COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maughan v. University of British Columbia,* 2009 BCCA 447

Date: 20091020
Docket: CA035776

Between:

Cynthia Maughan

Appellant
(Plaintiff)

And

The University of British Columbia, Lorraine Weir, Susanna Egan, Anne Scott and Judy Segal

Respondents
(Defendants)

And

The Attorney General of British Columbia

Respondents

Corrected Judgment: The style of cause was amended to include The Attorney General of British Columbia

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Frankel

On appeal from the Supreme Court of British Columbia,
Maughan v. University of British Columbia, Vancouver Registry, January 4, 2008, 2008 BCSC 14, Docket S025856

Acting on her own behalf:	C. Maughan
Counsel for the Respondent University of British Columbia:	T.A. Roper, Q.C. J. Russell
Counsel for the Respondents L. Weir, S. Egan, A. Scott and J. Segal:	B.C. Elwood
Counsel for the Attorney General of British Columbia	E. Hughes S. Bevan
Place and Date of Hearing:	Vancouver, British Columbia September 14-17, 2009
Place and Date of Judgment:	Vancouver, British Columbia October 20, 2009

Written Reasons of the Court

Reasons for Judgment of the Court:

INTRODUCTION

[1] Cynthia Maughan, appearing in person, is appealing from the decision of a trial judge, made January 4, 2008, dismissing her claims against the respondents for negligence and for breach of the *Civil Rights Protection Act*, R.S.B.C. c. 49 (the "*CRPA*"), following a "no evidence" motion by the respondents. Ms. Maughan also appeals various evidentiary rulings made during the course of the trial.

[2] The judgment is reported and can be found at 2008 BCSC 14, 2008 Carswell BC 35, [2008] B.C.J. No. 32 (Q.L.).

[3] The trial judge's decision followed a 29-day trial in which Ms. Maughan alleged that the individual respondents, by their communications and conduct, either deliberately or negligently caused actionable harm to her, primarily on the basis of her religion. She also alleged acts of negligence not referable to her religion. Her claim against the University of British Columbia ("U.B.C.") is based on its position as the employer, or principal, of the individual respondents and others who are not named as parties to the action.

[4] Ms. Maughan attributes the genesis of her action to a negative course assessment she received from Dr. Weir in April 2001, but her allegations of negligence and breach of the *CRPA* on the part of one or more of the respondents relate to events spanning the period from late November 2000 up to the date of trial. Ms. Maugham also seeks to lead "new evidence" and "fresh evidence" on this appeal.

[5] Ms. Maughan was granted leave to file a 60-page factum which contains numerous and broad-based allegations of error on the part of the trial judge and includes a submission that his conduct of the trial and his reasons for judgment give rise to a reasonable apprehension of bias. In Ms. Maughan's view, the trial judge

misconceived the nature of her action and, in effect, simply adopted the views and submissions of the respondents without proper regard to the merits of her claims.

CONCLUSION

[6] There is no basis in the record for finding that the trial judge's conduct or reasons for judgment in this matter gave rise to a reasonable apprehension of bias. Further, the trial judge did not err in dismissing Ms. Maughan's action on a "no evidence" motion. Although we are satisfied he erred in his ruling on one *voir dire* in admitting one document (a "press release"), and that there may be minor errors of fact in his lengthy (174 page) reasons for judgment, we are not persuaded that any such errors affected the result.

[7] In our view, Ms. Maughan's claim is not based on the evidence *per se*, but on her interpretation of the evidence and the inferences she drew from the evidence founded on her firm conviction that she was subjected to discriminatory treatment by the respondents on the basis of her religion. While it is clear that the relationship between Ms. Maughan and Dr. Weir, in particular, came to be highly charged and adversarial as this matter progressed toward trial, we are satisfied that the trial judge correctly found that there was no admissible evidence before him that this disharmony was attributable to religious discrimination or bad faith dealings on the part of Dr. Weir or the other respondents. Thus, there was no evidentiary basis for finding that the respondents, or any of them, had breached the provisions of the *CRPA* or were liable to Ms. Maughan in negligence. Nor is there any basis for Ms. Maughan's claim for relief under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.),1982, c. 11 (the "*Charter*").

[8] We would dismiss the appeal, with costs to the respondents.

THE PARTIES

[9] Ms. Maughan is an Anglican Christian. Throughout most of the period during which the events giving rise to this action occurred (late 2000 to 2005), she was a

graduate student pursuing a Master of Arts Degree in English at U.B.C. At that time, she was in her mid-40's, having worked for many years before returning to university. She obtained her Master's degree in 2005.

[10] At the relevant time, Dr. Weir was a professor in the Department of English at U.B.C. Ms. Maughan enrolled in Dr. Weir's seminar entitled: "The Proper: From Derrida to Delgamuukw", which commenced in January 2001. Ms. Maughan had taken a previous undergraduate course from Dr. Weir and Dr. Weir had provided Ms. Maughan with a letter of reference in support of Ms. Maughan's application for graduate studies.

[11] Dr. Scott was a lecturer in French at U.B.C. She was consulted by Ms. Maughan in January 2001 with respect to a question of translation relating to a Derrida text. This text became a thorny topic of discussion both inside and outside Dr. Weir's seminar and one of the factors relied upon by Ms. Maughan's as relevant to her eventual claim of discriminatory treatment on the basis of her religion.

[12] Dr. Segal was an associate professor of English at U.B.C. Ms. Maughan had been a student in one of her undergraduate courses in 1999-2000. She ultimately provided Dr. Weir with a copy of her email file documenting a disagreement she had with Ms. Maughan relating to that course.

[13] Dr. Egan was the Associate Head of the Department of English and Graduate Chair of that department at U.B.C. She was also co-chair of the department's Equity Committee.

[14] U.B.C. is a corporation under the *University Act*, R.S.B.C. 1996, c. 468 and is named as a respondent as being liable under the *CRPA* and in negligence for the acts of its agents and employees, including the individual respondents.

ISSUES ON APPEAL

[15] In her factum, Ms. Maughan has raised numerous allegations of error on the part of the trial judge including, but not limited to, minor errors of fact, fundamental

errors relating to the admissibility of evidence, errors in his interpretation and application of the *CRPA*, errors in his application of the law of negligence, and errors in his application of the "no evidence" test to the evidence before him.

[16] As a matter of convenience, we will group the issues as follows:

(1) Admissibility of Evidence

(a) Did the trial judge err in finding that materials and evidence relating to Ms. Maughan's appeal to the Senate Committee on Appeals on Academic Standing (the "Senate Committee") were inadmissible as protected by absolute immunity?

(b) Did the trial judge err in admitting a "press release" referring to Ms. Maughan's suit against the respondents?

(c) Did the trial judge err in excluding student evaluations of Dr. Weir and a student complaint relating to Dr. Weir?

(2) Charter Issues

(a) Did the trial judge err in failing to apply the *Charter* or *Charter* values in his analysis of the issues before him?

(3) The *CRPA*

(a) Did the trial judge err in his interpretation of the *CRPA*?

(b) Did the trial judge error in his application of the no evidence motion to Ms. Maughan's claims against each of the respondents under the *CRPA*?

(4) Negligence

(a) Did the trial judge err in failing to find a duty of care owing by the respondents to Ms. Maughan at all relevant times?

(b) Did the trial judge err in his application of the standard of care?

(c) Did the trial judge err in finding that there was no evidence of breaches of the duty of care by one or more respondents?

(d) If the trial judge erred in his analysis of the duty of care and/or the application of the standard of care, can his judgment on negligence be upheld on the basis that, in any event, Ms. Maughan did not lead evidence of compensable damages? (This issue was raised by the respondents.)

(5) Reasonable Apprehension of Bias

(a) Did the trial judge's conduct or reasons for judgment give rise to a reasonable apprehension of bias?

(6) "New Evidence" and "Fresh Evidence"

(a) Should this Court admit any of the "new evidence" or "fresh evidence" tendered by Ms. Maughan on this appeal?

(7) Costs

(a) Did the trial judge err in awarding costs against Ms. Maughan?

BACKGROUND

[17] The background giving rise to this action and subsequent appeal are set out in great detail by the trial judge in his reasons for judgment (see, in particular, paras. 24-323). For that reason, and because we are of the view that he did not make any errors which would lead to a different result, we will provide only a chronological summary of the background. We agree with the trial judge that a chronological presentation of the relevant events is the most effective way to analyze the issues, rather than the "thematic" presentation preferred by Ms. Maughan. We bear in mind Ms. Maughan's view that the relevant chronology should start with Dr. Weir's course assessment of Ms. Maughan in April 2002, and that the events which occurred before and after that assessment should be analyzed in light of it.

[18] The abbreviated chronology is as follows:

1. November 2000 – There is an email exchange on a "listserv" for English graduate students triggered by an email which is highly critical of the Canadian Alliance Party and the political and religious views of its leader, Stockwell Day. M, a graduate student, participates in the ensuing email exchange and ends his email with the comment: "He [Stockwell Day] makes me recall fondly a time period when Christians were stoned :)." This email sets off a further flurry of emails in which Ms. Maughan participates by taking strong exception to Mr. M's "stoning" remark. (Ms. Maughan does not raise any official concerns with U.B.C. concerning this email exchange until May 2001.)

2. January 2001 – Dr. Weir's graduate seminar commences. M is registered in this seminar. Early in the course, the students, including Ms. Maughan, agree to hold a colloquium on Sunday March 11, 2001 to discuss the students' proposed papers for the course. M subsequently offers his home for the purpose of this colloquium.

3. January 22 and 25 - Ms. Maughan sends emails to Dr. Weir asking if the date of the colloquium can be changed. She does not mention her religion as a basis for changing the date.

4. January 30 – Ms. Maughan raises an issue arising from a passage from a Derrida text in which Derrida appears to compare the Holy Eucharist to "mystical cannibalism"). Ms. Maughan's suggestion that Derrida has misinterpreted the Bible sparks a spirited exchange and a defence of Derrida by other students. After the class, Ms. Maughan emails another professor, Dr. Cooper (who acted as an informal mentor to her), in which she describes her experience in the seminar as "shocking" and the passage from Derrida as "intense sacrilege."

5. Shortly after the January 30th class - Ms. Maughan telephones the respondent, Dr. Scott, (with whom she has had no prior contact) on the question of the proper translation of the Derrida passage from French to English. Dr. Scott, in turn, refers her to a professor at the Vancouver School of Theology.

6. February 1 – Dr. Scott sends Ms. Maughan an email discussing the Derrida passage, which Ms. Maughan interprets as Dr. Scott dismissing the issue she had raised by advising her to "let it go".

7. February 2 – Ms. Maughan sends an email to Dr. Weir stating that she intends to write her first paper on the Derrida passage and that she will not be attending the Sunday colloquium. She also

requests that she not be required to participate further in seminar discussions, and that an accommodation of some kind be reached with respect to these matters.

8. February 3 - Dr. Weir emails Ms. Maughan discussing Ms. Maughan's proposed paper; agreeing that Ms. Maughan does not have to attend the Sunday colloquium; and asking that she prepare a conventional paper instead, which she will assess in the usual way. Dr. Weir states that Ms. Maughan is not required to participate in the seminar since there is no participation grade, and expresses "regret that Derrida's passage has disturbed you to such an extent but there is little we can do [to] change his language or politics." Ms. Maughan replies the same day stating that she would like to speak with Dr. Weir about the date (Sunday) and place (M's home) of the colloquium, together with other matters. (This February 2 and 3 exchange of emails has been referred to by the parties and by the trial judge as constituting the "accommodation agreement".)

9. February 8 – Ms. Maughan and Dr. Weir meet. Ms. Maughan testifies that her recollection of the meeting is that she told Dr. Weir about the exchange of emails in November in which M had referred to "stoned Christians", and also told Dr. Weir that she did not wish to attend the Sunday colloquium for religious reasons. She states that Dr. Weir refused to change the date. (At trial, Ms. Maughan also reads in evidence of Dr. Weir's recollection of the meeting in which Dr. Weir states that Ms. Maughan never raised her religious beliefs as the basis for changing the date of the meeting.)

10. March 11 – The Sunday colloquium is held at which the other students discuss their proposed final papers. Ms. Maughan does not attend.

11. March 12 – Ms. Maughan requests, and Dr. Weir grants, an extension for Ms. Maughan's proposal for her final paper.

12. March 21 – Ms. Maughan sends Dr. Weir an email attaching her 2 ½ page proposal for her final paper. The email reads: "As discussed. Thanks again for speaking with me yesterday, particularly on such short notice and after such a late afternoon seminar." It is undisputed that Dr. Weir does not respond to this proposal until after the end of term. In evidence read in by Ms. Maughan, Dr. Weir says she had expected a hard copy of the proposal, that she did not open the attachment to Ms. Maughan's March 21st email when she received it, and she did not realize Ms. Maughan had provided her proposal until shortly after the end of term.

13. March 29 (5 days before the final paper deadline) – Ms. Maughan telephones Dr. Weir and asks for an extension for her final paper. Dr. Weir refuses an extension. Ms. Maughan does not raise Dr. Weir's failure to respond to her draft.

14. April 3 – Ms. Maughan submits her final paper, but on a different topic than she had originally planned. The paper, entitled "Given Time for Derrida", contains, amongst other things, a thinly disguised criticism of Dr. Weir's refusal to grant an extension. The first two sentences read, "This paper examines the demand for a paper at term end on a particular due date, in a seminar that has been *given*. It asks, if a seminar is *given*, particularly a seminar on First Nations in which the potlatch is a focal point, must there not be a period of time for the countergift to be produced?"

15. May 3 – Ms. Maughan accesses her course marks for the seminar online. She receives: 40.8 out of 60 on her final paper, 13.6 out of 20 on her proposal (which Dr. Weir did not read until after the end of term) and 17 out of 20 on her first short paper, for an overall

course grade of 73%. Ms. Maughan sends an email to Dr. Weir expressing unhappiness with her grade and asking if any other students had been granted extensions. Dr. Weir responds by email suggesting that Ms. Maughan take any concerns she has to Dr. Egan who is on the departmental Equity Committee.

16. May 7 – Ms. Maughan obtains her final paper and reviews Dr. Weir's written assessment.

[19] Ms. Maughan submits that Dr. Weir's written assessment was the trigger for her conclusion that Dr. Weir's treatment of her was motivated by anti-religious bias. As stated by the trial judge at para. 126 of his reasons for judgment:

> Ms. Maughan testified that upon reading the comments on her papers, particularly the final paper, she was extremely disturbed, saw in them a perversion of the facts and a denial of her religious and academic freedom.

[20] Ms. Maughan then proceeded to exhaust the various avenues available to her within the university community in an effort to obtain redress for what she perceived to be the wrong or wrongs perpetrated on her based on her religion. She began by referring back to the email exchange between English graduate students in November 2000 and proceeded thereafter as follows:

17. May 15, 2001 – Ms. Maughan telephones the U.B.C. Equity Office and a worker there fills out a form noting that "Student reports disparaging emails (against her religious beliefs) on graduate student email list and negative comments from a professor on a course evaluation which resulted in a low grade/performance evaluation."

18. May 16 – Ms. Maughan drops off a binder at the Equity Office containing the listserv emails (from November 2000). She also details her concerns about Dr. Weir and indicates she wishes to contest her

mark because of Dr. Weir's "treatment of (her) Christian beliefs which seriously impeded her ability to proceed through the seminar", and including the "false and astounding" reasons Dr. Weir gave for assigning a low grade to her final paper.

19. May 17 - June 1 – Further communications take place between Ms. Maughan and the Equity Office in which Ms. Maughan seeks confirmation that she was exposed to a "chilly" learning environment for a Christian, and denies that she is complaining about harassment or discrimination or seeking any kind of legal remedy. One focus of this interaction relates to the listserv email exchanges; the other is on her treatment by Dr. Weir during the seminar including Dr. Weir's refusal to change the colloquium date and her final assessment. Ms. Maughan does not give permission to the Equity Office to contact Dr. Weir in relation to her statements, on the basis she is merely seeking a consultation. The Equity Office closes its files as Ms. Maughan does not lay an official Complaint.

20. Late May – Ms. Maughan telephones the Faculty of Graduate Studies ("FOGS"). She is advised to get the support of the graduate student advisor, Dr. Sian Echard, before approaching the Associate Dean of the Faculty of Graduate Studies (Dr. Rose).

21. May 28 – Ms. Maughan sends a 20 page document to Dr. Echard including: a memo titled "My Request to have my Grade Expunged from Professor Weir's 553 Seminar", a document headed "confidential" setting forth the reasons she is seeking to have her grade expunged, and documents refuting Professor Weir's grounds for establishing her grade. Included in those documents are Ms. Maughan's statements that Dr. Weir demonstrated disrespect for her compared to other seminar members, that Dr. Weir had "disregard for her faith" and "was biased against her for academic reasons." Ms.

Maughan states that she is not pursuing punitive action against Dr. Weir, but she copies these documents to Dr. Cooper, Dr. Egan (Associate Head and Graduate Chair of the English Department), and Dr. Grace (Head of the Department of English.)

22. June 13 – Ms. Maughan and Dr. Cooper meet with Dr. Echard to discuss the situation. Thereafter, Dr. Echard advises Dr. Weir of her meeting with Ms. Maughan and states the two options she and Ms. Maughan agreed to for dealing with Ms. Maughan's concerns are: (1) Dr. Weir acknowledges that she treated Ms. Maughan with insensitivity and permits her 23 days to write a final paper to be marked by someone else (Ms. Maughan's first choice) or (2) Ms. Maughan takes her case for religious bias to the departmental Equity Committee.

23. June 11, 13, 15 (the "June emails") – Dr. Weir writes several emails to Dr. Echard setting out her version of the events. Ms. Maughan asserts that these emails represent a continuation of Dr. Weir's biased conduct toward her. In the result, Dr. Weir rejects Ms. Maughan's first proposal for a rewrite and accepts her second proposal that Ms. Maughan take her concerns to the Equity Committee. (Ms. Maughan does not become aware of the June emails from Dr. Weir to Dr. Echard until January 2002.

24. June 16 – After further discussions with Dr. Echard, Ms. Maughan takes her concerns to the Department of English Equity Committee but asks that only Dr. Egan and Dr. Danielson of that committee "review the situation". Ms. Maughan advises them by email that "the core of her contention is that Professor Weir's statements document that she treated [her] differently than other students in the seminar for reasons that were ideological and religious."

25. June 17 – Dr. Weir advises Dr. Echard by email that Dr. Segal had shared her confidential file relating to her experience with Ms.

Maughan in 1999-2000. Dr. Weir notes similarities between Ms. Maughan's concerns about Dr. Segal with Ms. Maughan's current concerns about Dr. Weir. (Ms. Maughan had taken her concerns about her interactions with Dr. Segal to the Equity Committee asking to withdraw from the course.)

26. June 20 – Ms. Maughan meets with Dr. Egan and Dr. Danielson of the Equity Committee to discuss her concerns.

27. June 27 – Dr. Egan and Dr. Danielson meet with Dr. Weir to obtain her view of the relevant events. Amongst other things, Dr. Weir (who is a lesbian) suggests that "sexuality is a dimension of this context." (Dr. Danielson later testifies that Dr. Weir did not link this remark to Ms. Maughan's Christianity.)

28. June 28 – Ms. Maughan and Dr. Cooper attend a meeting with Dr. Egan and Dr. Danielson at which they provide Ms. Maughan with a letter stating their view that Ms. Maughan had not been treated differently than Dr. Weir's other students and that her work was not evaluated unfairly. They advise Ms. Maughan of her options of carrying the matter forward to the Equity Office and/or the Senate Committee, but strongly recommend that she not proceed further.

29. July 3 – Ms. Maughan writes to Dr. Rose (Associate Dean of the Faculty of Graduate Studies) and meets with Dr. Rose on July 6 to seek assistance in determining what to do next.

30. July 24 – Ms. Maughan and Dr. Cooper meet with Dr. Grace (head of the English Department) and suggest that Ms. Maughan be given 23 days to rewrite her paper. Dr. Grace advises that there will have to be a joint meeting with Dr. Weir. Ms. Maughan does not pursue this avenue.

31. August 7 – Ms. Maughan writes a letter to Dean Granot (Dean of the Faculty of Graduate Studies) seeking to appeal the decision of the Equity Committee with respect to the process by which her grade was determined by Dr. Weir, and raising for the first time an allegation that Dr. Weir had breached U.B.C. Policy #65. That policy provides that students can give advance notice of their wish to observe Holy days of their religion where there is a conflict with classes or exams and the instructors shall provide an opportunity for the student to make up missed work or exams without penalty.

32. August 13 and August 31 – Dr. Rose first advises Ms. Maughan by letter dated August 13 and sent (in error) that she will be permitted to rewrite her final paper. In a second letter, dated August 31, after reviewing further materials, Dr. Rose advises that a rewrite is not possible.

33. September 19 – Ms. Maughan seeks the assistance of Dr. McBride, Vice President Academic, who advises he cannot intervene and advises her to appeal to the Senate Committee.

34. September 20 – Dr. Granot emails Ms. Maughan confirming that she cannot rewrite her paper and advising her to proceed with the appeal process. Dr. Granot confirms that advice in writing on October 4.

35. October 29 – Ms. Maughan receives the formal decision rejecting her appeal to the Faculty of Graduate Studies from Dr. Rose.

36. November 14 – Ms. Maughan asks for an extension of time to file an appeal to the Senate Committee.

37. February 6, 2002 – Ms. Maughan files an appeal from the decision of the Faculty of Graduate Students to the Senate Committee. Although the remedy she seeks is a change of her grade for the

course, the materials she files in support are voluminous and include most, if not all, of the documents from the November 2000 emails forward.

38. April 24 – The Senate Committee dismisses Ms. Maughan's appeal, but comments adversely on the manner in which the English Department has dealt with the problem. (The trial judge rules at trial that the documents and evidence related to the Senate proceeding are inadmissible, on the basis of absolute immunity.)

39. October 23, 2002 – Ms. Maughan commences action in the Supreme Court against the respondents seeking damages in negligence or under the *CRPA*.

40. 2003-2005 – Dr. Weir is quoted in the media commenting on the lawsuit, and co-authors' academic articles (the "Weir/Petrina" papers) which comment on the lawsuit. These articles become the subject of further allegations by Ms. Maughan against Dr. Weir.

41. September 8, 2003 – Madam Justice Brown dismisses the respondents' application to strike the Statement of Claim pursuant to Rule 19(24) as disclosing no cause of action, but strikes specific paragraphs pursuant to that Rule.

42. January – June 2007 – Ms. Maughan's action is heard.

43. January 4, 2008 – Ms. Maughan's action is dismissed pursuant to Rule 40(8) of the *Rules of Court* on a no evidence motion.

44. February 4, 2008 – Ms. Maughan files a Notice of Appeal in this Court.

[21] It is apparent from this history that Ms. Maughan pursued every available avenue within U.B.C. to challenge the manner in which her grade was assessed,

and her treatment by Dr. Weir and others, based on allegations of religious bias and a variety of other concerns, including breach of her confidentiality at various stages of the process. She states that she did not take judicial review of the Senate Committee decision because that body did not have the jurisdiction to grant the relief she was by then seeking, namely, a recognition that she had been discriminated against on the basis of her religious beliefs, and that her academic freedom and freedom of speech had been infringed. For her, this was no longer a matter of damages (as suggested by her Statement of Claim), but a matter of principle. At the hearing of the appeal, Ms. Maughan states that she felt bound to pursue a remedy in order to protect other students from similar treatment.

DECISION OF THE TRIAL JUDGE

[22] The trial judge's reasons for judgment are thorough. Early in his judgment, he set forth and analyzed the applicable test on a no evidence motion. (No issue is taken with his statement of the law in that regard.) He then reviewed substantial portions of the evidence, all of which had been introduced by Ms. Maughan, including read-ins from the examinations for discovery of the individual respondents.

[23] The trial judge then went on to deal with the allegations of breach of the *CRPA* against Dr. Weir. He began by analyzing the provisions of the *CRPA* and then applied his interpretation of the relevant provisions to the evidence led by Ms. Maughan. In the result, he concluded that there was no evidence that Dr. Weir's conduct or communications with Ms. Maughan, or with others, amounted to a breach of the *CRPA*. In particular, he found no evidence that Dr. Weir's impugned conduct and/or communications relating to Ms. Maughan were based on her religion. He made similar findings with respect to Ms. Maughan's allegations of breach of the *CRPA* by Dr. Segal, Dr. Scott and Dr. Egan. The trial judge also found that there was no evidence of breach of the *CRPA* by any other U.B.C. employees (in particular, those with whom Ms. Maughan dealt at the Equity Office) with the result that U.B.C. could not be found to be liable for breach of the *CRPA*.

[24] The trial judge also analyzed the evidence to determine whether there was any evidence that any respondents were liable to Ms. Maughan in negligence. He found there was not. He noted that Ms. Maughan placed considerable reliance on the decision of the Supreme Court of Canada in *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108, in pursuing her claim for negligence. He distinguished *Young* on its facts and found that it was of limited assistance on the evidence before him.

[25] With respect to the claim of negligence against Dr. Weir, the trial judge found that, to the extent there was a duty of care between Dr. Weir and Ms. Maughan, it was vitiated "after the plaintiff launched her allegations of religious bias" (para. 439). Even assuming a duty of care, however, the trial judge found that there was no evidence that Dr. Weir had breached the standard of care which he found was established by s. 69 of the *University Act*. Based on his interpretation of s. 69, the trial judge concluded that, in order to succeed in an action for negligence against any of the respondents, Ms. Maughan had to establish that they were acting in bad faith. He found that the evidence led by Ms. Maughan did not constitute evidence of bad faith in relation to any of the respondents.

[26] Based on his findings with respect to the duty of care and the standard of care, the trial judge did not find it necessary to consider whether there was any evidence of damages. (The respondents submit that Ms. Maughan would also have failed at the damages stage of the negligence analysis.)

[27] The trial judge also examined those allegations of negligence against U.B.C. which existed independently of the claims against the individual respondents, but involved actions or inactions by other U.B.C. faculty or staff with whom Ms. Maughan dealt, as summarized in the history set forth earlier in these reasons. He concluded that there was no evidence that U.B.C. could be found negligent in relation to those interactions.

[28] In the result, the trial judge dismissed Ms. Maughan's action, stating at para. 492 of his reasons for judgment:

> This is a case which in the final analysis fails because it relies on speculation, innuendo and conjecture, rather than inferences based on the evidence, of the respective states of mind of the various defendants necessary to establish liability; in the case of the ***CRPA***, the intention to interfere with the plaintiff's civil rights by promoting hatred, contempt or her inferiority in comparison to others based on her religion; in the case of bad faith negligence, malice or ill will arising out of religious bias, or otherwise.

[29] During the course of the trial, the trial judge made various rulings on evidentiary matters which Ms. Maughan challenges on appeal. The most significant ruling, made on January 16, 2007 following a *voir dire*, was that the Senate Committee appeal process was quasi-judicial, and that all materials prepared for the purpose of that appeal, including evidence collected in preparation for and used at the hearing of the appeal, were protected by absolute immunity and were inadmissible.

[30] A second ruling challenged by Ms. Maughan related to what has been referred to as a "press release" which counsel for the faculty defendants tendered during Ms. Maughan's cross-examination. On April 12, 2007, following a *voir dire*, the trial judge ruled that the press release was admissible to give context to the "public shape given Ms. Maughan's law suit by her former counsel" and to place Dr. Weir's later publications (the Weir/Petrina papers) in context.

[31] The trial judge also refused to admit student evaluations of Dr. Weir's course, and a complaint by an unidentified student about Dr. Weir's performance as his/her Ph.D. thesis advisor, on the basis that this evidence was inadmissible hearsay if tendered for its truth, and inadmissible on any other basis.

[32] Finally, the trial judge awarded costs against Ms. Maughan.

DISCUSSION

1) Overview

[33] In Ms. Maughan's view, the trial judge completely misapprehended the nature of her case by portraying it as one which pitted her allegations of discrimination on

the basis of her religion against the respondents' rights to academic freedom and freedom of speech. Ms. Maughan submits that she was the victim in this process, not the respondents, and that she went out of her way to avoid an adversarial dispute by consistently seeking to resolve her problem through a consultative process. In her view, the respondents ultimately drove her to adopt an adversarial approach through the Senate Committee and the courts by refusing to accept her attempts to resolve her concerns at lower levels. She refers to the trial judge's description of her actions as "complaints" as an indication that he did not appreciate that she had expressly avoided making a "complaint" or engaging an adversarial process. Ms. Maughan remains convinced that she was discriminated against by the respondents based on her religion and that this was abundantly clear from the evidence she led at trial.

[34] The respondents adopt the trial judge's analysis of the evidence, his interpretation of the law (with one caveat), and his application of the law to the evidence. The caveat is that the respondents submit that the trial judge was overly generous to Ms. Maughan in finding any duty of care owed to her by the respondents at any time.

2) Admissibility of Evidence

(a) The Senate Committee Materials

[35] During the course of the trial, Ms. Maughan sought to introduce as evidence "all the documents provided to the Senate and appeals committee as well other e-mails, letters and communications generated by or on behalf of the faculty defendants in the course of developing the faculty's response to Ms. Maughan's appeal of her grade." (Para. 15 ruling.) The trial judge gave reasons for judgment ruling that those documents and related evidence were protected by absolute immunity and, therefore, inadmissible. His reasons are unreported and may be found at *Maughan v. U.B.C. et al* (16 January 2007), Vancouver S025856 (S.C.). He analyzed the nature of absolute immunity, found that the Senate Committee was performing a quasi-judicial function, and determined (at para. 43) that the law

"mandates protection of any communications that 'are incidental and proximate to quasi-judicial proceedings' such as those at bar."

[36] Ms. Maughan challenges this ruling, primarily on the basis that none of the individual respondents were "parties" to that proceeding and, therefore, did not have any duty to provide evidence and documentation in relation to it. If there was no duty to provide the information, Ms. Maughan submits that it should not be protected. Ms. Maughan takes particular exception to the trial judge's ruling insofar as it excluded from admission letters written by Dr. Segal, Dr. Scott and Ms. Mell (another student in Dr. Weir's seminar) which were provided to the Senate Committee as attachments to the response of Dr. Weir. Dr. Weir's response, in turn, was included with a letter from Dr. Rose to the Senate Committee as the response of the Faculty of Graduate Studies, whose decision was under appeal.

[37] In our view, the trial judge was correct in finding that the Senate Committee was performing a quasi-judicial function in this case. (See, for example, *Re Polton and Governing Council of the University of Toronto* (1976), 8 O.R. (2d) 749, 59 D.L.R. (3d) 197 (Ont. H.C.), and *Harelkin v. the University of Regina*, [1979] 2 S.C.R. 561.) Ms. Maughan does not take issue with that aspect of the trial judge's ruling.

[38] We are also satisfied that the trial judge correctly concluded that absolute immunity attaches to the materials and "evidence" relating to the Senate Committee appeal, essentially for the reasons given by him. In our view, whether or not all of the documents and evidence proffered to the Senate Committee were considered relevant or helpful by the Committee (and there is some indication that much of the material filed by both Ms. Maughan and Dr. Rose on behalf of the Faculty of Graduate Studies went beyond the limited issue which the Committee could decide), they were protected by the immunity. It was Dr. Rose who put forward the materials in answer to Ms. Maughan's appeal and she was entitled to respond as representative of the body whose decision was being appealed. It was up to the Senate Committee to determine what materials were necessary to their disposition of the case, and the trial judge was not sitting in judicial review of their decision. To

the extent either party put forward irrelevant and inflammatory material, those materials are, nonetheless, protected by the absolute immunity which attached to the occasion of the proceeding.

(b) The "Press Release"

[39] During the cross-examination of Ms. Maughan at trial, the respondents sought to introduce a hard copy of an internet posting entitled "U.B.C. sued for discrimination", dated October 24, 2002. The document referred to the lawsuit filed by Ms. Maughan the previous day, described the suit in terms favourable to Ms. Maughan, and contained inflammatory comments with respect to Dr. Weir. It had the appearance of a press release and purported to quote Ms. Maughan's then lawyer. The position of counsel for Dr. Weir with respect to the press release was set out at para. 7 of the *voir dire* decision:

> Counsel for the defendants submits that the impugned evidence is relevant to show that what was being addressed in the "Weir Petrina" communications was not the promotion of hatred or contempt of the plaintiff or the inferiority of the plaintiff or any class of persons in comparison with another or others, but rather the "media campaign" that ensued from the institution of these proceedings.

[40] Ms. Maughan did not identify the document as authored by her or by her then lawyer. She objected to its admissibility on the basis that its authenticity had not been established and that there was no evidence that it had ever been published on the internet so as to influence either the media or justify a response from Dr. Weir.

[41] The trial judge admitted the press release. He found that one of the search results Ms. Maughan produced as a result of an internet search during the break between her cross-examination (when the press release was introduced) and her re-examination (of herself) provided some basis for finding that the document had originated from the website of Ms. Maughan's then counsel. His reasons for admitting the document are found at para. 15 of his reasons on the *voir dire*:

> I conclude that Exhibit AA [the press release] is admissible in that there is sufficient threshold evidence of its authenticity through the evidence

> of Ms. Maughan's search on the internet which led to a document on the website of her former lawyer, a summary of which tracked the language of Exhibit AA identifying it as a press release. The relevance of the document is that it relates to the public shape given Ms. Maughan's law suit by her former counsel. As well it corresponds to some subsequent portrayals of the action's nature made in several publications which arguably formed part of the context for the Weir Petrina Articles which focussed in part on the "media campaign" arising from the law suit.

[42] On appeal, counsel for the faculty respondents acknowledged that Ms. Maughan had not clearly identified or adopted this article as one she had seen before. Further, the admissibility of the document could not be justified by reference to the evidence of Dr. Weir (which was read in by Ms. Maughan after the trial judge's ruling on the *voir dire*), since Dr. Weir did not make clear reference to this document as one which had influenced her later actions. In our view, there was no proper foundation laid for the admission of this document through the evidence of Ms. Maughan.

[43] The next question, therefore, is what flows from the fact that the press release was wrongly admitted into evidence?

[44] The trial judge referred to the press release several times in his reasons for judgment as one aspect of the media activity surrounding the action after it was commenced. The media linked Ms. Maughan's lawsuit to a prior criminal proceeding in which Dr. Weir had given expert evidence for the defence – the case of *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, in which Mr. Sharpe had been charged, amongst other things, with possession of child pornography. In some instances, the media linkage of the Sharpe case and Ms. Maughan's action was framed in language extremely hostile to Dr. Weir. Some provisions of the original Statement of Claim appeared to provide a basis for that link. There was also some evidence indicating that both Ms. Maughan and Dr. Weir took their case to the media by granting interviews. The press release was found by the trial judge to be part of this overall media activity, which cast some light on Dr. Weir's subsequent actions in publishing the Weir/Petrina papers, which Ms. Maughan relied on as evidence of negligence or of a breach of the *CRPA* on the part of Dr. Weir.

[45] In our view, the erroneous admission of the press release could not reasonably have affected the result. There was other evidence of media reports attacking Dr. Weir with reference to various allegations in the Statement of Claim. That evidence, in and of itself, provided some context for the Weir/Petrina papers and was relevant to the question of whether those papers were evidence of bad faith or breach of the *CRPA* on the part of Dr. Weir. Had the press release been ruled inadmissible, Ms. Maughan's claims of bad faith (in relation to negligence) and discriminatory acts and communications (within the meaning of the *CRPA*) would still have suffered from lack of an evidentiary foundation.

(c) The Student Evaluations

[46] Ms. Maughan sought to introduce into evidence anonymous student evaluations relating to Dr. Weir's Derrida seminar. The trial judge refused to admit them on the basis that they were being tendered for their truth and, thus, constituted inadmissible hearsay. The transcript reveals that, although Ms. Maughan insisted that they were not being tendered for their truth, she was, in fact, relying on the evaluations to establish that it was Dr. Weir, and not Ms. Maughan, who was the cause of disruption in the seminar.

[47] We are satisfied that the trial judge properly excluded these documents. In our view, he correctly determined that Ms. Maughan was effectively attempting to rely on them for the truth of their contents.

(d) The 'Student X' Letters

[48] Ms. Maughan also sought to introduce anonymous letters highly critical of Dr. Weir and, apparently, written by a student who had Dr. Weir as a Ph.D. thesis advisor. It appears that Ms. Maughan sought to introduce these letters as some kind of "similar fact" evidence; that is, as evidence that another student had felt demeaned and ill-treated by Dr. Weir in the academic context. It appears that Ms. Maughan also sought to admit these and related responsive letters from Dr. Egan and other members of the English Department as evidence of their state of

mind in dealing with Ms. Maughan's complaints about Dr. Weir for similar demeaning behaviour.

The trial judge excluded this evidence on the basis that it was effectively being tendered for its truth and, thus, was inadmissible hearsay. He also found that there was no suggestion that the student letters alleged any kind of religious bias on the part of Dr. Weir. We agree with the trial judge's decision that these letters were inadmissible for the reasons given by him. It is also difficult to conceive what weight could have been given to such evidence given its anonymous nature and highly personalized and inflammatory content.

3) The *Charter* and *Charter* Values

[49] Ms. Maughan submits that the trial judge failed to apply the *Charter* and/or *Charter* values in his analysis of her claims. She submits that she made claims of breach by one or more of the respondents, of her *Charter* rights under: s. 2(a) (freedom of conscience and religion); s. 2(b) (freedom of thought, belief, opinion and expression); and s. 15 (equality before and equal protection under the law). She says the substance of these claims, without reference to specific provisions of the *Charter*, can be found in her Statement of Claim as amended and were clear from her submissions before the trial judge.

[50] Following the trial, on August 24, 2009, Ms. Maughan filed a Notice under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, raising various *Charter* arguments, including an argument that the decision of the trial judge breached her *Charter* rights. Amongst other things, she states that she is "seeking a remedy that prevents future violations of my rights and freedoms under *The Charter* by requiring the faculty defendants to correct their false reports, and to make future reports with honest representation of basic facts."

[51] The respondents submit that Ms. Maughan did not clearly plead that she was seeking *Charter* relief in her Statement of Claim; rather, her claim was pleaded as

founded in either a breach of the *CRPA* or in negligence. We agree with that submission.

[52] The respondents submit that, in any event, the *Charter* has no application to this lawsuit, which is one between private litigants. They note that there is no challenge to any section of the *CRPA* or to the common law which would engage the *Charter*. U.B.C. also relies on the decisions of *McKinney v. The University of Guelph*, [1990] 3 S.C.R. 229 and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, for the proposition that U.B.C. is not a government actor and, thus, not subject to the *Charter* with respect to any of the wrongful conduct alleged by Ms. Maughan in relation to its employees or otherwise.

[53] We note that the Attorney General of British Columbia appeared in this Court by counsel in response to Ms. Maughan's *Charter* Notice. She also took the position that Ms. Maughan should not be permitted to raise *Charter* claims for the first time in this Court and that, in any event, the *Charter* had no application in these circumstances.

[54] We agree with the respondents and with counsel for the Attorney General, for the reasons put forward by them, that the *Charter* has no application to the claims made by Ms. Maughan against the respondents. We also reject Ms. Maughan's submission that the trial judge himself breached any of her rights under the *Charter*. Her submission in that regard is unclear, at best. Although there are instances where the *Charter* has been held to apply to court orders, no foundation has been established for finding that it applies in these circumstances.

[55] Ms. Maughan also invokes *Charter* values in support of her submission that the trial judge applied too high a standard to the nature of the conduct she had to establish in order to found a claim for breach of the *CRPA*. She submits that the trial judge erred in treating the *CRPA* as if it were a quasi-criminal statute, rather than a statute simply establishing a tort of discrimination, and that his conclusion would have been different had he applied *Charter* values in his interpretation of it.

[56] For reasons which will become clear in the next section of these reasons, we are satisfied that the trial judge's interpretation of the *CRPA* was correct and that he did not err in failing to apply *Charter* values as an aid to interpretation.

[57] We also note that we are not persuaded that the application of *Charter* values would have led to a different conclusion as to the interpretation of the *CRPA* in any event.

[58] In conclusion on this point, we conclude that there is no merit to Ms. Maughan's claims based on the *Charter* or on *Charter* values.

4) Application of the No Evidence Motion to Claims Under the *CRPA*

(a) The Test on a No Evidence Motion

[59] The trial judge carefully reviewed the law with respect to the test to be applied on a "no evidence" motion under Rule 40(8) of the *Rules of Court* at paras. 6-21 of his reasons for judgment. Apart from his reference to *Bingo City Games Inc. v. British Columbia Lottery Corporation*, 2004 BCSC 1496, suggesting that there is an "air of reality" aspect to the test to be applied under Rule 40(8) (a suggestion which we do not find helpful), we adopt the trial judge's analysis on this point. In the result, after reviewing several authorities in both the civil and criminal context, the trial judge stated his conclusion on the test to be applied at para. 21 of his reasons for judgment:

> I conclude therefore that in considering the no evidence motion in this case, I am obliged in the case of elements of the torts being advanced which are supported by direct evidence, not to weigh the evidence, but only to consider whether it meets a threshold of reasonableness such that a properly instructed jury could make the requisite finding. In the case of elements supported solely by circumstantial evidence, on the other hand, I am obliged to engage in a limited weighing of the evidence to ensure that it is reasonably capable of bridging the inferential gap between the evidence proffered and the element to be proved. [Emphasis in original.]

[60] Ms. Maughan does not take issue with the trial judge's statement of the test to be applied on a no evidence motion but, rather, on his application of the test to the evidence before him.

(b) The Interpretation of the *CRPA*

[61] The *CRPA* is a relatively short statute and provides, in its entirety, as follows:

> **Definition**
>
> 1 In this Act, "prohibited act" means any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting
>
> (a) hatred or contempt of a person or class of persons, or
>
> (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
>
> on the basis of colour, race, religion, ethnic origin or place of origin.
>
> **Prohibited act is actionable**
>
> 2(1) A prohibited act is a tort actionable without proof of damage,
>
> (a) by any person against whom the prohibited act was directed, or
>
> (b) if the prohibited act was directed against a class of persons, by any member of that class.
>
> (2) If a corporation or society engages in a prohibited act, every director or officer of the corporation or society who authorized, permitted or acquiesced in the commission of the prohibited act may be sued by the persons referred to in subsection (1) and is liable in the same manner as the corporation or society.
>
> (3) In an action brought under this section, the commission of a prohibited act by any director or officer of a corporation or society must be presumed, unless the contrary is shown, to be done, authorized or concurred in by the corporation or society.
>
> (4) An action under this section must be commenced in the Supreme Court.
>
> **Attorney General may intervene in action**
>
> 3(1) The Attorney General may intervene in an action commenced under section 2.
>
> (2) If the Attorney General intervenes, the Attorney General becomes a party to the proceedings.
>
> (3) If a person commences an action under section 2, the person must serve the Attorney General with a copy of the writ of summons within 30 days after commencing the action.

> **Remedies**
>
> 4(1) A party to an action brought under section 2 may be awarded damages or exemplary damages.
>
> (2) If the court awards damages or exemplary damages in an action brought by a member of a class of persons under section 2, the court may order payment of the damages to any person, organization or society that, in the court's opinion, represents the interests of the class of persons.
>
> (3) In an action brought under section 2, the court may, in addition to any other relief, grant an injunction.
>
> **Offence**
>
> 5(1) A person who engages in a prohibited act commits an offence and is liable to a fine of not more than $2 000 or to imprisonment for not more than 6 months, or to both.
>
> (2) A corporation or society that commits an offence under subsection (1) is liable to a fine of not more than $10 000.
>
> (3) If a corporation or society commits an offence under subsection (1), every director or officer of the corporation or society who authorized, permitted or acquiesced in the commission of the prohibited act commits an offence and is liable to the penalties under subsection (1). [Emphasis added.]

[62] Ms. Maughan's submission with respect to the *CRPA* is that the conduct and communications of the respondents, or any of them, had as their purpose interference with the civil rights of a person (herself) or class of persons by promoting "the superiority or inferiority of a person or class of persons in comparison with another or others on the basis of ... religion". In other words, Ms. Maughan relies on s. 1(b), not on s. 1(a), of the *CRPA* to found her cause of action.

[63] As earlier stated, Ms. Maughan submits that the trial judge erred in applying too high a threshold to the nature and quality of the prohibited conduct or communications a plaintiff must establish to found a successful claim under the *CRPA*. She submits that this, in turn, affected his determination of whether she had established some evidence of those acts sufficient to overcome a no evidence motion.

[64] The trial judge set out the primary issue of statutory interpretation before him at para. 332 of his reasons for judgment:

> At issue in this case is whether the *CRPA* simply created a tort of discrimination in the wake of the Supreme Court of Canada decision in *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 which held that discrimination does not give rise to a common-law tort in view of the relief provided by the provincial (Ontario) *Human Rights Code* for such conduct, or whether the *CRPA* was enacted to address what the defendants describe as "grave instances of interferences with civil rights."

[65] The trial judge then engaged in an exercise in statutory interpretation of the *CRPA* at paras. 333-347 of his judgment. In so doing, he referred to the *CRPA*'s legislative history, and to both civil and criminal statutes employing similar language of hatred and contempt. He concluded his analysis at paras. 346-47 of his reasons as follows:

> I conclude that the meaning attributed to the words "hatred" and "contempt", in similar statutory contexts, as provoking strong and deeply held emotions apply to the *CRPA*. Further, I conclude the meaning attaching to the words "superiority" and "inferiority" in the *CRPA* imports an equally strong connotation of promoting profound emotional antipathy based on notions of physical moral or intellectual inferiority or superiority.
>
> I also conclude that there must be evidence under the *CRPA* that the person whose communication or conduct is impugned, must intend to create the consequences prohibited by the *Act*. In other words, there must be evidence that the person accused of infringing the *Act* intended to promote hatred, contempt, inferiority or superiority on a prohibited ground and intended to interfere thereby with the civil rights of the person or class of persons against whom the promotion of hatred, contempt or inferiority was directed. [Emphasis added.]

[66] We agree with the trial judge's interpretation of the *CRPA*, substantially for the reasons given by him. In coming to this conclusion, we are unable to find any ambiguity in the provisions of the *CRPA* which requires or justifies the analysis of its provisions through the lens of *Charter* values. In that regard, we refer to *Bell Express Vu Limited Partnership v. Rex*, [2002] SCC 42, 2 S.C.R. 559 at para. 62, where the Court states:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in

> accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

[67] We turn, then, to Ms. Maughan's allegations of error relating to the manner in which the trial judge applied the no evidence test to Ms. Maughan's claims under the *CRPA.*

(c) Application of the No Evidence Test

(i) General

[68] Ms. Maughan alleges numerous errors on the part of the trial judge in his application of the no evidence test, including allegations: that he misapprehended portions of the evidence, that he failed to consider relevant evidence and that he impermissibly weighed the evidence and made credibility findings adverse to her. Her submissions in this regard apply not only to the trial judge's analysis of the evidence in relation to her claims under the *CRPA*, but also to her claims in negligence.

[69] In our view, the majority of Ms. Maughan's submissions reveal a fundamental misapprehension of the reasons for judgment of the trial judge. Her submissions are based on her interpretation of the evidence and on her firm conviction that she was discriminated against by Dr. Weir and the other respondents on the basis of her religion. Because we are not persuaded that the trial judge erred in any significant manner in which he treated the evidence, or in his conclusion that there is no evidence which would justify sending this case to trial, we will restrict our comments to only a few of the many arguments raised by Ms. Maughan. In our view, her other arguments are not sufficiently meritorious to warrant a discussion.

[70] Ms. Maughan states that the trial judge erred in failing to refer in his reasons to all of the relevant evidence. She submits that he may have been handicapped in

that regard by the fact that there were gaps in the transcript which were not discovered until Ms. Maughan was preparing for the appeal. (Apparently, the trial judge was provided with copies of various transcripts by the court reporters, although not at the request of counsel.) We are not persuaded that the trial judge failed to refer to evidence because he did not have the advantage of full transcripts. Generally-speaking, transcripts are uncommon and unnecessary in the judgment-writing process at the trial level. The trial judge heard and viewed the evidence and undoubtedly took notes. He also had the benefit of lengthy written submissions, including approximately 300 single-spaced pages of submissions from Ms. Maughan.

[71] As we advised Ms. Maughan during the course of the appeal, there is no obligation on a trial judge to review all of the evidence in reasons for judgment; certainly, after a 29 day trial, it would be fruitless to do so. It is up to trial judges to sift through the evidence and use their judgment as to which portion or portions are essential to a proper discussion of the issues. It is only if a trial judge fails to refer to a critical piece or pieces of evidence that there is a basis for finding error; and then only if it is clear that the trial judge did not take that evidence into account in his or her decision. In this case, we are not persuaded that the trial judge failed to consider relevant evidence in coming to his conclusions, or that the additional evidence referred to by Ms. Maughan could have made a difference to the outcome.

[72] Ms. Maughan also submits that, in ruling on the no evidence motion, the trial judge erred in weighing the evidence and in making determinations of credibility based on inconsistencies in the evidence. In the course of making this submission, she advised the Court that the trial judge assured her that he would not use her reading-in of the evidence of the respondents against her. She said that he then proceeded to do just that by refusing to accept her evidence on certain points where it was in conflict with other evidence.

[73] One example Ms. Maughan relies on to demonstrate that the trial judge improperly weighed the evidence relates to a meeting she had with Dr. Weir on

February 8, 2001. Ms. Maughan testified that she advised Dr. Weir at that meeting that she did not want to attend the Sunday colloquium for religious reasons. Ms. Maughan then read in evidence from the examination for discovery of Dr. Weir in which Dr. Weir denies that Ms. Maughan advised her that she wished to move the date of the colloquium for religious reasons. There was other evidence which also related to the issue of whether Ms. Maughan had clearly advised Dr. Weir that she wanted to change the date of the Sunday colloquium for religious reasons.

[74] The trial judge discussed this evidence in relation to Ms. Maughan's claim in negligence, but the same analysis would apply to her claim under the *CRPA*. He stated his conclusion in relation to this evidence at para. 423 of his reasons for judgment:

> There is no evidence that Dr. Weir's refusal to change the colloquium or failure to provide feedback on her paper were malicious or morally oblique actions. There is no clear evidence of what Dr. Weir knew the basis of Ms. Maughan's objection to the colloquium to be, given that she did not initially object to it being held on a Sunday, was indirect in raising the prospect of changing it in her two emails to Dr. Weir, and was unclear in her evidence as to what she told Dr. Weir on February 8, 2001 concerning her previous interaction with [M]. It would in my view be impossible to conclude on the state of the evidence before me that Dr. Weir's refusal to change the colloquium had "ill will" or "furtive design" towards Ms. Maughan based on her religion as its animating force as opposed to the difficulty of rearranging the colloquium to another date, given the difficulty with which the first date was settled on.

[75] In the result, we are satisfied that, to the extent the trial judge engaged in a limited weighing of the evidence on this point, he did so in a manner consistent with the assessment of circumstantial evidence on a no evidence motion. As is clear from the trial judge's reasons, there was a great deal of evidence relating to the decision by the students (including Ms. Maughan) to hold the colloquium on a Sunday, and to Ms. Maughan's later requests to move the colloquium to another date. The evidence simply was not as stark as Ms. Maughan suggested; that is, that she objected to the colloquium being held on a Sunday for religious reasons and made that clear to Dr. Weir. We are not persuaded that the trial judge erred in his

analysis of this evidence or in concluding that it did not constitute evidence of breach of the *CRPA*, or of negligence, by Dr. Weir.

[76] One other example Ms. Maughan relies on to demonstrate that the trial judge improperly weighed evidence and made credibility findings relates to Ms. Maughan's submission at trial that Dr. Segal had written a letter to Dr. Weir describing Ms. Maughan as "unstable" prior to Ms. Maughan launching her appeal to the Senate Committee. If so, this letter would not have been protected by the absolute immunity the trial judge applied to the other documents relating to that proceeding.

[77] The issue of absolute immunity was decided on a *voir dire* in which the trial judge was entitled to consider all of the evidence in determining which documents were protected by the immunity. He concluded that the date set out in the Segal letter was the date it was written, rather than the earlier date suggested by Ms. Maughan. We are satisfied that the trial judge was justified in drawing this inference from the evidence on the *voir dire*, rather than the inference urged upon him by Ms. Maughan. His analysis on this point did not turn on an assessment of the credibility of Ms. Maughan, but on what inferences could properly be drawn from the evidence.

[78] We do not propose to review other instances in which Ms. Maughan asserts the trial judge improperly weighed evidence or made findings of credibility since, in our view, Ms. Maughan's allegations of error are not supported by a consideration of the evidence in the context of the trial judge's reasons as a whole.

[79] Further, we find that Ms. Maughan's apparent belief that she could read in discovery evidence of Dr. Weir and the other respondents without risk of adverse consequences is not supported by the transcript references she has provided. Rather, it is apparent that the trial judge painstakingly advised Ms. Maughan on numerous occasions that if she was going to read in certain questions and answers of a respondent, the respondent was entitled to have further questions and answers read in which were necessary to place the original questions and answers in context. The trial judge gave Ms. Maughan the option of withdrawing certain questions and answers, or putting them in with the qualifying questions and answers. He advised

her that he would then consider all of the evidence in coming to his conclusion on any particular issue. Thus, to the extent Ms. Maughan led evidence contradictory to her own, the trial judge was entitled to consider it together with the rest of the evidence in making his decision as to whether the respondents' no evidence motion should succeed or fail.

(ii) The CRPA Claims against Dr. Weir

[80] As earlier stated, in order to succeed in her claim under s. 1(b) of the *CRPA*, Ms. Maughan had to lead evidence that one or more of the respondents engaged in "conduct or communication that had as its purpose interference with the civil rights of a person or class of persons by promoting the superiority or inferiority of a person or class of persons in comparison with another or others, on the basis of ... religion" or other prohibited ground. There is little doubt that the main focus of Ms. Maughan's evidence and submissions throughout the trial was directed to the role Dr. Weir played in the events ultimately leading to the commencement of the underlying action.

[81] The trial judge engaged in a lengthy analysis of the evidence as it related to Ms. Maughan's claim that Dr. Weir had breached the provisions of the *CRPA*. For ease of analysis, he broke her claims down into various periods and events: (1) the seminar itself, which occurred between January and May 2001; (2) the June 2001 emails sent by Dr. Weir to Dr. Echard in response to Ms. Maughan's initial attempt to have her grade expunged; (3) Dr. Weir's statements to Drs. Egan and Danielson made in response to Ms. Maughan's approach to the Department of English Equity Committee on June 25, 2001; (4) Dr. Weir's public comments to the *Ubyssey* student newspaper and the newspaper/magazine *Xtrawest* after the lawsuit was commenced in October 2002; and (5) the publication of the Weir/Petrina articles in November 2004 and November 2005. The trial judge then proceeded to analyze Ms. Maughan's claims against Dr. Weir under each of these headings.

[82] In summary, the trial judge found that there was no evidence that any of the impugned conduct or communications made by Dr. Weir was in breach of the *CRPA*;

that is, there was no evidence that Dr. Weir engaged in conduct or communications which had as its purpose interference with the civil rights of a person (Ms. Maughan) or class of persons in comparison with another or others, on the basis of religion or any other prohibited ground. In our view, he did not err in coming to that conclusion on the evidence before him and we do not find it useful to repeat his analysis in that regard.

[83] Before leaving this issue, we note that Ms. Maughan has applied to introduce "new" and "fresh" evidence on appeal which she submits would lead to a different result. In our view, none of this evidence meets the requisite tests for admission and we would dismiss her application in that regard. We will address the question of the admissibility of this evidence more fully later in these reasons.

(d) The *CRPA* Claims against Dr. Segal, Dr. Scott, Dr. Egan and U.B.C.

[84] The trial judge also found that there was no evidence that the acts and communications of the other individual respondents constituted a breach of the *CRPA*. There was far less evidence relating to these respondents than there was against Dr. Weir.

[85] The trial judge dealt with the *CRPA* claims against these respondents at paras. 385-391 of his reasons for judgment. We agree with the trial judge that there is no admissible evidence from which a reasonably instructed jury could find or infer that there was a breach of the *CRPA* by these respondents in relation to Ms. Maughan.

[86] The claim against U.B.C. under the *CRPA* encompasses not only the communications and acts of the individual respondents, but also of the individuals Ms. Maughan dealt with in the Equity Office. Again, we can find no basis for interfering with the trial judge's conclusion that there is no evidence that U.B.C. was in breach of the *CRPA*.

(e) Conclusion on the *CRPA*

[87] In summary, we are not persuaded that the trial judge erred in finding that there was no evidence of a breach of the *CRPA* by the respondents, or any of them.

5) Negligence

(a) Introduction

[88] In the alternative to her claim under the *CRPA*, Ms. Maughan has pleaded a claim in negligence against each of the respondents.

[89] The trial judge summarized the focus of Ms. Maughan's claim for negligence at paras. 414-415 of his reasons:

> The plaintiff's claim in negligence is pleaded compendiously in para. 101 of her Second Second Second Further Further Statement of Claim as follows:
>
> > The plaintiff claims that Weir's conduct as a professor was negligent, and that insofar as the other defendants instigated, authorized, permitted, committed, conspired or acquiesced to Weir's conduct, they were negligent in their duties as officers, employees and agents of UBC.
> >
> > The plaintiff further pleaded that as she was a student at UBC, the defendants had a duty to take reasonable care to avoid acts or omissions "which they could reasonably foresee would be likely to injure the plaintiff ... and which would foreclose (her) equal opportunity for a future academic career".

[90] The trial judge went on to quote extensively from the pleadings with respect to the numerous acts and communications of the respondents upon which Ms. Maughan relied as evidence of negligence, primarily on the part of Dr. Weir, but also on the part of the other respondents.

[91] The vast majority of the evidence Ms. Maughan relies on to prove her claim in negligence is the same evidence she relied upon to establish her claim under the *CRPA*. In other words, she relies for her claim in negligence on evidence which she submits shows that the respondents breached a duty of care they owed her, and that

they did so on the basis of her religious beliefs. She does not, however, rely on her religious beliefs as the sole basis for her claims in negligence. For example, she submits that Dr. Weir breached the accommodation agreement reached with Ms. Maughan in early February 2001, and then relied upon her own mistaken view that Ms. Maughan had failed to comply with the accommodation agreement as a basis for denigrating and unfairly grading her course work.

[92] Ms. Maughan submits that the trial judge erred in failing to find a duty of care owed to her by Dr. Weir (in particular) that survived the commencement of her action in October 2002. She also submits that the trial judge erred in finding there was no evidence that, assuming one or more of the respondents owed her a duty of care, they failed to meet the standard of care demanded of them in the circumstances. Ms. Maughan accepts the position of the respondents that, by virtue of s. 69 of the *University Act*, she had to lead some evidence of bad faith on the part of the respondents as the basis for her claims of breach of the duty of care. She submits that she did so, and that the trial judge erred in finding otherwise.

[93] The respondents support the decision of the trial judge with respect to his analysis of Ms. Maughan's claims in negligence, except to the extent he found any duty of care owing by Dr. Weir or the other individual respondents to Ms. Maughan by virtue of the professor-student relationship. In their view, significant policy considerations militate against finding a duty of care in the educational context in circumstances such as these. They say that the *Young* decision, in which the Supreme Court of Canada found a duty of care arising in the professor-student relationship, was correctly distinguished on its facts by the trial judge.

[94] The respondents further submit that the Court should decline to decide whether one or more of the respondents owed a duty of care to Ms. Maughan in these circumstances. They submit that the trial judge effectively determined the negligence issue on the basis that Ms. Maughan had failed to lead evidence that the respondents had not met the requisite standard of care, so that her action must fail on a no evidence motion in any event. The respondents urge this Court not to

undertake an analysis of the duty of care, but to assume, without deciding, that there was a duty of care existing up to the time Ms. Maughan issued her Statement of Claim in October 2002, and to find, as the trial judge did, that Ms. Maughan failed to lead evidence that the respondents, or any of them, breached the duty of care.

[95] The respondents also submit that, although the trial judge did not find it necessary to deal with the issue of damages, there is no evidence that Ms. Maughan suffered any damages that are recognized at law. In that regard, they place particular reliance on the decision of the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27, [2008] 2 S.C.R. 114.

(b) The Duty of Care

[96] After careful consideration, and because we agree with the respondents that the issue is one of considerable importance and would benefit from full argument by counsel, we conclude that it would be unwise to make a definitive statement as to whether the respondents, or any of them, owed Ms. Maughan a duty of care prior to Ms. Maughan commencing her lawsuit against the respondents. We are prepared to assume, without deciding, that Dr. Weir, in particular, owed Ms. Maughan a duty of care prior to that date (October 2002). In our view, however, assuming there was such a duty, the nature and extent of the allegations made by Ms. Maughan against the respondents in her Statement of Claim terminated, or, to use the language of the trial judge, “vitiated” any such duty. We do not say that any lawsuit by a student against her professor or the university will terminate an existing duty of care, but here there were serious allegations of discrimination and other unfair treatment which constituted a significant attack on Dr. Weir’s integrity and her reputation. The fact that Ms. Maughan viewed her allegations as justified and pursued them relentlessly only emphasizes the fact that the parties’ relationship had moved beyond a situation of proximity sufficient to found a duty of care, to a situation where they were clearly adversaries.

[97] As noted by the trial judge, to the extent Ms. Maughan believed the respondents went too far in the defence of her allegations against them, it was open

to her to sue for defamation (assuming she could establish a basis in fact and in law for such a suit). We recognize that the *Young* decision contemplates that an action in defamation and negligence can co-exist in appropriate circumstances, but we agree with the trial judge that those circumstances did not exist in this case. While Ms. Maughan was entitled to take a hard line with respect to the alleged discrimination and other unfair treatment she believed she had suffered at the hands of the respondents, we agree with the trial judge that the evidence did not support a duty of care owing to her after she commenced action, particularly given the nature of the allegations contained in her Statement of Claim (including amendments thereto).

[98] In summary on this point, for the purpose of this appeal we assume, without deciding, that Dr. Weir and the other respondents owed Ms. Maughan a duty of care while Ms. Maughan was a student, and prior to her commencing the underlying action; that is, prior to October 23, 2002, but not thereafter.

(c) The Standard of Care

[99] The respondents submit that, in order to succeed in an action in negligence against the respondents, Ms. Maughan must lead evidence that one or more of the respondents acted in bad faith toward her in relation to the impugned acts or communications set forth in her pleadings. The respondents rely on s. 69(1) of the *University Act* as establishing that bad faith (which they equate with the absence of good faith) is the relevant standard of care.

[100] Section 69, which is headed “Limitation of liability”, provides:

> 69(1) An action or proceeding must not be brought against a member of a board, senate or faculties, or against an officer or employee of a university, in respect of an act or omission of a member of a board, senate or faculties, or officer or employee, of the university done or omitted in good faith in the course of the execution of the person’s duties on behalf of the university.
>
> (2) In an action against a university, if it appears that the university acted under the authority of this Act or any other Act, the court must dismiss the action against the university.

[101] The trial judge stated, at para. 413 of his reasons for judgment that:

> I conclude that the effect of s. 69(1) of the ***University Act*** is to preclude the successful prosecution of the claim in negligence against the faculty defendants and UBC in the absence of evidence of bad faith.

[102] No issue is taken with this conclusion, with which we agree.

(d) Breach of the Duty of Care

[103] After determining the standard of care, the trial judge set out the pleadings in which Ms. Maughan particularized the conduct of the respondents which she alleged demonstrated bad faith on their part with a resultant breach of the duty of care. He reviewed in considerable detail Ms. Maughan's allegations; distinguished the *Young* decision upon which Ms. Maughan relied (both with respect to whether there was a duty of care, and whether there was evidence of a breach of that duty); examined the significance of Dr. Weir's unfounded view that Ms. Maughan's allegations were motivated in part by Dr. Weir's sexuality (he stated that Dr. Weir's view was honest, but mistaken); and concluded (at para. 446) that there was "no evidentiary basis upon which a claim in negligence could be found against Dr. Weir."

[104] Assuming that there was a duty of care owing to Ms. Maughan up to the time she commenced action against the respondents, we are not persuaded that the trial judge erred in concluding that there was no evidence that Dr. Weir had acted in bad faith in relation to any of the matters alleged against her during that time. With respect to Ms. Maughan's reliance on Dr. Weir's breach of the accommodation agreement as an example of bad faith, we note that the trial judge stated that the breach was inadvertent and not based on ill will or bad faith on the part of Dr. Weir.

[105] Since we agree with the trial judge that there was no relevant duty owing by Dr. Weir or the other respondents after the lawsuit was commenced, no actions by her thereafter could have constituted a breach, with the result that her claim in negligence could not succeed.

(e) Damages

[106] The trial judge did not find it necessary to address the question of damages. On appeal, the respondents submit that Ms. Maughan did not lead evidence of compensable damages at trial. They state that, at best, Ms. Maughan led evidence that she had suffered stress and anxiety as a result of the various proceedings she engaged in to challenge the assessment process. They point to the fact that she did not provide any medical report or other evidence establishing any significant psychological or other compensable injury caused by the impugned actions of the respondents. They also submit that there is no evidence that Ms. Maughan suffered any economic loss arising from the respondent's actions.

[107] The respondents rely on the following passage at para. 9 of the *Mustapha* decision as support for their submission that Ms. Maughan did not establish evidence of compensable damages:

> ... Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

[108] We agree with the respondents that Ms. Maughan did not lead evidence of compensable injury. She provided some medical records at trial, but those records are generally unhelpful and their contents are not tied to the actions of the respondents *per se* beyond Ms. Maughan's evidence that she suffered stress and anxiety in relation to these matters.

[109] Although Ms. Maughan stated that she had intended to pursue a Ph.D. degree prior to the events leading to this lawsuit, she did not apply for a Ph.D., or

lead evidence that anything the respondents had said or done precluded her from making or succeeding on such an application. In oral submissions on appeal, the most she was able to say was that, as a result of these events, she did not have the heart to pursue a Ph.D. degree. That may be so, but such a submission does not constitute evidence of compensable damage. Nor did Ms. Maughan allege that anything done by the respondents affected her ability to obtain employment.

[110] Thus, in our view, Ms. Maughan's claim in negligence would also have failed on the basis that she had led no evidence of compensable damage.

(f) Claims in Negligence Against Dr. Scott, Dr. Segal, Dr. Egan and U.B.C.

[111] The principal allegations of negligence, like the principal allegations of breach of the *CRPA*, were led against Dr. Weir. Ms. Maughan also made individual claims in negligence against each of Dr. Scott, Dr. Segal and Dr. Egan. The trial judge dealt with these claims at paras. 447- 487 of his reasons for judgment. We agree with his analysis and conclusions with respect to the claims in negligence against these respondents, substantially for the reasons given by him.

[112] The claims against U.B.C. turned on the actions of its employees or agents. Since the trial judge found no evidence of negligence against any of the respondents, or in relation to the workers in the Equity Office who were not named as respondents, it followed that the claim against U.B.C. must also be dismissed.

[113] Our additional conclusion that Ms. Maughan failed to lead some evidence of compensable damages would also apply to her claims of negligence against these respondents.

(6) Reasonable Apprehension of Bias

[114] Ms. Maughan submits that this Court should order a new trial on the basis of a reasonable apprehension of bias on the part of the trial judge such that a reasonable person would conclude that she had not had a fair and impartial trial.

She submits that this apprehension of bias arises from his conduct of the trial, including his exclusion of evidence favourable to her and his direction of her during the course of the trial with respect to what evidence she could lead and how she should lead it (chronologically, rather than thematically). She submits that the trial judge essentially adopted the respondents' framing of the issues, their theory of the case and their interpretation of the evidence, and that he effectively ignored what she viewed as key issues and evidence. She details her concerns in numerous paragraphs of her factum.

[115] The test for a reasonable apprehension of bias is set out in the following passage from the dissenting reasons of de Grandpre J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at para. 394:

> ... the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude ...

[116] In our view, there is no basis in the record for suggesting that the trial judge conducted the trial in anything other than an even-handed and fair manner. He suggested that Ms. Maughan present her evidence in a chronological manner, rather than thematically, as she preferred, but with a view to having the evidence developed in an orderly fashion. He also directed Ms. Maughan as to the difference between giving evidence and making argument, and with respect to the manner in which she sought to introduce evidence. This direction was necessary since Ms. Maughan is not a lawyer and could not be expected to have a grasp of all of the rules of evidence and procedure which govern a trial. It is evident from the transcript that the trial judge was endeavouring to assist Ms. Maughan in the orderly presentation of her case; not to thwart her or to derail her case.

[117] While it is true that the trial judge eventually concluded that the respondents should succeed in their submission that Ms. Maughan had not presented a case

which called upon them for a response, that conclusion was the result of his application of the law to the evidence, not an indication of bias.

[118] In the result, the trial judge did not accept Ms. Maughan's interpretation of the evidence. He gave thorough reasons for his decision. In our view, her rights were respected during the trial, and what she now presents as an apprehension of bias on the part of the trial judge is little more than her strong disagreement with his disposition of her case.

[119] We are satisfied that this ground of appeal is without foundation.

(7) New Evidence

[120] Ms. Maughan seeks to introduce volumes of "new" and "fresh" evidence on appeal. Some of the documents contained in her materials are simply proceedings from another trial which she alleges demonstrate that counsel for U.B.C. has taken contradictory positions as to the applicability of the *Charter* to U.B.C. Although we do not agree with Ms. Maughan's submission in that respect, we advised her during the hearing of the appeal that if she wished to adopt the argument of counsel for U.B.C. in the other proceedings as supporting her *Charter* argument in this appeal, she was free to do so, and she could refer to the materials for that purpose. She chose not to pursue that point and, as earlier stated, we have concluded that her *Charter* arguments are without merit in any event.

[121] Ms. Maughan seeks to lead evidence which was available at trial and which does not meet the criteria for the admission of fresh evidence set forth in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and applied in countless decisions since then in both the criminal and civil context.

[122] Finally, there are documents which Ms. Maughan seeks to admit which post-dated the trial (the "new evidence"). It is rare that new evidence will be admitted on appeal. In the words of Madam Justice Rowles, speaking for the Court in *Struck v. Struck*, 2003 BCCA 623 at para. 37: "Generally speaking the need for certainty and

finality leaves no room for the admission of such evidence on appeal [citations omitted].”

[123] In this case, which was heard over many days, and which was decided on a no evidence motion, it would be anomalous to now permit Ms. Maughan to lead further evidence to bolster her case. To do so would completely undermine the entire point of a no evidence motion. Further, in our view, the evidence which Ms. Maughan proposes to lead as either fresh evidence or new evidence could not have affected the result at trial.

(8) Costs

[124] Ms. Maughan submits that the trial judge erred in awarding costs against her. She relies on the fact that there is very little authority either interpreting the *CRPA* or dealing with claims of negligence in the context of the student-professor relationship. In her view, therefore, her action should have been regarded in the nature of a “test case” in which each party bears its own costs.

[125] In our view, there is no basis for treating this action as a “test case” justifying a departure from the usual rule as to costs, which is that costs follow the event. This is not a test case as, for example, when the government decides to test a new law by choosing a particular litigant to test it against. In such a case, there is something to be said for requiring the government to fund the litigation, since it initiated the suit with a view to testing its own law for the benefit of the public.

[126] In this case, it is Ms. Maughan who chose to institute this litigation against these respondents. She did so on the basis of allegations which the trial judge, and now this Court, have found were not supported by an evidentiary foundation. The respondents, in the meantime, have been forced to participate in this litigation, not of their choosing, for seven years. We can see no basis for finding that any of them should be required to fund the litigation by compelling them to pay their own costs.

[127] We would uphold the trial judge's order of costs and award the respondents costs of the appeal.

DISPOSITION

[128] We would dismiss the appeal with costs to the respondents.

"The Honourable Madam Justice Prowse"

"The Honourable Mr. Justice Lowry"

"The Honourable Mr. Justice Frankel"