others involved and pass it on to him, with her comments, in writing.

In this context, it is relevant that she was a professor of law. Just as one would expect a computer science professor to know more about and be more sensitive to the implications of a computer virus (for example), so too one expects a law professor to be more knowledgeable about and sensitive to a legal issue like defamation. She would be aware of the immense harm that defamatory comments can cause, and the seriousness with which the law views the issue. Her knowledge of and practice in the criminal law area would well acquaint her with ways in which issues are investigated, of the importance of speaking to the "accused", and of the different versions that can be obtained from witnesses to the same event. Accordingly, in my view it can be said that she would reasonably be expected to know the requirements of the University in this context. As a result, the University has established this ground for discipline.

Appropriate discipline for this item of misconduct, taken alone and in light of the circumstances surrounding it, would be a reprimand. Given the potential serious consequences to a student when defamatory material is published in a small college like the College of Law, when the student has another full year to complete in that College, a warning is simply not sufficient.

4. Cumulative Discipline and the Standard of Conduct

In summary:

(a) I have found the University's case to have been made out in the allegations respecting student B on the second day of class.

(b) I have agreed with the Chair in connection with Professor Vandervort's failure to attend the moot competition in Fredericton, though would impose a higher penalty.

(c) I have found that the University's case was made out in connection with E.

(d) I agree with the Chair in connection with the criminal law class, though on balance in my view the scheduling of 13 classes in March, when only 10 classes were held in the months of January and February together, is also misconduct deserving of a warning. This is so even if one accepts the evidence of some of the students that the students voted in favour of cancelling the 2 February classes which were at issue, as Professor Vandervort was still the one responsible for the rescheduling of the missed classes from the first week of January into March.

The cumulative effect of these incidents is very troubling, as is discussed in more detail below.

I would also like to comment on the rehabilitation question and the concern raised by President Ivany that Professor Vandervort at no time indicated that she harboured remorse, regrets or even second thoughts.

The Chair has commented in his Award that in the course of the arbitration process, Professor Vandervort was under attack, and was defending her job. Accordingly, in his view it was not reasonable to expect her to engage in soul-searching and equivocation in relation to her conduct. However, in my view it is relevant whether or not she has realized that errors in judgment were made. She testified that she was free of wrongdoing. She said under oath on more than one occasion that the complaints against her were frivolous and vexatious. She testified that she searched for an explanation for the bringing of discipline against her, and found none in her own behaviour. She attempted to shift responsibility to others - for example, in connection with concerns on the scheduling of first year classes, she stated under oath that C and H seemed to be incapable of handling the stress of first year law school.

While I agree with the proposition that one would not expect to find a person whose job is on the line admit to the employer's allegations, it is also in my view an accepted proposition that rehabilitative potential can be important in assessing the final penalty. The complete lack of acknowledgement of any fault whatsoever, even in connection with something as obvious as breaching the college's rule on scheduling makeup classes in the last two weeks of classes, seems to me to indicate a consistent approach that she did nothing wrong. If Lucinda Vandervort cannot find that she in fact erred, it is difficult to see how she can avoid similar errors in future.

It is particularly instructive to contrast Professor Vandervort's testimony and her lack of willingness to admit her error with the evidence of Dean MacKinnon. While his job was not on the line in these proceedings, he was clearly under attack. (The attack was quite unsuccessful in that it revealed no substantive errors in his conduct or any bias on his part whatsoever, but clearly was made). His evidence indicated a person of great fairmindedness who was more than willing to consider and acknowledge the perspective and concerns of the other party. Professor Vandervort showed no such willingness, at least when her own actions were at issue.

As I have stated earlier, I am of the view that Professor Vandervort's conduct respecting student B is sufficient, in and of itself, to justify her dismissal. That decision is based in part however on Professor Vandervort's failure to admit fault in relation to it. Had she admitted, to Dean MacKinnon, to the President, or perhaps even to this panel, that she recognized her error in ignoring the interests of B on the second day in her focus on her own interests, my conclusion could well have been different. However, the cumulation of other events, and her lack of any acknowledgement of responsibility, shows an attitude toward students which is consistent with that shown by the incident involving B - namely, a professor who does not sufficiently take into account the interests of the students she is responsible to teach, and over whom she exercises power and influence. As a result, the other incidents merely reinforce my opinion that Professor Vandervort ought not to be entrusted with teaching responsibilities to students, and should be dismissed as a professor at the University of Saskatchewan.

I would like to end by echoing the Chair's concerns with the arbitration process found in the Collective Agreement. In my view, it is important that the President be able

to hear from both the college bringing forth the discipline issue and the professor whose conduct is at issue (and as well, of course, the Faculty Association). The only way, in my view, that this can occur is if the Collective Agreement expressly provides for without prejudice meetings to be held. That may, then, assist in avoiding the time-consuming, expensive and difficult process that has been gone through in this hearing.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 19th day of April, 1994.

_____
NANCY E. HOPKINS, Q.C.

IN THE MATTER OF AN ARBITRATION COMMITTEE PROCEEDING PURSUANT TO ARTICLE 31.5.6 OF THE COLLECTIVE AGREEMENT:

BETWEEN:

THE UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION

(The Association)

-and-

THE UNIVERSITY OF SASKATCHEWAN

(The University)

RE: Professor Lucinda Vandervort and The College of Law

DISSENT OF SUZIE SCOTT, ASSOCIATION NOMINEE

I hereby dissent from the decision of the Chair of this Arbitration Committee in three areas: (1) The characterization of some of the evidence; (2) The decision to impose discipline upon Professor Vandervort; and (3) The findings made with respect to whether or not the decision by the University to seek dismissal was discriminatory.

Background. in my view, the University's decision to seek the dismissal of Professor Vandervort on the basis of complaints that, at their worst, are fairly insignificant ones, can only be explained by a review of various decisions taken by the College of Law over the years preceding the University's decision to seek the dismissal of Professor Vandervort.

Professor Vandervort, who had already been awarded a PhD. in Philosophy from McGill University, obtained her U.B. in 1977 from Queen's University in Ontario. She then articled and attended the bar admission course. In the spring of 1980 she received her Master's degree in law from Yale University. During the entire time she attended law school, articled, and then attended Yale for purposes of receiving her Master's degree, she was a single parent and the sole support for her two young daughters. To make ends meet she did a variety of contract work, including work with Health and Welfare Canada, teaching a course for prisoners in a federal prison on prisoners' rights, obtaining some research monies for a paper on prisoners' rights, lecturing at Ottawa University while articling, and so on.

After taking up a tenure-stream position at the State University of New York at Albany, teaching for two years in an inter-disciplinary program in criminal justice, Professor Vandervort decided that her children's best interests would be served by moving back to

Canada. She applied for and was hired into the tenure-stream at the College of Law as an assistant professor in 1082.

In October of 1983, during Professor Vandervort's second year at the College of Law, a normal probationary review of her progress was undertaken. The review was entirely positive, with all members recommending her continued appointment. Her teaching was judged to be competent and a majority of the committee members viewed her research as being "superior," the highest rating possible.

During the 1984-85 academic year, the College of Law promotions committee considered Professor Vandervort's promotion to associate professor. The promotions committee did not recommend promotion, but found her teaching to be competent. It was with her research that the committee found fault: despite the "superior" rating at her probationary review, the promotions committee now found her research to be "unsatisfactory."

In the 1985-86 academic year, the promotions committee once again voted against Professor Vandervort's promotion. Unlike the evidence available in the first promotion decision, the committee this time had evidence from four external evaluators with regard to Professor Vandervort's research:

> Professor Keith Jobson of the University of Victoria concluded his review by saying, "Were this colleague on our staff, I would be prepared to recommend her for promotion."
>
> Professor David Muilan from the Law Faculty at Queen's University said, "Let me say from the outset that judged by standards at Queen's and other like assessments that I have made, it is my firm view that Professor Vandervort deserves promotion to Associate Professor. Her published contributions are considerable in both quantity and quality, her work in progress is impressive and her research ambitions indicative of a development into a very significant scholar on the Canadian legal scene."
>
> Professor Dickens of the Faculty of Law at the University of Toronto took a different view, saying he felt promotion was "premature," but at the same time judged her work in progress as "showp[Ing] the candidate as a serious scholar."
>
> Professor Edward Belobaba of the Osgoode Hall Law School at York University evaluated Professor Vandervort's work without indicating whether or not she ought to be promoted; however, Professor Belobaba's assessment of each of the papers he reviewed are filled with phrases such as, "above average," "a well-written and well-researched piece of writing," "an excellent grasp of the current literature," and "In my view the article makes a significant and scholarly contribution to the literature."

Despite these assessments from well-known Canadian legal scholars, the promotions

committee once again found Professor Vandervort's research to be "unsatisfactory," by a vote of 12 to 1. And, unlike their decision of the year before and the previous probationary review, the committee suddenly found that Professor Vandervort's teaching was "unsatisfactory," too.

In October of 1986 the College of Law's Tenure Committee met to consider the awarding of tenure to Professor Vandervort. Despite the evaluation of her research as "unsatisfactory" only ten months earlier in the last promotion decision, the tenure committee voted unanimously (18:0) that the research was "satisfactory." However, the majority again found the teaching to be "unsatisfactory." Tenure was not recommended.

The promotions committee once again considered Professor Vandervort for promotion to associate professor six weeks after the tenure decision. The decision echoed that of the tenure recommendation: satisfactory in research, unsatisfactory in teaching.

Professor Vandervort appealed the tenure decision to the Tenure Appeal Committee. In a unanimous decision, the Tenure Appeal Committee overturned the recommendation of the College of Law, and granted Professor Vandervort tenure. The Promotions Appeal Committee also granted Professor Vandervort promotion to Associate Professor.

It should be noted that, with respect to the decisions made by all of the College of Law committees, their composition was virtually identical, consisting of an the tenured professors in the College; the Tenure Appeal Committee and the Promotions Appeal Committee are, however, are comprised of tenured full professors from the University at large.

During the academic year 1987-88, Professor Vandervort taught and did her research at the College of Law. During the 1988-89 year, she was on sabbatical leave, working on her research and writing at Harvard University and attending seminars there. For the two years between 1989-91, Professor Vandervort took leave without pay, continuing to do scholarly work under various grants at Harvard, where she continued to attend various seminars.

Professor Vandervort's sabbatical year coincided with another event at the College of Law: Professor Peter MacKinnon, who had participated in all of the previous decisions and who had, while on those committees, consistently opposed Professor Vandervort's promotion and tenure, became the Dean of the College of Law on July 1, 1988. A few months later, in the fall of the same year, Dean MacKinnon called Professor Vandervort's lawyer and asked him to ask Professor Vandervort if she would consider letting the College of Law "buy out" her tenure. This offer was rejected by Professor Vandervort. Dean MacKinnon testified at this hearing that he made the request because, despite the finding of the University-wide Tenure Appeal Committee, he was still of the view that the College's concern about Professor Vandervort's teaching was correct.

This, then, is the historical setting for the events that were to take place when Professor Vandervort arrived back at the College of Law to resume her teaching and research there in the fall of 1991.

The Allegations and the Evidence. Let me now move to the various allegations made against Professor Vandervort by the University in its recommendation of her dismissal.

Firstly, there is the "incident" involving student B. Professor Vandervort used the term "limp-wristed" in describing a judge who had made a decision in a case that Professor Vandervort felt was indecisive. She received a note from student B, complaining about the use of that phrase. Professor Vandervort did not at that time have any inkling that the phrase was used by some to pejoratively refer to homosexuals; in fact, she testified that she felt maybe student B. had a physical handicap involving her wrist and was, in her words, "horrified" to think that she had could have said something so uncaring, if that were the case. She then went to the faculty lounge and asked other faculty members what their understanding of the phrase was. They told her it was a pejorative reference to homosexuals. Having never before understood the phrase to be used in that manner, Professor Vandervort looked the phrase up in two slang dictionaries, which confirmed what others had told her.

Professor Vandervort, acting on the advice of other faculty members, including Assistant Dean Bilson, decided to raise the matter of her use of the phrase in the next class. It is important to note that the class was of a seminar type, having only six students in it

Professor Vandervort wanted her students to know that she had used the phrase unwittingly, that she now understood the term to be pejorative, and that she would not, therefore, be using it again.

In the ensuing discussion, student B, ended up in tears and told the class that she had been upset by the use of the phrase because she herself was a lesbian.

According to Professor Vandervort, there had been anti-gay vandalism on campus the weekend before the class and that student B, indicated in class that she was generally having a hard time dealing with rampant anti-gay attitudes in the community and on campus.

There was much evidence on the point of who said what during the class meeting at which the phrase was discussed. Student B. said she felt compelled to tell people why she was so upset; that it wouldn't have made any sense if they did not know she was gay. Professor Vandervort said that the student brought this information out quite quickly and seemed upset not about Professor Vandervort's use of the phrase, but about homophobia in general, especially in light of the recent graffiti.

There was evidence before this arbitration committee that student B. had, at a public conference in 1990 at which she was a speaker, identified herself when she spoke as a

"lesbian." Likewise, the student herself indicated that when she ran for office as student body president at the College of Law, only a month or so after this "incident," she identified herself as a lesbian in her campaign.

I found that there was no evidence whatsoever to indicate that Professor Vandervort used "bad judgement" in dealing with the issue of her use of the phrase "limp-wristed." Rather, I found the evidence to indicate that Professor Vandervort is a very caring teacher who was extremely concerned that she had used, albeit unwittingly, a phrase that had rightly offended one of her students. I agree with the Chair of this committee that there is no question that Professor Vandervort herself is not in the least homophobic; in fact, both her testimony and her activities surrounding this "incident" suggest quite strongly that Professor Vandervort is quite adamantly opposed to discrimination on the basis of sexual orientation.

No doubt the next time Professor Vandervort approaches a similar situation, she will handle it differently, perhaps by dealing with the matter in private. However, In light of the fact that several senior members of the faculty advised her to deal with the matter in class, it seems unfair to label her doing exactly that as "bad judgement."

In my view, this entire matter would have challenged the capacities of Solomon himself.

In a related matter, the University also alleged that Professor Vandervort made "Improper contact" with the student when, months after the in-class "incident," the Dean wrote to Professor Vandervort about it. The Chair of this committee has found that there was nothing improper about Professor Vandervort's contacting of the student, that in no way did Professor Vandervort attempt to unduly influence the student. I agree entirely with this view. So long as there was no attempt to influence the student -- and there was not here -- there is no impropriety whatsoever.

Another allegation made by the University revolved around the Laskin Moot competition. I agree with the Chair that Professor Vandervort's work with the students on the moot was satisfactory however, I would go farther and say that, from the evidence we heard at this arbitration hearing from the members of the team, who presented a picture of a group effort that was rife with differential effort and jealousies, Professor Vandervort did a good job of getting the students to the point of having completed their briefs in time for the competition. It was not only some of the students who worked on weekends to get materials completed; Professor Vandervort herself was present on those weekends to help things along.

Professor Vandervort testified that she intended to go to Fredericton to the moot, that she had stayed up very late packing and had not gone to sleep until 3:00 a.m. She had mistakenly set her digital alarm dock for "p.m." instead of "am." and awoke too late to catch her scheduled flight She immediately called the travel agent and, she said, asked him about alternative arrangements. Her evidence was that he told her she couldn't go that day and that even if she went the next day she would not arrive in time to see that day's moots. On the strength of these representations, Professor Vandervort decided

not to go to Fredericton.

The travel agent testified that he did not recall the conversation that way. His recollection was that Professor Vandervort had told him that she had missed the flight and that she wouldn't be going; that there was no discussion about alternative arrangements.

In my view, the evidence of Professor Vandervort is preferable to that of the travel agent. The travel agent admitted that he had dealt with thousands of telephone calls since this event took place and that he had no reason to remember it until much later when the University asked him about it. Professor Vandervort, on the other hand, had good reason to remember the conversation and, in addition to the fact that she had students to see, was also looking forward to the trip as she intended to stop over in Montreal on her way back to see her daughter, a student at McGill. She testified that she was especially disappointed about not going because she was missing an opportunity to see her daughter and that she had neither the spare money nor time to fly to Montreal to see her otherwise. Given the fact that Professor Vandervort is a single parent and sole support of two daughters in university, her evidence that she intended to use her University-paid-for trip to Fredericton as an opportunity to see one of her children without incurring any indebtedness rings true. There was also no evidence to indicate that Professor Vandervort took any of her responsibilities as a faculty member lightly and, in view of the fact that this trip also represented an opportunity for her to see her daughter, I find Professor Vandervort's evidence on this point compelling, it is unfortunate that Professor Vandervort was not able to be with her students in Fredericton, but I accept as fact that, having overslept, she did make the proper inquiries about alternative arrangements, and that the alternatives made it entirety impractical for her to go. For this she cannot be held to account.

Having regard to the University's allegation that Professor Vandervort "improperly published an allegation of dishonesty against a student," I agree entirely with the Chair's finding that Professor Vandervort was entitled to take the complaint about student E's dishonesty seriously and that she did not improperly "publish" the allegation. What she did was put the allegation in writing and deliver it to the mailboxes of the very faculty members who would have to deal with the matter in Faculty Council. The University was on very thin ground indeed to suggest, as it did, that faculty members' mailboxes are not private ones. Surely it is the expectation of the faculty members themselves that mail delivered to their faculty mailboxes is private.

With regard to the University's allegations regarding both the missing of and the scheduling of classes, I agree with the Chair's decision only in part. I agree that for the most part, the missed classes were by arrangement with the Dean. In one case, it appears that Professor Vandervort did not speak with the Dean and get his permission to miss class, but did telephone the Dean's secretary for the purpose of notifying the students and posting reading lists. This is common practice at most universities, and surely not a case for discipline.

The fact that many make-up classes were held near the end of term and that that became oppressive to some students is accountable to the fact that Professor Vandervort tried hard to accommodate her students who were in the midst of both their moots and the annual follies. The students voted on the matter and the majority voted in favour of cancelling the classes that would have to be made up at a later date. If Professor Vandervort is to be faulted, the fault lies in her responding too much to her students desires, forgetting that students may not realize what they're letting themselves in for by postponing necessary work. But here again what the evidence indicates is that Professor Vandervort is a concerned teacher, trying her best to help her students get through the undoubtedly difficult years that law school brings.

There then arises the matter of Professor Vandervort's scheduling of a class in the two weeks before examinations. There is a clear rule in the College of Law that this is not to be done and, therefore, Professor Vandervort should not have scheduled such a class; on the other hand, I agree with the Chair that this is a minor breech of the rules, and a reminder of the rule ought to have been sent to Professor Vandervort at the time her violation of the rule was first known.

Frivolous and Vexatious. The Chair has found that the University's bringing of a dismissal against Professor Vandervort was neither frivolous nor vexatious. I must disagree.

There is a very strong history of the College of Law's attempts to rid itself of this faculty member. The evidence established beyond any doubt that the Dean of the College of Law, despite the unanimous judgement of the Tenure Appeal Committee, continued to think that he and his colleagues were right in their assessment of Professor Vandervort and that the Appeal Committee was wrong. The Dean never seems to have accepted the decision of the Tenure Appeal Committee; and by this I do not mean only that he failed to agree with the decision -- that is clear -- but also that he never realty accepted that the Tenure Appeal Committee's decision was the final word on Professor Vandervort's staying at the University. One of Dean MacKinnon's earliest decisions after coming into office was to try to get rid of Professor Vandervort by "buying out" her tenure. This does not in my view, indicate that Dean MacKinnon was' ready to accept the Tenure Appeal Committee's decision nor that he accepted Professor Vandervort as a colleague.

As I listened to the evidence, I was struck by the uncollegial and discriminatory way in which the Dean handled -- and in some cases created -- complaints against Professor Vandervort.

The first the Dean learned of behaviour on the part of Professor Vandervort with which he took issue was when he learned that she had not gone to Fredericton with the mooting team on February 20th or thereabouts. The following Monday he was advised by Professor Bilson, the Assistant Dean, that some of the mooters had come to the office and indicated that they wanted an opportunity to evaluate the experience of the mooting course. The Dean wrote a note to one student, inviting him to see him in his

office. He testified that he chose that particular student because he was in third year and because he was the only student on the team that the Dean knew, since he was also in the Dean's evidence class. At their meeting, the Dean apologized to the student for the fact that a faculty member was not present at the moot and then invited the student to make a written complaint. He also advised the student to let the other students know that they, too, could write letters to the Dean.

At no time did the Dean advise the students to express their concerns to Professor Vandervort, although he willingly agreed with counsel for Professor Vandervort that it is usual to tell students to make a complaint directly to the professor involved. The Dean also never communicated the contents or the substance of the student letters to Professor Vandervort, although he again willingly agreed with counsel that complaints should normally be discussed with a faculty member.

The Dean proceeded to recommend Professor Vandervort's dismissal -- in part on the basis of the letters he received from some of the students -- without ever giving copies of the letters to her or informing her of their contents.

At about the same time, Professor Vandervort received a complaint from one of the mooters that student E. had lied to the judges during the moot in Fredericton. She told the Dean about the issue and asked him what to do. When he testified the Dean could not recall exactly what he had told Professor Vandervort to do about the complaint he thought that he had either told her to investigate or that perhaps he would. What is clear from the evidence is that the Dean was far more interested in receiving complaints about Professor Vandervort than he was in helping her to resolve the problem of a student complaint that one of the mooters had lied during the moot.

At the end of February or early March, Assistant Dean Bilson told the Dean that "something" had happened in the Critical Legal Studies class (later established as having occurred in the last week of September or the first week in October), involving student B. The Dean promptly wrote a note to student B., asking her to come see him. This she did and explained what had happened on both the day the original comment had been made and the second day, when the comment was discussed in class. The Dean asked her to reduce the events to writing and she did, by letter dated March 4.

The Dean called the student some time later to ask her if he could use the material in the letter to proceed with a complaint. Student B. agreed, with reservations. She testified that she did not understand then why the Dean was so concerned about what had happened on that second day in class, as she was only concerned about the "limp-wristed" comment

The Dean wrote to Professor Vandervort on March 23, saying he had received a statement from student B., "...outlining her concerns about her treatment in that course as follows:" The Dean then reproduced the letter in what appears to be its entirety, but in fact left off the student's last paragraph which read:

> In closing I want to qualify this whole letter by claiming that I'm sure these kind of incidents occur in other profs' classes as well; in this instance, Professor Vandervort just had the bad luck of having me in the class (or was it i, who had the bad luck of being in her class? I'm not sure). At any rate, I hope I have included the aspects of my verbal narrative which you thought significant.

The Dean had received the letter from the student more than two weeks before he wrote to Professor Vandervort, yet he ended his letter to Professor Vandervort by saying, "I would ask you to provide me with your written response to this statement within the next forty-eight hours."

Later, when the student found out that the Dean had written to Professor Vandervort, she sent him a second letter, urging him to "reconsider this calling to account." She also wrote:

> In particular I want to urge that when a professor makes an inappropriate comment or misjudges a situation i would rather see her/him educated than see her status on faculty reviewed, especially when she is a good teacher and did not mean anything malicious.

The Dean telephoned the student at home in March to talk to her about what had happened the second day of class and why he viewed it so seriously. The student testified that she still didn't understand his concern. They spoke again in May and again, the student testified, she still did not understand his point about why the second day was of so much concern. Eventually, she said, she came to realize that she had been mistreated on that second day of class.

The Dean's solicitation of a letter from student B involving an incident that had taken place five months earlier and about which she had never complained (and her testimony indicated that she was no stranger to making complaints to the Dean's office) and the subsequent conversations in which he urged her to understand why the second day in class was inimical to good teaching Indicate to me that the Dean was interested in drumming up charges against Professor Vandervort, not in responding to real complaints.

How differently the Dean dealt with two -- unsolicited -- letters of complaint about another professor he had received the previous month. Two students wrote lengthy letters to the Dean complaining about similar incidents. One told of how the professor had, on the first day of class in each of the three courses the student had taken from the professor, demanded to know from each woman in the class whether she wished to be known as "Miss, Mrs., or Ms." This process was described as one that, "...could most charitably be termed antediluvian, and most negatively be termed as sexist and abusive to the point of being actionable as sexual harassment." Both also complained of many sexist comments being made in class. The complaints also indicated that the professor used the terms "son of a bitch" and "shit" in class. There were many, many more complaints in the letters, including complaints about the material being covered and

non-existent class structure.

The Dean wrote a letter to the professor involved, quoting at length from one letter of complaint and making reference to the second, saying, "I will summarize the complaints that they have made in the anticipation that you will want to take them into account." He ends his letter to the professor by saying, "I would appreciate having the benefit of your considered reaction to these concerns in the hope that they can be addressed in a manner that is mutually satisfactory to yourself and to your students, and in the best interests of the College."

This response to another professor is a far cry from his letter to Professor Vandervort in which he gives her forty-eight hours to respond to a statement that he himself solicited five months after an event that had not been complained about by the student.

There is no doubt that the Dean treated Professor Vandervort differently than he treated other professors.

I find, therefore, that the dismissal proceedings brought by the University were frivolous and vexatious and discriminatory. The Dean cobbled together what, in my view, were very minor instances of non-perfection in the performance of Professor Vandervort and, especially in the case involving student B., distorted and magnified their significance beyond recognition.

There is no doubt in my mind that had these events occurred in the career of any other faculty member at the College of Law, the most that would have happened is that the Dean might have written a letter to the faculty member similar to the one he did write to the other faculty member about whom there were several complaints.

I disagree with the Chair's disposition of this case -- that two letters of warning might now be written by the Dean, along with a letter of counselling -- not because such letters might not have been appropriately written earlier, but because Professor Vandervort has had to suffer through nearly two years of litigation and the indignity of being actually removed from her office at the College of Law for a good deal of that time during the course of these proceedings which I find to have been undertaken both frivolously and vexatiously. It seems enough to me that this decision will find its way into her personnel file.

Finally, I would like to reiterate that the evidence presented suggested quite strongly to me that Professor Vandervort is a faculty member who tries extremely hard to aid her students and to do her job well. The fact that things did not go entirely smoothly during one academic year, for a variety of reasons, does not mean that she exercised bad judgement or that she is likely to do so in the future.

It is my hope that Professor Vandervort will now be accepted as a full member of the faculty at the College of Law and that any future difficulties she may encounter will be dealt with in a collegial fashion by her fellow faculty members. It is time that this matter

is put to rest

Suzie Scott,
Faculty Association Nominee