

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER of the Individual's Rights Protection Act, R.S.A. 1980, c. 1-2, as amended;

AND IN THE MATTER of the Decision of a Board of Inquiry appointed pursuant to section 27 of the Individual's Rights Protection Act

B E T W E E N:

ALEKSANDRA VINOGRADOV

Appellant

- and -

THE GOVERNORS OF THE UNIVERSITY
OF CALGARY, ROBERT LOOV and
THE ALBERTA HUMAN RIGHTS COMMISSION

Respondents

FACTUM OF THE APPELLANT

BRYAN E. MAHONEY
Barrister and Solicitor
Stanley House
1740 - 10th Street S.W.
Calgary, Alberta
T2T 3E8

Bryan E. Mahoney
(403) 228-0040

Solicitors for the Appellant

BENNETT JONES VERCHERE
Barristers and Solicitors
3200 Shell Centre
400 - 4th Avenue S.W.
Calgary, Alberta
T2P 0X9

Robert W. Thompson
(403) 298-3100

Solicitors for the Respondents

TABLE OF CONTENTS

	<u>Page No.</u>
PART I - THE FACTS	1
A. Introduction and Procedural History	1
B. Facts of the Case	4
Dr. Vinogradov	4
Women in Engineering	8
Withdrawal of N.S.E.R.C. Fellowship	9
Dr. Vinogradov's Initial Selection for a Tenure Stream Position	12
Dr. Loov's Campaign Against the Appellant ..	14
a) The Student Survey	15
b) Dr. Loov's Charges Against Dr. Vinogradov	18
Subsequent to Being Refused Appointment	24
C. The Decision Appealed From	27
PART II - ERRORS IN JUDGMENT	30
OF THE BOARD	30
OF MR. JUSTICE ROWBOTHAM	31
PART III - LEGAL ARGUMENT	32
THE DECISION OF THE BOARD OF INQUIRY	32
(a) Systemic Discrimination	32
(b) Burden of Proof	41
(c) Pretext	47
SUMMARY	54
MR. JUSTICE ROWBOTHAM'S ORDER	55

(a) As to the Finding there was no Error of Law	55
(b) As to the Refusal to Grant Leave	57
AS TO THE POWERS OF THIS HONOURABLE COURT ON APPEAL	58
PART IV - NATURE OF ORDER REQUESTED	61
APPENDIX A	62
Grounds of Appeal or Intended Appeal Dealt with by Rowbotham J.	62
APPENDIX B - LIST OF AUTHORITIES	64
APPENDIX C - STATUTES	66

PART I
THE FACTS

A. Introduction and Procedural History

1. The Appellant herein, Dr. Aleksandra Vinogradov, brought a complaint of discrimination under section 7 of the Individual's Rights Protection Act ("the Act"), arising from a refusal to appoint her to a "tenure stream" position in the Department of Civil Engineering at the University of Calgary.

2. Her complaint was an individual case of sex discrimination, which occurred in a context - an academic engineering faculty - from which women have been systematically excluded. The specific discrimination against Dr. Vinogradov involved particular invidious acts and procedural irregularities combined with the "business as usual" of the faculty recruitment system which had been part of the systemic discrimination.

3. Dr. Vinogradov had had a series of limited term and contract appointments in the Faculty of Engineering at the University of Calgary since 1977, before applying for a "tenure stream" position in 1984. During that time, she had received numerous excellent ratings as a teacher, and was the recipient of the prestigious University Research Fellowship of the Natural Sciences and Engineering Research Council (N.S.E.R.C.). This Fellowship, however, was not renewed: the heavy teaching load she was required to carry, contrary to the N.S.E.R.C. guidelines to the University in this regard, interfered with her ability to conduct research of the quality and quantity expected.

Paragraphs 13-15; 24-31, infra

4. Dr. Vinogradov was initially accepted by the Appointment Committee for the tenure stream post which had been advertised. Then Dr. Loov, the Head of the Department, embarked on a campaign to have the recommendation to appoint her rescinded. His efforts included a solicitation of student opinion about Dr. Vinogradov which was not conducted in accordance with University rules and from which she had no right of appeal; the bringing of charges of poor teaching and other alleged offences against her before a recalled Appointment Committee; the precipitation of a second (written) vote on her candidacy, the bringing of "heat" on one member of the Committee to change his earlier positive vote, and the circulation of additional material to the Committee prior to that vote and after Dr. Vinogradov had her one chance to deal in person with Dr. Loov's charges.

Paragraphs 35-58; 118, infra

5. Dr. Vinogradov was not given the tenure stream appointment after this second meeting. She remained in the Department, however, teaching on a contract basis and conducting research supported by N.S.E.R.C. operational grants.

Paragraphs 62-65, infra

6. Had Dr. Vinogradov been appointed, she would have been the first woman to hold a tenure stream appointment in the Department of Civil Engineering. The Faculty of Engineering at the University of Calgary, like other engineering faculties in Canada, is male-dominated at the level of the professoriate, and in the student population. In this particular competition, the Department Head who campaigned against Dr. Vinogradov's appointment favoured a candidate whose educational and personal profile closely matched that of previous hiring - young, male,

relatively inexperienced, without a Ph. D. or publications. For the University to have hired an experienced female researcher and teacher like Dr. Vinogradov would have been a departure from tradition.

Paragraphs 19-23, infra

7. Dr. Vinogradov's complaint was heard by a Board of Inquiry composed of E.W.N. MacDonald, Q.C., and dismissed in a decision delivered 20 July 1988. He concluded that Dr. Vinogradov's situation was the result of "atrociously bad luck" and personal failings, including her past assertion of claims of discrimination and her "lack of candour" in dealing with the charges against her which Dr. Loov put before the reconvened Appointment Committee. He did not place any weight on the systemic discrimination in the Faculty.

Judgment of Board of Inquiry, Binder 14, Tab
1

8. A notice of motion seeking leave to appeal that decision on several questions of fact or mixed law and fact was brought before Mr. Justice Rowbotham of the Court of Queen's Bench of Alberta, Judicial District of Calgary, as was an appeal from the decision on questions of law. While several of the grounds of appeal or intended appeal were abandoned, Mr. Justice Rowbotham dealt with the grounds set out in Appendix A hereto.

Originating Notice of Motion, Binder 14, Tab
2

Reasons of Mr. Justice Rowbotham, Binder 14,
Tab 7, pp. 1-2

9. By order delivered 2 March 1989, Mr. Justice Rowbotham refused to grant leave to appeal on the alleged factual errors or

the questions of mixed law and fact, saying he was unable to find that the Board drew the wrong inferences from the evidence or acted unfairly or in a discriminatory manner in dealing with the facts presented to it.

Reasons of Mr. Justice Rowbotham, Binder 14,
Tab 7, p. 2

10. In the same order, Mr. Justice Rowbotham refused to allow the appeal on the question of law, holding that the Tribunal had acted in good faith and within the relevant legislation, and moreover, had not committed an error of law in refusing to deal with the second meeting of the Committee called by Dr. Loov or to deal with the evidence globally.

Reasons of Mr. Justice Rowbotham, Binder 14,
Tab 7, pp. 2-3

11. In this appeal, the Appellant seeks to reverse the decision of Mr. Justice Rowbotham. The Appellant also asks this Court of Appeal, pursuant to subsection 33(7) of the Act, to reverse the order of the Board and grant her the relief the Board could have granted, namely appointment to a tenure stream position, damages for lost salary, expenses and costs.

12. This appeal challenges errors which together resulted in misallocations of burdens of proof and circumvented the legal necessity in a case like this to evaluate the individual in a systemic context.

B. Facts of the Case
Dr. Vinogradov

13. Dr. Vinogradov achieved her Masters degree, with distinction, in 1962, then practised as an engineer at the Coal

Industry Design Institute at Lugansk. After obtaining her Ph.D. in solid mechanics at Leningrad University in 1972, she spent six years in industry as a research group supervisor at a National Research Institute in the Soviet Union. Associated with the University of Calgary from 1977 in a series of limited term and contract positions, she taught several undergraduate and graduate courses and supervised graduate students. She had published 31 articles, in national and international engineering publications in English, French and Russian by the time of applying for the geotechnical appointment in 1984; by the time of the Inquiry, she had a total of 46 published articles. In 1984, she received a N.S.E.R.C. research grant for \$48,000, followed by another for \$39,000. As part of the record of the Inquiry, Exhibits 16, 42, 72, 74-78, 99, 100, 105, 138, 142, 143 and 147 were tendered through witnesses who spoke highly of her achievements in teaching and research.

Evidence: Dr. Vinogradov, Binder 1, Vol. 1,
p. 47, L. 20-24; p. 129, L. 9-19

Binder 10, Exhibit 7

Binder 11, Exhibit 107

14. In 1980, Dr. Vinogradov was awarded a University Research Fellowship (U.R.F.) by the Natural Sciences and Engineering Research Council (N.S.E.R.C.). These fellowships were awarded only to "very promising and experienced researchers in the natural sciences and engineering". They financed the cost to the University of the recipient's salary in return for requiring the Fellow to teach only a 25% load, so as to permit enhanced involvement in research. One of the important criteria for awarding this Fellowship was "the assessment of the commitment of the University to the candidate and the likelihood of his/her being effectively integrated into the host department".

Evidence: Dr. Vinogradov, Binder 1, Vol. 1,
p. 45, L. 12-24

Evidence: Dr. Franklin, Binder 4, Vol. 11,
p. 1232, L. 26 to p. 1234, L. 9; p. 1242, L.
1-22; p. 1245, L. 21 to p. 1246, L. 16

Binder 11, Exhibits 106A, 109, 110

15. From 1980 to 1983, Dr. Vinogradov's teaching and research received very positive reviews from senior colleagues and administrators, including the Dean and Associate Dean of Engineering and the Head of the Department of Civil Engineering. She was regarded as "excellent", "effective" and "well above average". Indeed, even the Board found that during the years 1980-83, "There was nothing untoward about Dr. Vinogradov". He stated "She appeared to be accepted as a better than average teacher and researcher...".

Reasons of the Board, Binder 14, Tab 1, p. 3

Evidence: Dr. Malik, Binder 2, Vol. 6, p.
683, L. 6-14

Evidence: Dr. Ward, Binder 6, Vol. 17, p.
1736, L. 14-16; p. 1738, L. 9-15

Binder 10, Exhibits 16, 66

Binder 11, Exhibits 72, 74-78, 99, 100

Binder 12, Exhibit 147

16. In spite of the positive teaching evaluations and the high quality of her research, Dr. Vinogradov's salary throughout this period was below the peer average.

Evidence: Dr. Franklin, Binder 4, Vol. 11, p.
1242, L. 1-12

Binder 11, Exhibit 106A

17. Moreover, throughout the years of her association with the University of Calgary, Dr. Vinogradov had no access to a tenure stream appointment. Her appointments were all contractually limited, affording no opportunity for promotion or the securing of tenure. This situation may be contrasted to the progress made by several male academics, hired in the tenure stream between 1969 and 1987, as shown by Exhibit 278:

C.V. DATA COMPARATIVE-CHART

LD.	POSITION AT U of C	APPOINT- MENT DATE	Ph. D. DATE	PROFESSIONAL EXPERIENCE PRIOR TO APPOINTMENT	
				Years	Publications
#1	Assistant Professor	1969	1969	6	0.5
	Associate Professor	1973		10	1.5
#2	Assistant Professor	1976	1976	7	3.0
	Associate Professor	1979		10	8.5
	Professor	1987		18	27.0
#3	Associate Professor	1978	1973	9	8.0
#4	Associate Professor	1987	1979	8	7.0
#5	Assistant Professor	1983	1985	7	0
	Associate Professor	1987		11	5.0
#6	Assistant Professor	1985	1984	2	1.0
Vinogradov	Denied	1985	1972	17	23.0

Binder 10, Exhibit 7

Binder 11, Exhibit 106A

Binder 13, Exhibit 278

Women in Engineering

18. There have been no women in tenure stream, or tenured, positions in the Department of Civil Engineering at the University of Calgary.

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 580, L. 1-5

Evidence: Maria Fogarasi, Binder 6, Vol. 18, p. 1946, L. 17-22

19. Dr. Ward, the Department Head before Dr. Loov, believed Dr. Vinogradov would have a difficult task of carrying the burden of being a woman in what he called "a decidedly male chauvinistic environment". In working in a department where everyone else is male, he said, "you don't have colleagues of the same sex and I think that has got to count - it has got to be somewhat negative".

Evidence: Dr. Ward, Binder 6, Vol. 17, p. 1791, L. 6-21

Binder 11, Exhibit 74

20. Dr. Bruce Irons, a senior professor in the Civil Engineering Department, reflected upon the presence of Dr. Vinogradov in this totally male context: "For the first time in my working life, I now have a colleague who is female and obviously above the male average."

Binder 11, Exhibit 72

21. This absence of women in the tenure stream in the Department of Civil Engineering is part of the pattern of systemic discrimination against women at the University of Calgary recognized by the University Senate Report on Employment Trends. Engineering at the University of Calgary was described in the Report as "a case all to itself": "The female percentages are so small as to be hardly visible".

Binder 12, Exhibit 112, pp. 5, 9

22. The situation in Calgary is comparable to that in Canada overall. Breslauer and Gordon observe "It is truly astonishing to note that in all of Canada in 1985-86, in all ranks, there were only 62 full-time female faculty in Engineering and Applied Sciences (among them seven Full Professors and 16 Associates) which represented 2.3% of the full-time faculty in Engineering and Applied Sciences".

Helen Breslauer and Jane Gordon, The Two-Gender University: Catching Up to Changes in the Clientele (Paper prepared for a joint session of the Canadian Sociology and Anthropology Association and the Canadian Society for the study of Higher Education, Laval University, June, 1989), p. 21

Withdrawal of N.S.E.R.C. Fellowship

23. In the spring of 1983, Dr. Vinogradov was advised that N.S.E.R.C. was refusing a two year extension of her Fellowship because the "quality and quantity" of her research did not measure up to their standards. In an attempt to reverse this decision, her University colleagues wrote glowing letters testifying to the excellence of her teaching and research. However, Dr. Vinogradov's efforts at that time to secure a regular university teaching position were unsuccessful.

Reasons of the Board, Binder 14, Tab 1, pp.
4-5

24. Dr. Ursula Franklin, a distinguished scientist who was a member of the newly formed N.S.E.R.C. from 1978 to 1981, testified that a significant factor in the N.S.E.R.C. decision not to renew her Fellowship was the University's requirement that she undertake a teaching load comparable to that of a full academic staff member, plus the increased research load required by the terms of the Fellowship.

Evidence: Dr. Franklin, Binder 4, Vol. 11,
p. 1252, L. 17-21; p. 1255, L. 26-27; p.
1256, L. 1-14

25. The Board agreed that "Dr. Vinogradov probably taught more than the 25% allowable by N.S.E.R.C.", and that "the University seemed to take advantage of this situation...". The Board, however, attached no weight to this finding because of his views that men were also exploited, and that, in any event, to "ordinary people" the resulting workload would not be seen as overwork.

Reasons of the Board, Binder 14, Tab 1, pp.
5-6, 37

26. The Board also accepted that "By supporting a person to obtain an N.S.E.R.C. grant there appears to be some obligation on the part of the University to make efforts to obtain this employment for the applicant", although he found there was nothing in writing making this mandatory, and that even if there had been such an obligation, it ended with the loss of Dr. Vinogradov's N.S.E.R.C. grant.

Reasons of the Board, Binder 14, Tab 1, pp.
4, 7-8, 32

27. Moreover, the Board found in Dr. Vinogradov's attempts to reverse this N.S.E.R.C. decision, or to survive its adverse consequences, justification for her later treatment by the University. He wrote deprecatingly of her "using everything in her power" to get a salaried position at the University, and "continually going over everyone's head to attempt to get her desires".

Reasons of the Board, Binder 14, Tab 1, pp.
10, 29

28. In a long indictment of her conduct, the Board wrote:

Dr. Vinogradov undoubtedly did things that would not enhance her getting a job. She talked discrimination from the start even when none existed. She threatened legal action before I think there was any existence for such threats. She complained constantly about her treatment in late 1983 and 1984 when I felt that Dr. Ward was trying to assist her. She appealed every move of the Department, the Dean and the Vice-President Academic. She felt after losing her N.S.E.R.C. grant that the University owed her. If they did it must be based on something that was not placed in evidence at this hearing. I think if anyone, male or female, had acted in this manner that he or she could anticipate some future problems in obtaining full time or limited term appointment.

Reasons of the Board, Binder 14, Tab 1, p. 29

29. In fact, Dr. Vinogradov's efforts to stabilize her employment situation after the N.S.E.R.C. decision did not, initially, cause her colleagues to be negative regarding her integration in the department. There was solid evidence in the record that her colleagues considered her easy to get along with, cooperative, and pleasant, and thought she fitted into the Department "as well as any other individual, male or otherwise".

Evidence: Dr. Ward, Binder 6, Vol. 17, p.
1791, L. 22-27; p. 1792, L. 1-2

Evidence: Dr. Loov, Binder 4, Vol. 13, p.
1434, L. 11-18

Binder 11, Exhibits 88, 99

Binder 12, Exhibits 133, 147

Dr. Vinogradov's Initial Selection for a Tenure Stream Position

30. In June 1984 the Department of Civil Engineering sought to fill a regular academic position in the geotechnical area at the Assistant or Associate Professor level, to start in January of 1985. Pursuant to the regular University and Department procedures in this regard, an Appointment Committee was struck, to make a recommendation to the Dean, who was to pass it, in turn, to the President. The Committee comprised six staff members in the Department of Civil Engineering, and was chaired by the then Department Head, Dr. Robert Loov. Dr. Loov did not participate in the final Committee vote, but was otherwise very active in its proceedings and openly expressed his opposition to the Appellant's appointment.

Evidence: President Wagner, Binder 7, Vol. 24, p. 2361, L. 23-27; p. 2362, L. 1-27

Evidence: Dr. Vinogradov, Binder 1, Vol. 1, p. 62, L. 24-27

Evidence: Dr. Muzik, Binder 2, Vol. 5, p. 593, L. 11-18

Evidence: Dr. Loov, Binder 4, Vol. 13, p. 1458, L. 8-23; p. 1459, L. 22-27; p. 1460, L. 1-5; p. 1462, L. 3-9

Binder 10, Exhibits 3, 5, 6

Reasons of the Board, Binder 14, Tab 1, p. 11

31. Dr. Vinogradov applied for the position. After a thorough scrutiny of the candidates, the Committee voted by a "straw vote", in December of 1984, four to two in favour of recommending her appointment. Following an even more thorough review of her credentials, including examination of her educational background, review of a number of her research

publications and her presentation of a seminar in the Department, the Committee on 18 January 1985 voted five to one in favour of recommending her appointment.

Evidence: Dr. Vinogradov, Binder 1, Vol. 1, p. 57, L. 18-27; p. 58, L. 1-10, 21-27; p. 59, L. 1-27; p. 60, L. 1-21, p. 69, L. 17-27; p. 70, L. 1-11

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1305, L. 8-22; p. 1308, L. 8-16; p. 1310, L. 18-26; p. 1311, L. 11-27; p. 1312, L. 1-3; p. 1312, L. 16-26; p. 1313, 14-21; p. 1317, L. 2-27; p. 1318, L. 1-13

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 534, L. 27; p. 535, L. 1-4; p. 536, L. 10-27, p. 537, L. 1-14

Evidence: Dr. Muzik, Binder 2, Vol. 5, p. 591, L. 1-8

Evidence: Dr. Kuhlmeier, Binder 9, Vol. 30, p. 2746, L. 10-12

32. After the Appointment Committee recommended to Dr. Loov that Dr. Vinogradov be appointed, he advised her of his intention to forward the recommendation to the Dean. Thomas Barton, the Dean of Engineering, stated at the hearing that had he received the Appointment Committee recommendation from Dr. Loov, he would have made the appointment. Norman Wagner, President of the University, would have also made the appointment so long as the Vice-President, Academic, confirmed the funding for the position was in place.

Dr. Vinogradov, Binder 1, Vol. 1, p. 69, L. 17-27; p. 70, L. 1-11

Evidence: Dr. Barton, Binder 5, Vol. 16, p. 1698, L. 17-27; p. 1699, L. 1-4

Evidence: President Wagner, Binder 7, Vol. 24, p. 2362, L. 16-27

Dr. Loov's Campaign Against the Appellant

33. However, Dr. Loov did not forward to the Dean the recommendation of the Committee to hire Dr. Vinogradov. Instead, he embarked upon a course of conduct that caused the Board to find that, by June of 1985, "It is clear at this point that Dr. Loov is leading the charge to have her appointment rescinded." He was "actively trying to convince the committee to change its mind...."

Reasons of the Board, Binder 14, Tab 1, p.
19, 34

34. The means adopted by Dr. Loov to get the committee to rescind its initial recommendation have been summarized at paragraph 4, above, and are dealt with in more detail below.

35. During the initial deliberations of the Appointment Committee, it had been clear that Dr. Loov opposed Dr. Vinogradov's appointment. He favoured Mr. Vandamme, who was a graduate student who had not completed his Ph.D., had no professional experience, and no publications. In these characteristics, Mr. Vandamme was markedly similar to most of the other persons hired by the Department over the course of the previous years, as shown by Exhibit 278, reproduced above at paragraph 17.

Evidence: Dr. Loov, Binder 4, Vol. 13, p.
1462, L. 3-11; Binder 5, Vol. 15, p. 1603,
L. 12-27; p. 1604, L. 1-10

Binder 12, Exhibits 121, 122

36. Hiring Dr. Vinogradov, an experienced female scholar

and teacher, with a doctorate and many publications, would constitute a departure from this previous pattern.

Binder 13, Exhibit 278

37. Even after the Appointment Committee rejected Mr. Vandamme's candidacy, Dr. Loov continued to support him, particularly in informal submissions to Dean Barton. A colleague sympathetic to Dr. Loov's views wrote to the Dean that Dr. Loov was in a "difficult situation" as he "felt constrained" by the Committee vote.

Evidence: Dr. Loov, Binder 4, Vol. 13, p. 1449, L. 8-22; p. 1462, L. 3-11

Evidence: Dean Barton, Binder 5, Vol. 16, p. 1683, L. 20-27; p. 1684, L. 1-12; p. 1717, L. 3-27; p. 1718, L. 1-20

Binder 11, Exhibit 79, 80

a) The Student Survey

38. Soon after telling Dr. Vinogradov that he would forward to the Dean the Appointment Committee recommendation, Dr. Loov conducted a survey of student opinion of all full-time Civil Engineering faculty members including Dr. Vinogradov. He gave two reasons for including Dr. Vinogradov in the survey: because he anticipated that she would soon be a member of the Department, and because he had received prior negative student comments about her. Dr. Vinogradov ranked lowest in the group surveyed by Dr. Loov.

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1334, L. 16-22; Vol. 13, p. 1487, L. 17-27; p. 1488, L. 1-21; p. 1491, L. 4-13; p. 1493, L. 24-27; p. 1494, L. 1-27; p. 1495, L. 1-4; p. 1496, L. 2-19

Evidence: Judy Lo, Binder 9, Vol. 30, p.
2812, L. 23-27; p. 2813, L. 1-11

Binder 10, Exhibit 19

Binder 11, Exhibit 92

39. The student survey conducted by Dr. Loov did not follow faculty guidelines which are designed to protect the integrity of such surveys. It was irregular in several important respects:

- (a) the questionnaire used in the student survey was different in form from that adopted by the Faculty Office;
- (b) Dr. Loov administered the questionnaire after the end of the term, a departure from the previous pattern of timing of student surveys;
- (c) the survey was conducted by the Department Head and not by the staff from the Faculty Office as required by the faculty guidelines;
- (d) the results of the survey were processed by the Dr. Loov and not by the staff from the Faculty Office as required by the above guidelines.

Evidence: Dr. Malik, Binder 2, Vol. 6, p.
690, L. 21-27; p. 691, L. 1-13

Evidence: Dr. Norrie, Binder 3, Vol. 8, p.
932, L. 12-27

Evidence: Dean Barton, Binder 5, Vol. 16, p.
1637, L. 12-27; p. 1638, L. 1-14

Evidence: Dr. Loov, Binder 4, Vol. 12, p.
1336, L. 17-27; Vol. 13, p. 1485, L. 10-16;
p. 1337, L. 1-9

Binder 12, Exhibit 163

40. Moreover, Dr. Vinogradov did not have a right to appeal the results of the survey, as provided to full-time faculty by the collective agreement, because she was a sessional instructor holding a part-time appointment. By contrast, two full-time members of the Department, Dr. Muzik and Dr. Joshi, testified at the inquiry that they successfully appealed the results of Dr. Loov's evaluation following the regular appeal procedure.

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1334, L. 16-22

Evidence: Dr. Romney, Binder 2, Vol. 5, p. 631, L. 27; p. 632, L. 1-15

Evidence: Dr. Muzik, Binder 2 Vol. 5, p. 605, L. 11-27; p. 606, L. 1-6

Evidence: Dr. Joshi, Binder 2, Vol. 4, p. 464, L. 21-27; p. 465, L. 1

41. Dr. Loov refused Dr. Vinogradov's request that he provide to her the original documents containing the student comments and he refused to tell her the reason for the survey and the reason for the methods used. Dr. Vinogradov expressed in writing her disagreement with the validity of the student survey results and requested Dr. Loov to look at earlier positive surveys. He refused.

Evidence: Dr. Vinogradov, Binder 1, Vol. 1, p. 78, L. 6-27; p. 79, L. 1-27; p. 80, L. 1-10;

Evidence: Dr. Loov, Binder 5, Vol. 14, p. 1538, L. 24-27; p. 1539, L. 1-27; p. 1540, L. 1-19

Binder 10, Exhibit 16

42. The Board of Inquiry minimized these failings of Dr. Loov's evaluation by saying, "...while it is subject to the same criticisms as any student survey at least, as it affected Dr. Vinogradov, it concerned courses that she had completed teaching." (emphasis supplied) There is no evidentiary basis for this opinion about criticisms of student surveys generally.

Reasons of the Board, Binder 14, Tab 1, p. 17

43. Two days after conducting the student survey, Dr. Loov wrote a memo to the other Appointment Committee members indicating his intention to reconvene the Appointment Committee in order to have them withdraw the positive recommendation of Dr. Vinogradov for the position.

Binder 11, Exhibit 92

b) Dr. Loov's Charges Against Dr. Vinogradov

44. Between doing the student survey and the Appointment Committee meeting of 21 June 1985, Dr. Loov conducted an investigation into the competency and credentials of Dr. Vinogradov. Only three days before the meeting, he presented Dr. Vinogradov with the following list of charges:

- (a) failing to cover all topics in the calendar description of the course;
- (b) copying course notes from a textbook without acknowledging the source;
- (c) setting examination questions that were identical to questions in the textbook or identical to questions on previous year examinations and quizzes;

- (d) submitting a Curriculum Vitae with her application for the position that had certain differences from a 1980 Curriculum Vitae.

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1343, L. 3-14; Binder 5, Vol. 14, p. 1541, L. 10-25

Binder 10, Exhibit 19

Reasons of the Board, Binder 14, Tab 1, p. 18

45. Dr. Vinogradov, under protest, agreed to the consideration of these allegations at the reconvened Appointment Committee, and responded with her written defence on 20 June 1985.

Binder 10, Exhibits 18, 20

46. The June 21 1985 meeting, at which Dr. Loov presented his charges against Dr. Vinogradov, lasted six hours. For four hours, Dr. Vinogradov was required to respond to what the Board of Inquiry called Dr. Loov's "accusations". Most of the questions to the Appellant were posed by Dr. Loov, in the manner of a "critic" or a judge.

Reasons, Binder 14, Tab 1, p. 19

Evidence: Dr. Vinogradov, Binder 1, Vol. 1, p. 102, L. 12-27; p. 103, L. 1-15

Evidence: Dr. Romney, Binder 2, Vol. 5, p. 641, L. 1-10

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 542, L. 18-27; p. 543, L. 1-8; p. 546, L. 20-27; p. 547, L. 1-18; p. 548, L. 4-12

Evidence: Dr. Muzik, Binder 2, Vol. 5, p. 597, L. 17-27; p. 598, L. 1

Binder 12, Exhibit 133

47. After Dr. Vinogradov left the meeting, Dr. Loov stayed to participate in the Appointment Committee discussions. He then suggested a written vote, which eventually took place even though some members of the Appointment Committee preferred to vote immediately. Dr. Vinogradov registered a protest to the written voting method on 24 June 1985, but it proceeded nonetheless. The Board noted in its reasons that the Faculty Association observer had objected to the written vote as "unusual". The Board also stated, "Certainly on the basis of other meetings held by Committees such as this, this was an unusual request...".

Reasons, Binder 14, Tab 1, p. 19

Evidence: Dr. Romney, Binder 2, Vol. 5, p. 642, L. 1-26

Binder 10, Exhibit 21

48. While Dr. Loov refused a request of the Faculty Association observer to contact Appointment Committee members to ask them not to communicate with one another about their vote, he himself had additional contact with them on matters of substance. In particular:

- (a) Dr. Loov circulated further material to the Appointment Committee members after the meeting and before the deadline for voting, 26 June 1985.

Evidence: Dr. Romney, Binder 2, Vol. 5, p. 645, L. 10-25; p. 661, L. 19-27; p. 662, L. 1-16

Evidence: Dr. Loov, Binder 5, Vol. 15, p. 1592, L. 25-27; p. 1593, L. 1-24

Binder 10, Exhibit 22

- (b) Dr. Loov spoke with Appointment Committee member, Dr. Joshi, after the meeting and before Dr. Joshi submitted his final vote. Dr. Joshi said he felt "heat" from Dr. Loov to vote against Dr. Vinogradov.

Evidence: Dr. Joshi, Binder 2, Vol. 4, p. 482, L. 9-27; p. 483, L. 1-27; p. 484, L. 1-27; p. 485, L. 1-4; p. 487, L. 8-14; Binder 2, Vol. 6, p. 766, L. 14-26

Binder 11, Exhibits 82 and 83

49. In their written vote, the Committee voted 3 against and 2 for recommending Dr. Vinogradov for the position. There was one abstention.

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1384, L. 2-27; p. 1385, L. 1-26

Binder 11, Exhibits 82, 83, 87, 89, 95,

Binder 12, Exhibits 133, 134, 135

50. Dr. Joshi, in his typewritten letter dated 3 July 1985, (Exhibit 82) voted against recommending the Appellant's appointment. However, attached to Exhibit 82 was a handwritten note from Dr. Joshi (Exhibit 83) in which he recommended that Dr. Vinogradov be given a definite or fixed term appointment. Dr. Loov kept the typewritten letter containing the negative vote and returned the handwritten note (which recommended an appointment) to Dr. Joshi refusing to have it included in the Appellant's file. Later Dr. Joshi requested Dr. Loov. to have the supportive material included in Dr. Vinogradov's file.

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1388, L. 8-27

Evidence: Dr. Joshi, Binder 2, Vol. 4, p. 471, L. 5-27; p. 472, L. 1-11

Binder 11, Exhibits 80, 82-84

51. On 2 July 1985, Dr. Loov sent to the new Dean of Engineering, Leonard T. Bruton, a letter summarizing the results of the vote. Copies were provided to the Appointment Committee. Dr. Vinogradov was notified on 9 July 1985, that Dr. Loov did not recommend her appointment to Dean Bruton.

Evidence: Dr. Bruton, Binder 8, Vol. 25, p. 2367, L. 16-18

Binder 10, Exhibit 24

Binder 11, Exhibit 87

52. The appointment procedure to which Dr. Vinogradov was subject following Dr. Loov's active intervention after the January 1985 Appointment Committee vote was different from that ordinarily followed.

Evidence: Dr. Muzik, Binder 2, Vol. 5, p. 602, L. 6-21

53. Dr. Gillott, who had been a member of a number of appointment committees, identified the following irregularities in the appointment procedure of Dr. Vinogradov:

- (a) the Head of the Department failed to forward the Appointment Committee recommendation to the Dean of Engineering after the 5:1 January vote;
- (b) further evidence was introduced based on a student survey after the Appointment Committee had discharged its duty;

- (c) a written vote was taken subsequent to the June Appointment Committee meeting;
- (d) and the June meeting itself was an "unusual situation of one person acting as a critic ... of an applicant for a position".

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 546, L. 20-27; p. 547, L. 1-18; p. 548, L. 4-12

54. Dr. Romney, who attended the Appointment Committee meeting on 21 June 1985 as an observer of the University of Calgary Faculty Association, testified that:

- (a) the voting procedure applied in the case of Dr. Vinogradov was "unusual" because of the requirement that a written vote be submitted to the Department Head at a certain time after the meeting; and
- (b) at the meeting, Dr. Romney protested Dr. Loov's suggestion to use the higher criteria of an Associate Professor when Dr. Vinogradov was being considered for the more junior position of an Assistant Professor which had lower criteria and for which the evidence of successful teaching ability was not an essential requirement.

Evidence: Dr. Romney, Binder 2, Vol. 5, p. 646, L. 15-27; p. 647, L. 1-27; p. 648, L. 1-8

Binder 10, Exhibit 3

Binder 11, Exhibit 98

55. Dr. Wirasinghe, Appointment Committee member, wrote in his letter to Dr. Loov dated 25 June 1985 that the process of Dr. Vinogradov's appointment had been replaced by "a case of "judging" a colleague".

Binder 12, Exhibit 133

56. The Board of Inquiry in this case agreed that the reconvened meeting of the Appointment Committee was "not usual" and that Dr. Loov's desire to have written voting was "an unusual request". The Board also stated, while refusing to decide the point, that Dr. Loov's sending material to the Committee members after the meeting had ended "may be wrong if the hearings were judicial...".

Reasons of the Board, Binder 14, Tab 1, pp.
19, 34-35

Subsequent to Being Refused Appointment

57. After an unsuccessful request to Dr. Bruton to investigate the revocation of the recommendation to appoint her, and unsuccessful recourse to other internal procedures, Dr. Vinogradov filed the present complaint to the Human Rights Commission, on 26 August 1985. She also began proceedings in the Court of Queens Bench seeking to quash the decision not to hire her. Mr. Justice Lutz concluded the Appellant was treated unfairly and referred the matter back to the University for reconsideration. This judgment forestalled a second competition for the position which had begun by this time.

Evidence: Dr. Vinogradov, Binder 1, Vol. 1,
p. 119, L. 21-27; p. 120, L. 1-27; p. 121, L.
1-27; p. 122, L. 1-16; p. 128, L. 16-27; p.

125, L. 9-27; p. 126, L. 1-27; p. 127, L. 1-27; p. 128, L. 1-22

Evidence: Dean Bruton, Binder 8, Vol. 25, p. 2408, L. 19-25

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 545, L. 17-27; p. 546, L. 1-19

Evidence: Dr. Loov, Binder 4, Vol. 12, p. 1389, L. 11-27; p. 1390, L. 1-12

Decision of Justice A.M. Lutz dated 22 May 1986, unreported

Binder 10, Exhibit 1

Binder 11, Exhibit 94

58. On appeal to the Court of Appeal the decision of Mr. Justice Lutz was quashed, on the ground that the Appellant was obliged to exhaust her internal remedies before the Board of Governors under s. 18 of the Universities Act. The Court did not deal with the merits of the fairness arguments.

Opening Statement, Binder 1, Tab 1, p. 26, L. 1-27

Reasons of Court of Appeal, Appellant's Brief of Authorities, Tab a

59. Dr. Loov resigned as Head of the Department of Civil Engineering effective 1 July 1986 and Dr. M. Sargious was appointed Acting Head. In a third competition for the vacant geotechnical position that began in July 1986, Dr. Vinogradov was selected to a short list of eight potential candidates, from a field of twenty-four applications. The whole competition was later cancelled at the request of counsel for Dr. Vinogradov because of the court hearings.

Evidence: Dr. Sargious, Binder 7, Vol. 23, p. 2074, L. 13-17; p. 2114, L. 14-16; p.

2116, L. 16-22; p. 2123, L 1-5; p. 2187, L.
1-11; p. 2189, L. 6-12

Binder 12, Exhibits 214, 217

60. In spite of her teaching having been made an issue by Dr. Loov in June of 1985, Dr. Vinogradov continued thereafter to be employed as a teacher of engineering at the University. Dr. M. Sargious testified that Dr. Vinogradov had a teaching assignment in the academic term beginning May 1988.

Evidence: Dr. Sargious, Binder 7, Vol. 23, p.
2186, L. 16-21

61. Dr. Malik, Associate Dean (Academic) of Engineering, testified that he had no concerns regarding Dr. Vinogradov's teaching after it was made an issue by Dr. Loov's survey. He in fact proposed her as an instructor to the Faculty of Continuing Education in the Spring terms of 1986 and 1987.

Evidence: Dr. Malik, Binder 2, Vol. 6, p.
700, L. 7-23

Exhibit 101

62. With an appointment commencing in 1984 and renewed to 30 June 1991, the Appellant is presently an Adjunct Assistant Professor in the Department of Mechanical Engineering at the University of Calgary. This position carries with it no remuneration, but permits access to the N.S.E.R.C operating research grants with which she conducts research. She has received such grants since the discontinuation of her Fellowship in 1984; they have been above the average amount received by Assistant or Associate Professors in the Department of Civil Engineering.

Evidence: Dr. Vinogradov, Binder 1, Vol. 1,
p. 42, L. 22-27; p. 43, L. 1-19; p. 129, L.
1-21

Evidence: Dr. Franklin, Binder 4, Vol. 11,
p. 1237, L. 9-27; p. 1238, L. 1-12; p. 1243,
L. 26-27; p. 1244, L. 1-19

Evidence: Dr. Sargious, Binder 7, Vol. 23,
p. 2184, L. 9-25

Binder 11, Exhibit 106A

C. The Decision Appealed From

63. The Board of Inquiry did not find that discrimination against Dr. Vinogradov had occurred. It ruled that Dr. Vinogradov was "the victim of some atrociously bad luck." It also found she was "the author of a lot of her own misfortune", because she was "not frank" with the reconvened committee about Dr. Loov's accusations and because "she was continually going over everyone's head to attempt to get her desires."

Reasons of the Board, Binder 14, Tab 1, pp.
28, 29

64. It ruled that Dr. Loov's "actively trying to convince the Committee to change its mind" does not show discrimination, but only "a man who had decided in his own mind that Dr. Vinogradov had not been completely candid to the committee and that under all the circumstances he no longer wanted her in his Department...".

Reasons of the Board, Binder 14, Tab 1, p.
34-35

65. With respect to the argument that the reconvening of the Appointment Committee in June of 1985 shows discrimination

against Dr. Vinogradov, the Board stated "I have no authority to rule on the legality of the meeting and therefore I can find no discrimination because of it."

Reasons of the Board, Binder 14, Tab 1, p. 35

66. However, although the Board stated that he had no jurisdiction to rule on the legality of the meeting, he accepted it as proper, and justifies Dr. Loov's campaign against Dr. Vinogradov on the basis of her behaviour at the meeting, as described in paragraph 66, above.

67. He further ruled that it was up to the complainant to show him that the concerns raised by Dr. Loov at the reconvened meeting were not allegations that would concern a department head, or that the points he raised were not serious.

Reasons of the Board, Binder 14, Tab 1, pp.
29, 34

68. After refusing to consider "the legality" of Dr. Loov's reconvening of the Appointment Committee in June 1985 to argue against the appointment of Dr. Vinogradov, the Board proceeded to state its agreement with Dr. Loov on the points he had brought forward at that meeting.

Reasons of the Board, Binder 14, Tab 1, pp.
37 ff.

69. The Board also rejected the complainant's allegations of systemic discrimination. He held that the University of Calgary was no better or worse than other institutions of comparable type, and that the Engineering Faculty on the evidence did not appear any better or worse than any other Engineering Faculty.

Reasons of the Board, Binder 14, Tab 1, pp.
24-25

70. Specifically, he preferred the statistics and conclusions on discrimination against Dr. Vinogradov personally reached by Dr. Madden, a witness for the University, over those of the outside experts called by the complainant.

Reasons of the Board, Binder 14, Tab 1, pp.
25-26, 31

PART II
ERRORS IN JUDGMENT
OF THE BOARD

71. The Board erred in ignoring the role played in this individual case by the element of structural or systemic discrimination, an element which the Individual's Rights Protection Act and jurisprudence on human rights in Canada requires it to take into account.

72. Further, the Board erred in requiring the Appellant to show that the reasons advanced for the refusal to hire her were "allegations that would not concern a Department Head or a committee in determining whether an appointment should be made," (Reasons p. 29), or that "the points raised by Dr. Loov were not serious" (p. 34). The proper rule in discrimination cases is that once the complainant has shown a prima facie case of discrimination, the burden on rebuttal shifts to the Respondent to attempt to show that a legitimate non-discriminatory reason for the acts is the reason for the acts. Even if such a showing is made, the complainant may still show that the proffered reason is, in fact, a pretext.

73. The Board erred in failing to find or infer discrimination regarding the investigation of Dr. Loov and his reconvening of the appointments Committee on 21 June, 1985 with the object of rescinding the earlier recommendation to hire Dr. Vinogradov.

74. Similarly, the Board erred in holding that he had to determine whether the University had breached a contract with Dr. Vinogradov before he could infer discrimination from its refusal

to provide her with regular employment in connection with her University Research Fellowship.

75. The Board erred in refusing to define as pretextual the alleged shortcomings of Dr. Vinogradov, advanced by Dr. Loov in the reconvened meeting as the reason to rescind the recommendation for her appointment.

OF MR. JUSTICE ROWBOTHAM

76. The Honourable Mr. Justice Rowbotham erred in law in applying to an appeal on a question of law the standard of reviewability which obtains in applications for judicial review.

77. Accordingly, he wrongfully declined to exercise the appellate authority given to him by section 33 of the Individual's Rights Protection Act.

78. Further, Mr. Justice Rowbotham erred in law in determining the issue of whether to grant leave to appeal on the questions of fact and mixed law and fact solely on the basis of reading the reasons of the Board, and thus on the basis of the Board's findings of fact. Nowhere in his reasons does he mention having referred to the evidence before the Board. This method amounts to a reviewable declining of his jurisdiction to consider the leave question.

79. In the alternative, it appears from his reasons that while he said he was declining leave, he actually dealt with the merits of the appeal on questions of fact or mixed fact and law, and committed reviewable errors in so doing.

PART III
LEGAL ARGUMENT

THE DECISION OF THE BOARD OF INQUIRY

(a) Systemic Discrimination

80. It is respectfully submitted that the Board of Inquiry erred in overlooking entirely the role played in this case by systemic discrimination.

Reasons, Binder 14, Tab 1, pp.24-25

81. Systemic discrimination has been described by the Supreme Court of Canada in these terms:

... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job...". To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

Action Travail des Femmes v. CN [1987] 1 S.C.R. 1114, per Dickson, C.J. at p.1139

82. Systemic discrimination, then, deals with the largely unintended, but nonetheless exclusionary, consequences of

policies and practices which themselves may seem, or may have seemed, unobjectionable.

83. Systemic discrimination against a group is itself a wrong which can be addressed by human rights legislation. The Supreme Court has affirmed the legitimacy of a group remedy for systemic discrimination.

Action Travail des Femmes, supra, paragraph
84

84. This recognition that there can exist systemic discrimination against a group exists side by side with the more traditional focus on discrimination against an individual. The two are by no means mutually exclusive. The Supreme Court of Canada has recently defined discrimination in a way that specifically acknowledges the co-existence of the two sorts of discrimination and the interplay between them:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Andrews v. Law Society of British Columbia,
[1989] 1 S.C.R. 143, per McIntyre, J. at 174
(emphasis added)

85. Intent is not required to establish either discrimination against an individual, or systemic discrimination.

It is the result or the effect of the action complained of which is significant. If it

does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, per McIntyre, J. at 547

In Canada, as I have noted, discrimination does not depend on a finding of invidious intent.

Brooks et al. v. Canada Safeway Limited, [1989] 1 S.C.R. 1219, per Dickson, C.J. at p. 1240

86. The principled basis for this affirmation is the Court's application of a purposive approach to the interpretation of human rights legislation. In particular, the Court has stated:

Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., supra, per McIntyre J. at 547

87. The stress on the effect of conduct, not its intent, is the result of "a commitment to the purposive approach to human rights legislation", and in this regard the Court has adopted the following statement of the Saskatchewan Court of Appeal:

Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive

interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided.

Action Travail des Femmes, supra, per
Dickson, C.J. at p.1137-8, referring to
Canadian Odeon Theatres Ltd. v. Saskatchewan
Human Rights Commission [1985] 3 W.W.R. 717,
per Vancise, J.A. at p.735

88. In this complaint and appeal, the Appellant does not seek a remedy for systemic discrimination against a group. Rather, she seeks a remedy for discrimination against herself. However, it is submitted that whether discrimination against an individual has occurred on the basis of her membership in a protected group often cannot properly be determined unless the context of the treatment of that individual is taken into account. The presence of systemic discrimination against individuals who share the characteristics of the complainant is a material part of the context for decision-making about an individual, and must be taken into account by a board or court in determining whether discrimination has occurred. It is part of her showing that her treatment is sex-based.

Edmonton Journal v. A.G. for Alberta et al.,
Reasons for Judgment of Madame Justice
Wilson, pp. 1-7 (Unreported, Released
December 21, 1989)

A Report of the Grievance Review Panel,
University of Toronto, in the Matter of a
Grievance of Professor Marsha Hewitt,
Trinity College, February 5, 1990, p.9

89. In this case, the context of systemic discrimination against women by the Department of Engineering at the University of Calgary created a receptive environment for Dr. Loov's campaign of disparagement against Dr. Vinogradov.

90. How systemic discrimination may interact with actions taken concerning a particular individual is explained by the nature of systemic discrimination itself. As pointed out by the Supreme Court (supra, paragraph 84), the effect of systemic discrimination is to foster the belief, inside and outside the group, that the exclusion of disadvantaged individuals is the result of "natural forces". One of these "natural forces" which is often fastened upon to explain a person's failure to thrive in a discriminatory environment is that of personal shortcomings.

91. The result of fastening upon alleged personal shortcomings to explain the results of systemic discrimination in an individual case, however, is an over-focus on these personal shortcomings, to the exclusion of the individual's positive qualities. An individual being evaluated in these circumstances will not be seen in a fair light, because the structure of the environment skews the evaluation in the direction of the negative.

92. The effect described in paragraph 94 can be seen at work in this case: Dr. Loov specifically caused a focus on Dr. Vinogradov's alleged shortcomings - which he purported to find only after a search process conducted in a fair manner had resulted in a recommendation that she be offered the position. It was only after an unfair manipulation of the process that Dr. Loov put new allegations of Dr. Vinogradov's shortcomings before the Committee. This unfair and highly irregular manipulation of the process is summarized below at paragraph 118.

93. In considering what happened to Dr. Vinogradov at and after the reconvened Appointment Committee meeting of June 1985, the Board not only ignored the influence of systemic discrimination on Dr. Vinogradov's treatment as an individual;

but it, too, was led astray by elements of systemic discrimination.

94. The Board totally downplayed the element of systemic discrimination in the Civil Engineering Department, and focussed exclusively on the alleged shortcomings of the Appellant in order to explain what happened to her. Such a focus on Dr. Vinogradov's alleged misconduct was, in turn, exactly the technique used by Dr. Loov in his effort to replicate, with respect to this position, the traditional male-oriented hiring practices of the Department. Because the Board actually did the same thing as Dr. Loov did, he failed to see Dr. Loov's behaviour for what it was: the maintenance of the Department's record of systemic discrimination against women.

95. The evidence of systemic discrimination at the University of Calgary and in engineering faculties, generally, is unmistakeable, and was actually recognized in a back-handed way by the Board's conclusion that Calgary was no worse than other Universities. Moreover, in this case, the elements of structural discrimination against women are plain: the comparatively lower salary paid to Dr. Vinogradov, her exclusion from the tenure stream, and the non-compliance of the University with the terms of the N.S.E.R.C. University Research Fellowship, in spite of her fine record as a teacher and researcher, are almost classic examples of how systemic discrimination can be reflected in the life of an individual woman academic.

Breslauer and Gordon, supra, paragraph 23,
pp. 22-25

96. Yet, the Board of Inquiry regarded the similarity between the Respondent and other universities and departments as an exonerating factor. Meeting the uniformly low "community

standard" in this regard was seen as a reason not to find that discrimination had occurred, or was occurring, at Calgary.

97. In fact, it is submitted, the evidence about the Calgary department, and engineering faculties generally, shows a particularly serious and pervasive situation of systemic discrimination, which should have been recognized as such by the Board.

98. Systemic discrimination being excused or ignored, the Board focussed exclusively on Dr. Vinogradov's alleged personal shortcomings as the reason for her misfortune. Significantly, one large group of such references is to Dr. Vinogradov's alleged aggression in perceiving discrimination against her and pursuing remedies for it.

Paragraphs 28-29, supra

99. It is clear that the Board formed a negative impression of Dr. Vinogradov because of her activity on her own behalf, to redress what she saw as discrimination against her. This negative opinion, which was inconsistent with the evidence about how her colleagues actually saw her, played an important role in his decision that the result in this case was justified.

100. Such an attitude towards persons who believe themselves to be victims of discrimination is, it is submitted, totally inappropriate in a Board of Inquiry. People will be discouraged from taking steps to enforce their rights if they believe these steps will later be used to justify rulings against them. This chilling effect on rights enforcement is totally inconsistent with the purpose of human rights legislation: to promote removal of discrimination. It is also contrary to the principle, enunciated in the context of Charter remedies against denial of

equality, that "Persons ought not to be deterred from asserting their rights".

O.H.R.C. and O'Malley v. Simpsons-Sears Ltd.,
supra, paragraph 89

Action Travail des Femmes, supra, paragraph
90

The Queen and Canada Employment and
Immigration Commission v. Schacter and LEAF,
Federal Court of Appeal (A-1002-88), February
16, 1990, per Mahoney, J.A., Reasons, p. 6
(dissenting in the result but consistent
with the majority on this point)

101. Human rights legislation, like the Alberta Act, includes protection from reprisals for persons who seek to enforce their rights under the Act. It is not necessary to establish that a complaint would have been successful in order to claim the protection of the anti-reprisal section. Thus, for the Board to penalize Dr. Vinogradov for bringing forward anti-discrimination concerns which he regarded as baseless is contrary to the letter, spirit and purpose of the Act itself.

Individual's Rights Protection Act, s. 11

Love Kumar Sharma and Director, Human Rights
Code v. Yellow Cab Company Ltd. (1983), 4
C.H.R.R. D/1432, at pp. D/1442-3 (Board of
Inquiry, L. Getz, B.C.)

102. The attitude of the Board is also itself a form of sex stereotyping, premised on the view that a woman should be compliant and adaptive, willing to accept without challenge what is dealt to her. The University of Calgary Senate Committee Report specifically referred to the negative effect such expectations can have on women in academic life:

One tenured faculty member observed: "What I hope other women don't go through is - all through my time in the academic world, I have seen women go under or become very unhappy because of being pressured to be nice.... I think the great trap of young women today is that there is a sort of subtle pressure to be compliant, to not assert themselves intellectually, to spend 80 million times more time with students than the men do, to be motherly and nurturing, to be on a million committees, not to be a pioneer within the university but to just do the drudgery that has to be done, to be compliant in every way.

And then they don't get tenure and they fail. They don't say no to these demands and these are demands that are much more put on women.

A. Simone, Academic Women Working Towards Equality (Massachusetts, 1987) p. 36, quoted in Exhibit 112, at pp. 12-13

103. Accordingly, it is submitted that it was an error of law for Mr. Justice Rowbotham to state that the Board had not acted in a "discriminatory manner" in dealing with the facts presented to it.

Reasons of Mr. Justice Rowbotham, Binder 14,
Tab 7, p. 2

104. The other group of Dr. Vinogradov's alleged personal failings relied upon by the Board to justify Dr. Loov's campaign against her is her "lack of candour" in dealing with his allegations of improprieties in her teaching and misstatement in her curriculum vitae.

"... she is the author of a lot of her own misfortune. As I have said she was not frank with the committee over Dr. Loov's allegations and she was continually going over everyone's head to attempt to get her desires."

Reasons of the Board, Binder 14, Tab 1, pp.
28-29

"There were things that were done poorly and things that were done wrongly and then an attempt [at the reconvened meeting] made by Dr. Vinogradov to justify them. This is not going to enhance one's position in applying for a job."

Reasons of the Board, Binder 14, Tab 1, p. 31

105. The Board finds that Dr. Vinogradov's alleged "lack of candour" occurred at the June 1985 meeting. This alleged lack of candour, occurring at the end of Dr. Loov's campaign against Dr. Vinogradov, cannot explain why he embarked upon the campaign in the first place.

106. Had the Board not wrongfully obliterated from its consideration the elements of systemic discrimination in this case, it could have more clearly seen the unfairness in the treatment meted out to Dr. Vinogradov after the initial recommendation that she be hired. It would have acknowledged her excellence as a teacher and researcher. It could have concluded that for so fine a scholar to be denied employment in such a procedurally unfair way, discrimination must have been at work. The Board would have concluded that she had successfully established a prima facie case of discrimination.

(b) Burden of Proof

107. The Board recognized that in human rights cases the complainant must establish a prima facie case of discrimination, after which the burden on rebuttal shifts to the Respondent to show that discrimination played no part in the decision.

Reasons of the Board, Binder 14, Tab 1, p. 28, item 5

Walter Tarnopolsky, "Burden of Proof" in Discrimination and The Law (Toronto, De Boo, 1982) pp. 48-50

Beatrice Vizkelety, "Prima Facie Case, Burdens of Proof" and "Means of Proof" in Proving Discrimination (Toronto, Carswell, 1987) pp. 127-128, 140-144, 165-167

108. It further recognized that a finding of discrimination is warranted as long as discrimination played some part in the impugned decision.

Reasons of the Board, Binder 14, Tab 1, p. 28, item 7

Act, s. 31

Re Gadowsky, [1981] 1 W.W.R. 647, per Cawsey, J. at p. 659

R. v. Bushnell Communications Ltd. (1973), 1 O.R. (2d) 442 (H.C.J.), aff'd (1974) 4 O.R. (2d) 288 (C.A.)

109. Proceeding on these two proper principles, the Board should have first looked to see if a prima facie case had been made out, and then, upon that being shown, should have called upon the Respondent in rebuttal to show its reason for its actions was legitimate and non-discriminatory.

110. Yet what the Board actually did, was proceed on the basis that the complainant bore the burden of showing that there was no "good" (non-discriminatory) reason for the actions of Dr. Loov in pursuing the cancellation of the recommendation to appoint her.

111. In particular, the Board gave particular weight to the fact that "no one" had shown him that the matters raised by Dr. Loov at the reconvened Appointment Committee meeting were "allegations that would not concern a Department Head or a committee in determining whether an appointment should be made," or that "the points raised by Dr. Loov were not serious".

Reasons of the Board, Binder 14, Tab 1, pp.
29, 34

112. In law, it is submitted, requiring the complainant to satisfy such a burden is wrong. Had the Board required the University to demonstrate affirmatively the soundness of the basis for its decision, the complainant having first proven that it was unsound, it is submitted that the result in the case would have been quite different.

113. For example, it is submitted that the Board's approach to burden of proof caused it to overlook entirely the significant fact that Dr. Loov's charges against Dr. Vinogradov concentrate entirely in only one area of an academic's responsibilities to the University: teaching. The fact that Dr. Vinogradov has an excellent record as a researcher would, in any properly administered internal evaluation system, balance off against any alleged shortcomings in teaching performance.

Procedures Pertaining to Appointment,
Promotion and Dismissal (Academic Staff),
Section 2, p. 2

Binder 10, Exhibit 3

114. The Board, like Dr. Loov, appears to proceed on the basis that Dr. Vinogradov's solid achievements in research were irrelevant to the issue of whether she should be hired. Moreover, the Board, like Dr. Loov, totally refused to consider

the many positive teaching evaluations Dr. Vinogradov received prior to Dr. Loov's survey. Finally, the Board concluded on the basis of no evidence that the shortcomings of Dr. Loov's survey were just the ordinary complaints about student surveys, whereas the complainant had demonstrated several serious departures from the academic rules and the principles of fairness in the administration of that survey and the use to which it was put.

115. The behaviour of Dr. Loov was persistently and egregiously irregular and unfair to Dr. Vinogradov. He:

- (a) was opposed to Dr. Vinogradov's selection during the initial deliberations of the Appointment Committee;
- (b) told her he would make the appointment but then did not;
- (c) told a sympathetic colleague he felt constrained by the Committee's decision, yet reconvened a second meeting in order to reverse it;
- (d) conducted a student survey that violated University rules and afforded no right of recourse against its findings;
- (e) did not consider other positive evidence offered to him by Dr. Vinogradov;
- (f) carried out his own investigation although he had had the opportunity to place his concerns before the Appointment Committee at its first set of meetings;
- (g) prosecuted the case against her at the June meeting;

- (h) stayed in the June meeting after she left to discuss his allegations with the rest of the Committee before they made their decision;
- (i) suggested a week's delay in voting, which voting was to be in writing in spite of Dr. Vinogradov's objection to that procedure;
- (j) contacted members of the Committee after telling the faculty association observer he would not do that;
- (k) circulated written material adverse to Dr. Vinogradov after the meeting but before the vote, leaving Dr. Vinogradov no time to reply;
- (l) contacted Dr. Joshi and applied "heat" resulting in Dr. Joshi changing his vote; and
- (m) collected the voting letters and sent the negative recommendation to the new Dean.

This extraordinary conduct should have prompted the Board to call upon the Respondent, in rebuttal, to show that discrimination did not play a part in this behaviour.

116. Moreover, the demonstration of the total absence of women in the Department, the showing of the typical male-oriented hiring pattern of past years, the demonstration of Dr. Loov's preference for Mr. Vandamme whose characteristics were consistent with the hiring pattern of past years, and the evidence concerning Dr. Vinogradov's excellent record in teaching and research and her initial acceptability to the Appointment Committee, should have been enough to require that the Board

shift the burden to the Respondent to bring forward a plausible, non-discriminatory explanation for Dr. Loov's conduct.

117. In refusing to find that the Board had committed an error of law, the learned trial judge relied upon a decision of the Nova Scotia Court of Appeal upholding a Board of Inquiry finding that the complainant, a married woman refused a job by the Grace Bay School Board between 1972 and 1976 when its policy of not hiring married women was in place, had not succeeded in proving discrimination against herself, even though the Board found that the refusal to hire married women amounted to discrimination against the class of married women. The Board had held "I do not find any unlawful discrimination against the complainant personally, but only to the extent that she was a member of that class of individuals."

Reasons of Mr. Justice Rowbotham, Binder 14,
Tab 7, p. 3

Ferguson v. Cape Breton District School Board
and N.S. Human Rights Commission (1987) 8
C.H.R.R., p D/4198 (N.S.C.A.), at p. D/4199

118. Given the jurisprudence of the Supreme Court of Canada on the interplay between systemic and individual discrimination set out above at paragraphs 87 to 91, which does not seem to have been drawn to the Court's attention in Ferguson, it is submitted that the Ferguson case was wrongly decided. It would not have been decided the same way if the Supreme Court jurisprudence had been brought to bear on the issues before it.

119. Nor would Ferguson have been decided the way it was had the Nova Scotia Court of Appeal applied to the case the principle that if discrimination plays any part in a decision, a ruling in favour of the complainant should ensue.

Paragraph 111, supra

120. Accordingly, the Ferguson case can provide no support in law for the burden of proof placed on the complainant by the Board in this case. Nor should it have been played any part in Mr. Justice Rowbotham's decision to refuse the appeal herein.

(c) Pretext

121. In order to rebut the complainant's prima facie case of discrimination, the Respondent on rebuttal must provide an explanation which is credible on the evidence.

Paragraphs 110-112, supra

122. The major explanation relied upon by the Respondent for its treatment of Dr. Vinogradov is the alleged personal shortcomings discovered by Dr. Loov in his investigation after the initial Appointment Committee meeting recommending her appointment. This investigation (and its results) are also accepted by the Board of Inquiry as a valid reason for refusing to hire Dr. Vinogradov.

Reasons of the Board, Binder 14, Tab 1, p. ■

123. The Board never asked itself the question why Dr. Loov's investigation was embarked upon in the first place, if not for a discriminatory reason. All of the evidence of Dr. Vinogradov's teaching and research performance prior to the initial recommendation to hire her indicated first-rate performance on her part. Even the Board accepted that during the years 1982-83, "There was nothing untoward about Dr. Vinogradov" and that she was accepted as a "better than average teacher and researcher". Despite the Board's view that Dr. Vinogradov's

subsequent allegations of discrimination meant "she could anticipate some future problems in obtaining full-time or limited term appointment", the Appointment Committee decided to recommend her appointment. Dr. Loov had participated in that Committee, and had had an opportunity to influence its decision against Dr. Vinogradov and in favour of his candidate, Mr. Vandamme, but he was unsuccessful on both issues.

124. Significantly, it is only after Dr. Loov is faced with the prospect of having to recommend Dr. Vinogradov's appointment that he interests himself in putting together evidence of her professional failings, evidence which presumably had previously been accessible to him as the Head of the Department, evidence which he might have brought to the Committee's attention prior to its January, 1985 decision, but did not. The very timing of his revelation of this evidence should have raised lively suspicions about its legitimacy.

125. The Appellant asks this Honourable Court to draw the unmistakable inference that Dr. Loov's campaign against Dr. Vinogradov is to prevent her being hired, not because of alleged shortcomings, but because the Committee's decision of January 1985 brought home to him the reality that the Department was on the brink of hiring the first woman "tenure stream" professor in its history.

126. The Board of Inquiry recognized the many singular aspects of Dr. Loov's campaign against Dr. Vinogradov: the fact that he was "leading the charge" against her, the facts that the recalling of the Appointment Committee and the holding of a written vote were unusual, and the fact that Dr. Loov's conduct at the meeting and after it had elements of unfairness about it.

127. However, the Board wrongly put the burden on the complainant of showing that there was no merit in Dr. Loov's "concerns", as argued above at paragraphs 113 and 114, and, moreover, made great efforts to find a justification for what Dr. Loov had done.

128. The justifications found by the Board for Dr. Loov's conduct are, upon examination, either unsupported by the evidence or actually contradicted by it. For example, the Board states that "because Dr. Loov was actively trying to convince the committee to change its mind, does not under these circumstances show discrimination". It shows "a man who had decided in his own mind that Dr. Vinogradov had not been completely candid to the committee and that under all the circumstances he no longer wanted her in his Department, not because of his discriminatory views, but because of all the surrounding facts and circumstances."

Reasons of the Board, Binder 14, Tab 1, pp.
34-35

129. In fact, the Board finds that Dr. Vinogradov's lack of candour to the committee occurred at the June 1985 meeting (see paragraph 108, supra), and not before it. This alleged lack of candour should thus not be available to justify the events occurring prior to it, namely Dr. Loov's questionable student survey and his reconvening of the Appointment Committee. Secondly, the actions of Dr. Loov and the Committee did not have the effect of getting Dr. Vinogradov out of the Department: she continued to teach and do research there. The main accomplishment of Dr. Loov's actions was that Dr. Vinogradov was obliged to teach and do her research without much remuneration and without the standing and security of a tenure stream

position: a fate that has been shown to be characteristic for women academics.

Breslauer and Gordon, supra, paragraphs 23 and 98

130. The Board is similarly forgiving of Dr. Loov's bringing of "heat" against Dr. Joshi to change his mind on the vote. The Board states: "What he [Dr. Joshi] apparently meant was that in his opinion it was not good politics for him to oppose the Department Head who was by this time adamantly against her becoming part of his Department, not that there were any threats or pressures brought on him by Dr. Loov to bring as he put it "heat" on him. Undoubtedly, Dr. Loov's position in opposing Dr. Vinogradov did put pressure on Dr. Joshi but I find it was Joshi's decision and his alone to do what he did."

Reasons of the Board, Binder 14, Tab 1, p. 22

131. To conclude that Dr. Joshi made an independent decision in the face of such institutional pressure is an unrealistic finding. Two former department heads in Engineering both testified to the need for impartiality on the part of a Department Head, and two Appointment Committee members in this case confirmed the influence which a Department Head has over faculty members and that one does not wish to go against the Department Head.

Evidence: Dr. Norrie, Binder 3, Vol. 8, p. 925, L. 11-25; p. 926, L. 9-22; p. 927, L. 13-27

Evidence: Dr. Ward, Binder 6, Vol. 17, p. 1821, L. 19-27; p. 1822, L. 1-8; p. 1823, L. 4-26

Evidence: Dr. Gillott, Binder 2, Vol. 5, p. 544, L. 13-27; p. 545, L. 1-14

Evidence: Dr. Joshi, Binder 2, Vol. 4, p. 482, L. 25-27; p. 483, L. 1-27; p. 484, L. 1-15

132. The cogency of that kind of observation has been accepted by an experienced University grievance panel:

... just as the promises from a Dean to a prospective junior colleague are significantly more important than those from ordinary faculty members, so do the judgments of a Dean carry more weight than those of his colleagues whose positions in the administrative hierarchy are less lofty. A Dean's greater power lays upon him a greater obligation of discretion.

Hewitt, supra, paragraph 91, p. 10

It is submitted that this reasoning, and not the Board's, is to be preferred on this point.

133. Moreover, in considering this period in the history of the Respondent's dealings with Dr. Vinogradov, the Board refuses to deal with the issue of whether the reconvening of the Appointment Committee meeting was procedurally irregular and unfair.

Reasons of the Board, Binder 14, Tab 1, pp. 28, 34, 35

134. His refusal, on the formal level, to deal with Dr. Vinogradov's allegations of unfair procedure does not prevent him, however, from actually deciding that the meeting was fair. For example, he says at p. 35:

It is argued that Dr. Loov sent things to the committee members after the meeting was held. Again, this may be wrong if the

hearing were judicial but I can't find this and therefore as a committee of the University there appears to be nothing wrong in what he did. Appointment Committees at the University do things of this nature all the time when acting in this manner. (emphasis supplied).

135. There was no evidence on the record that Appointment Committees at the University do "things of this nature" all the time. The evidence on the record shows that the reconvening of the Appointment Committee was an unusual step, that other Appointment Committees had not dealt with people (in the past, all male) as Dr. Vinogradov had been dealt with, and that the treatment of Dr. Vinogradov at the reconvened meeting was not recruitment, but the process of "judging a colleague".

Paragraphs 48, 54-58, supra

136. In another very significant way, the Board actually accepts the legitimacy of what Dr. Loov did, while protesting that he cannot rule on it. He takes the items which Dr. Loov advanced against Dr. Vinogradov at this meeting, and against which she had an inadequate opportunity to defend herself, and uses these as the ultimate justification for her not getting the position. If bringing these matters forward to the Committee was improper and discriminatory - as a proper view of the law would have shown - it is improper to accept them as justification for the very discrimination complained of.

137. The Board actually rules at p. 34 that:

Legal advice said to reconvene the committee and that is the reason it was reconvened. That advice was given to attempt to be fair to Dr. Vinogradov. If she had not been allowed to answer and the committee had

revoked her appointment it would have surely been unfair.

It is submitted that the same logic applies to the holding of a reconvened meeting that was as infected with procedural irregularities as this one was. Such logic should also undercut the reliance on Dr. Loov's student survey, given that Dr. Vinogradov had such poor opportunity to respond to it.

138. The language used by the Board is unconsciously reflective of what actually went on in the reconvened hearing. At p. 35 of his reasons, he refers to Dr. Loov no longer wanting Dr. Vinogradov in his department. He here speaks of revoking her appointment. In his behaviour towards Dr. Vinogradov, Dr. Loov was actually conducting a form of dismissal hearing.

139. As well as declining to infer discrimination from the procedural irregularities of reconvening the Appointment Committee, the Board declined to address the issue of whether he should infer discrimination from the University not finding her a position after she was awarded the N.S.E.R.C. grant:

In any event if there is some agreement in which the University is bound to provide a position to Dr. Vinogradov that this would be a matter for the Courts to decide and not me. I realize that breach of such a contract or agreement can create an inference from which I can infer discrimination but I am unable to find such a contract or agreement and therefore can draw no inference particularly when one considers the tight budgetary policy of the last number of years.

Reasons of the Board, Binder 14, Tab 1, p. 32

140. In first declining to infer discrimination because "the legalities" are for the Courts, the Board takes the same narrow approach as he did with respect to the procedural

unfairness issues. Such an approach is contrary to the principle that human rights legislation must be given a fair large and liberal interpretation.

141. Then, however, he does take a position on the merits, i.e. he holds that there was no "contract" to give her a position because she had an N.S.E.R.C. grant, or, in the alternative, if there was a contract, it ended when she lost her N.S.E.R.C. Fellowship.

142. It is submitted that the Board committed an error of law in holding that he could not infer discrimination from either the procedural unfairness or the disappointment of Dr. Vinogradov's hopes that her Fellowship would help her to obtain a position, unless he could first find, as a court of law would, that there had been, respectively, a denial of natural justice or a breach of contract. In doing this, he sets up a sort of legal "condition precedent" to his jurisdiction to make a finding of discrimination, which is at odds with the approach to interpretation of human rights legislation developed by the Supreme Court of Canada.

143. In particular, even if the conduct fell short of a denial of natural justice or a breach of contract, it could still form sufficient basis for an inference of discrimination. A finding of discrimination does not, at law, depend on there first having to be a finding that some other legal wrong has occurred. Discrimination is not a "dependant" wrong.

Summary

144. It is, accordingly, submitted that there should be a finding that the University discriminated against Dr. Vinogradov on the basis of her sex, because her fine record as a scholar and

teacher, and the initial Committee recommendation to hire her, were totally overlooked in the campaign of disparagement mobilized against her by Dr. Loov when it became apparent that she would otherwise be the first woman to be hired for the tenure stream in the Department of Engineering. This campaign used cumulative unfairnesses to focus attention away from Dr. Vinogradov's merits, so that a manufactured list of her shortcomings might make her exclusion from the faculty seem "natural" and desirable, very much in the way that systemic discrimination makes the fate of its victims seem the result of naturally occurring factors. The Board failed to see what had happened because his view of the facts overlooked the context of systemic discrimination in the department, and the candidate's positive qualities which the discriminatory approach of Dr. Loov had masked. As a result he misinterpreted and misapplied the burden of proof and wrongfully erected certain conditions precedent to his ability to infer discrimination.

MR. JUSTICE ROWBOTHAM'S ORDER

(a) As to the Finding there was no Error of Law

145. There is a significant distinction between an appeal from a tribunal decision and judicial review of that decision. The right to appeal being conferred by statute, the appeal court may consider such questions and take such actions with respect to the appeal as the statute sets out. In judicial review, the court usually has a more restricted role.

Service Employees International Union v.
Nipawin District Staff Nurses Association of
Nipawin (1973), 41 D.L.R. (3d) 6, at p. 11
(S.C.C.)

146. Rights of appeal from a Board of Inquiry decision are given by section 33 of the Act. Where the grounds of appeal consist wholly or partly of a question of fact or mixed law and fact, leave to appeal must be sought from a judge of the Court of Queen's Bench, who may consider "any matters that he considers appropriate" in deciding whether to grant leave.

Act, subsection 33(2), 33(4)

147. By necessary implication, appeals on questions of law would be as of right appeals, as the Act imposes no requirement for leave.

148. In an appeal from a Board decision, the Court may confirm, reverse or vary the order of the Board and may make any order the Board may make under section 31 of the Act, including an order to cease the contravention, to refrain from the same or any similar contravention, to make available to the person discriminated against the rights, opportunities or privileges denied, to compensate the person for lost wages, income or expenses incurred, or to take any other action the Board considers proper to put the person in the position she would have been in but for the contravention of the Act.

Act, s.33(6), s.31

149. When dealing with the Appellant's appeal on a question of law, Mr. Justice Rowbotham employed the standard of review used in judicial review applications where a privative clause is present in the statute establishing the board, namely whether the board acted in good faith and within the ambit of its constituent statute.

Reasons, Binder 14, Tab 7, p. 3

Nipawin, supra, paragraph 104, p. 11

150. It is submitted that applying a judicial review standard, and not an appeal standard, to the appeal on a question of law raised by the Appellant, is a reversible error or law.

151. Moreover, the findings of the learned judge that the Board committed no errors of law ought to be evaluated in light of the application by the Court of the lower standard of scrutiny inherent in judicial review, namely a "supervisory" rather than appellate standard.

Nipawin, supra, paragraph 104, p. 13

152. Because the Court of Queen's Bench applied to the Appellant's appeal on a question of law the judicial review standard - which permits a tribunal considerable leeway to err as long as it is within its jurisdiction and acts in good faith - it cannot be said that her appeal was actually considered as an appeal.

153. The Appellant accordingly asks that this Honourable Court reverse the holding of Mr. Justice Rowbotham that the Board committed no errors of law, and itself consider whether errors of law were committed by the Board of Inquiry.

(b) As to the Refusal to Grant Leave

154. Ordinarily, no appeal lies from a decision of a Court to refuse leave to appeal, provided that the tribunal has not mistakenly declined jurisdiction.

Ernewein v. Minister of Employment and Immigration, [1980] 1 S.C.R. 639, per Laskin, C.J. at 651

155. In conceiving of the Court's task in the instant case as a supervisory one, and not an appellate one, it is submitted that Mr. Justice Rowbotham declined to exercise the jurisdiction conferred upon the Court by section 33 of the Act.

156. Accordingly, it is submitted, the refusal to grant leave to consider questions of fact and mixed law and fact should be reversed by this Honourable Court.

157. In the alternative, it is submitted that the learned trial judge, while purporting to deny leave to appeal, did so in a way that amounts to a holding on the merits of the appeal. He states, at page 2 of his Reasons: "However, I am unable to fund, upon reading the reasons for judgment of the Board of Inquiry, that it either drew the wrong inferences or acted unfairly or in a discriminatory manner in dealing with the facts that were presented to it."

158. Such a holding on the merits of the appeal seems to have been reached without a review of the underlying factual record which was before the Board of Inquiry. Nowhere in references by the learned trial judge to the material considered in arriving at his decision is there mention of a reference to his perusal or consideration of the evidence. At page 2 of his reasons, he refers to "reading the reasons for judgment of the Board of Inquiry"; at page 4, he refers to "a consideration of the arguments advanced by counsel, my study of the reasons for judgment of the Board of Inquiry, and my reading of the cases and authorities cited by Counsel...".

159. If the learned trial judge was, in fact, exercising appellate jurisdiction rather than simply deciding upon the leave application, then it is submitted that it is reviewable error for him to have reached these conclusions without a review of the

evidence. It is the duty of a Court of Appeal to "re-examine the evidence" to make sure that no reviewable error of fact occurred.

Stein Estate et al. v. The Ship "Kathy K" et al. (1975) 6 N.R. 359 (S.C.C.), per Ritchie, J. at p.366

160. Accordingly, it is submitted that this Honourable Court should entertain the appeal on questions of fact and mixed law and fact.

AS TO THE POWERS OF THIS HONOURABLE COURT ON APPEAL

161. This Honourable Court, sitting in appeal, may draw inferences of fact, give any judgment and make any order which ought to have been made, and make such further or other order as the case may require.

Rules of Court, R. 518(c)(e)

Norcan Oils v. Fogler, [1965] S.C.R. 36

162. The Supreme Court of Canada has affirmed the principle that an appeal court will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression.

The Sir Robert Peel (1880), 4 Asp. M.L.C. 321, per James, L.J. at 322, quoted with approval in Stein Estate, supra, paragraph 162, per Ritchie, J. at p.365

163. The Court has, further, summarized the position with respect to reversal of findings of fact, as follows:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts.

Stein Estate, supra, per Ritchie J. at p. 366

164. However, apart from the issue of reversal of findings of fact by an appellate tribunal, the Supreme Court has held that the proper conclusions from the other evidence and the question as to what inferences are to be drawn from the conduct of the parties are matters with respect to which appellate tribunals are in an equally good position as the lower courts.

United Marine & General Insurance Company Limited v. Bodnorchuk et al., [1958] S.C.R. 399, per Locke, J. at p.413

165. This Honourable Court has held that where no question arises as to truthfulness and where the question is as to the proper inference to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of the Appellate Court.

Tanner v. Norys, (1980) 21 A.R. 372 (C.A.)
per Liberman, at p. 392

166. Accordingly, it is submitted that this Honourable Court may not only consider whether the Board made errors of law, but may also review the evidence to determine whether the trial judge has focussed on "some governing fact which in relation to others has created a wrong impression" or has made some palpable and overriding error which affected his assessment of the facts". It

may also draw its own inferences from the evidence before the Board.


167. And for the reasons given above in paragraphs 83 to 148, it is submitted that both the Board of Inquiry and the learned Justice of the Court of Queen's Bench committed such errors as would entitle this Honourable Court to intervene.

PART IV

NATURE OF ORDER REQUESTED

168. The Appellant seeks the following relief:
- (a) An order vacating the decision of the Board and the Order of Mr. Justice Rowbotham denying leave to appeal and denying the appeal;
 - (b) A determination that the Respondent Governors of the University of Calgary breached the provisions of section 7(1) of the Individual's Rights Protection Act because of the sex of Dr. Vinogradov;
 - (c) An order that Dr. Vinogradov be put in the position she would have been but for the contravention of the Act. Without restricting the generality of the foregoing, an order that she be awarded the position in the Department of Civil Engineering and that she receive compensation for lost wages, income and expenses and damages arising from the discriminatory action;
 - (d) Such other remedies and relief that may be sought or that this Honourable Court may order.

All of which is respectfully submitted.


BRYAN E. MAHONEY
Counsel for the Appellant

APPENDIX A

Grounds of Appeal or Intended Appeal
Dealt with by Rowbotham J.

As to Errors of Law

1. The Board erred in law and misdirected itself as to the proper principles for considering, assessing and weighing circumstantial evidence, in particular in the context of human rights inquiries, by assessing each fact alleged in support of a finding of discrimination as an isolated act and by failing to direct its mind as to whether the evidence in its totality established on a balance of probabilities that prohibited discrimination had occurred;

As to Errors of Fact or Mixed Law and Fact

2. The Board erred in accepting and relying upon evidence of Dr. Loov, that Dr. Vinogradov was included in the student survey procedure because of reports of "problems" with her teaching, in the face of his previous evidence and other oral testimony that he had included her only because of her pending appointment to the Department;
3. The Board ignored the impact of the evidence referred to in (2) above on Dr. Loov's credibility;
4. The Board ignored relevant evidence that the University allowed Dr. Vinogradov to continue teaching students engineering credit courses once her application for the faculty position had been rejected because of concerns about the quality of her teaching, and alleged unethical conduct;
5. The Board failed to consider the significance of Dr. Loov's immediate intent to reconvene the Appointments Committee upon examining the results of his student survey in February 1985;
6. The Board erred when it failed to hold that the explanation given by the Respondent for its alleged discriminatory actions and practices was not credible given the weight of the evidence showing unfair and differential treatment, and given the contradictions exhibited in the evidence between the Respondent's explanations and its actual conduct;
7. The Board erred in finding certain facts, some of which are contained in the following list, when the evidence did not support such findings and in places was directly opposite to such findings:

- (a) that Dr. Vinogradov felt that the University of Calgary owed her a job;
- (b) that two members of the selection committee were against the appointment;
- (c) that Dr. Loov did not vote;
- (d) that Dr. Vinogradov failed to file her material in advance of the meeting;
- (e) that curriculum vitae had been changed or fudged;
- (f) that Dr. Joshi could not explain the "heat" he was getting;
- (g) that Dr. Ursula Franklin looked at statistics "supplied" by Dr. Vinogradov;
- (h) that Dr. Vinogradov by complaining to her superiors had created an image of herself that would create future problems in hiring her;
- (i) that the notes given to Dr. Norrie did not deserve his high praise;
- (j) that the University followed its own rules and procedures in the competition for the position;
- (k) that university committees do "things" that are "wrong" all the time but because the hearings are not "judicial" then there is nothing to these wrongs;
- (l) that many of Dr. Vinogradov's "requests" to higher University authorities were not reasonable;
- (m) that Dr. Vinogradov treated seven or nine hours of lecture time per week as "overwork" when ordinary people would not accept this as overwork.

APPENDIX B

LIST OF AUTHORITIES

Helen Breslauer and Jane Gordon, The Two-Gender University: Catching Up to Changes in the Clientele (Paper prepared for a joint session of the Canadian Sociology and Anthropology Association and the Canadian Society for study of Higher Education, Laval University, June, 1989)

Action Travail des Femmes v. CN [1987] 1 S.C.R. 1114

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536

Brooks et al. v. Canada Safeway Limited, [1989] 1 S.C.R. 1219

Edmonton Journal v. A.G. for Alberta et al., Reasons for Judgment of Madame Justice Wilson, pp. 1-7 (Unreported, Released December 21, 1989)

A Report of the Grievance Review Panel, University of Toronto, in the Matter of a Grievance of Professor Marsha Hewitt, Trinity College, February 5, 1990

The Queen and Canada Employment and Immigration Commission v. Schacter and LEAF, Federal Court of Appeal (A-1002-88), February 16, 1990, Reasons of Mahoney, J.A.

Love Kumar Sharma and Director, Human Rights Code v. Yellow Cab Company Ltd. (1983), 4 C.H.R.R. D/1432 (Board of Inquiry, L. Getz, B.C.)

Walter Tarnopolsky, "Burden of Proof" in Discrimination and The Law (Toronto, De Boo, 1982) pp. 48-50

Beatrice Vizkelety, "Prima Facie Case, Burdens of Proof" and "Means of Proof" in Proving Discrimination (Toronto, Carswell, 1987) pp. 127-128, 140-144, 165-167

Ré Gadowsky, [1981] 1 W.W.R. 647

R. v. Bushnell Communications Ltd. (1973), 1 O.R. (2d) 442 (H.C.J.) aff'd (1974) 4 O.R. (2d) 288 (C.A.)

Ferguson v. Cape Breton District School Board
and N.S. Human Rights Commission (1987) 8
C.H.R.R., p D/4198 (N.S.C.A.)

Service Employees International Union v. Nipawin
District Staff Nurses Association of Nipawin (1973), 41
D.L.R. (3d) 6 (S.C.C.)

Ernewein v. Minister of Employment and Immigration,
[1980] 1 S.C.R. 639

Stein Estate et al. v. The Ship "Kathy K" et al. (1975)
6 N.R. 359 (S.C.C.)

Norcan Oils v. Fogler, [1965] S.C.R. 36

United Marine & General Insurance Company Limited v.
Bodnorchuk et al., [1958] S.C.R. 399

Tanner v. Norys, (1980) 21 A.R. 372 (C.A.)

APPENDIX C

STATUTES

1. Rules of Court

216

RULES OF COURT

June 6, 1973

Powers
of court

518. The court may:

- (a) direct amendment of any proceeding before it;
- (b) receive further evidence either by oral examination, by affidavit, upon commission or otherwise;
- (c) draw inferences of fact;
- (d) direct a new trial;
- (e) give any judgment and make any order which ought to have been made and make such further or other order as the case may require;
- (f) make such order as to costs as to it seems just, but where the court is equally divided, the costs shall follow the event of the appeal.

2. Individual's Rights Protection Act

THE INDIVIDUAL'S RIGHTS PROTECTION ACT

(R.S.A. 1980, C.I.-2; as amended 1985, Act No. 33, effective June 5, 1985; 1985, Act No. 42, S. 13)

Discrimination re employment practices prohibited

7(1) No employer or person acting on behalf of an employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, sex, physical disability, marital status, age, ancestry or place of origin of that person or of any other person.

7(1.1) For the purposes of subsection (1), an employer or person acting on behalf of an employer who

- (a) refuses to continue to employ any female employee, or
- (b) discriminates against any female employee with regard to any term or condition of employment,

by reason only of pregnancy shall be deemed to have discriminated against that employee because of the sex of that employee.

7(1.2) Nothing in this section shall be construed so as to limit or enlarge the rights provided to female employees under Division 7 of Part 3 of the *Employment Standards Act*.

7(2) The provisions of subsection (1) relating to age and marital status shall not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Protection for complainant

11 No person shall evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty upon, or otherwise discriminate against any person because that person has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Act.

Crown is bound

12 The prohibitions contained in this Act apply to and bind the Crown in right of Alberta and every agency and servant of the Crown in right of Alberta.

Powers of board of inquiry

31 A board of inquiry

- (a) shall, if it finds that a complaint is not justified, order that the complaint be dismissed, and
- (b) may, if it finds that a complaint is justified in whole or in part, order the person against whom the finding was made to do any or all of the following:
 - (i) to cease the contravention complained of;
 - (ii) to refrain in future from committing the same or any similar contravention;
 - (iii) to make available to the person discriminated against the rights, opportunities or privileges he was denied contrary to this Act;
 - (iv) to compensate the person discriminated against for all or any part of any wages or income lost or expenses incurred by reason of the discriminatory action;
 - (v) to take any other action the board considers proper to place the person discriminated against in the position he would have been in but for the contravention of this Act.

1972, c. 2, s. 22; 1980, c. 27, s. 14

Order re costs

31.1 No settlement effected by the Commission or order made by a board of inquiry may compensate a person for wages or income lost or expenses incurred prior to 2 years before the date of the complaint by that person under section 19.

1985

31(2) A board of inquiry may make any order as to costs that it considers appropriate.

Appeal

33(1) A party to a proceeding before a board of inquiry may appeal the order of the board to the Court of Queen's Bench by originating notice filed with the clerk of the Court of the judicial district in which the inquiry was held.

33(2) If the grounds of appeal consist wholly or partly of a question of fact or mixed fact and law, no appeal lies without the leave of a judge of the Court of Queen's Bench.

33(3) An application for leave to appeal under subsection (2) shall be made by notice of motion within 30 days of the date the appellant receives a copy of the order of the board of inquiry.

33(4) The judge may, after taking into consideration any matters that he considers appropriate, grant leave to appeal under subsection (2).

33(5) The originating notice under subsection (1) shall

- (a) be filed with the clerk
 - (i) within 30 days of the date leave to appeal was granted, if the appeal is one to which subsection (2) applies, or

- (ii) within 30 days of the date the appellant receives a copy of the order of the board of inquiry, if the appeal is not one to which subsection (2) applies,
- (b) be returnable not later than 15 days after it is filed with the clerk, and
- (c) be served, together with all affidavits in support, on the board of inquiry and the other parties to the proceeding before the board not more than 5 days before the return date.

33(6) The Court may confirm, reverse or vary the order of the board and may make any order that the board can make under section 31.