BRITISH COLUMBIA LABOUR RELATIONS BOARD

UNIVERSITY OF THE FRASER VALLEY

(the “University” or "Employer")

-and-

THE UNIVERSITY OF THE FRASER VALLEY FACULTY & STAFF ASSOCIATION

(the “FSA” or "Union")

PANEL:	Koml Kandola, Vice-Chair and Registrar
APPEARANCES:	Kacey Krenn, for the Employer G. James Baugh, for the Union
CASE NO.:	71366
DATE OF HEARING:	December 4, 5, 13, 14 and 15, 2017
DATE OF DECISION:	February 9, 2018

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The FSA applies for interim and final orders against the University under Sections 6(1), 6(3)(d), 14 and 133(5) of the *Labour Relations Code* (the "Code"), with respect to the University's pursuit of the investigation of harassment complaints regarding the conduct of three of the FSA's Executive Officers, in their capacity as Union Officers, and other related matters (the "Application").

2 The Application was filed with the Board on November 27, 2017. The parties agreed to an oral hearing on December 4, 2017 to address the FSA's request for interim relief. That hearing was conducted on December 4 and 5, 2017 and, on December 5, 2017, I advised the parties via letter that the interim relief sought was granted in part. Reasons for that decision are included below.

3 The hearing on the merits of the Application was held on December 13, 14 and 15, 2017. On December 13, 2017, the Board received an application for interested party status. In a bottom line decision dated December 14, 2017, I dismissed the application. Reasons for that decision are also included below.

II. FACTS

BACKGROUND

4 The FSA is the exclusive bargaining agent for both faculty and support staff at the University. The FSA is also associated with the Federation of Post-Secondary Educators ("FPSE"). Sean Parkinson ("Parkinson") is the President of the FSA, Christina Neigel ("Neigel") is the FSA Faculty Vice-President, and Dr. Michael Maschek ("Maschek") is the FSA Secretary-Treasurer. Parkinson, Neigel and Maschek have held their respective offices since 2015.

5 The FSA's Constitution and By-Laws (the "Constitution and By-Laws") set out the duties and roles of FSA Executive Officers and the Executive Committee, which include the President, Faculty Vice-President, and Secretary-Treasurer.

6 Parkinson, Neigel and Maschek are also employees of the University. Pursuant to the parties' collective agreement, Parkinson is on a full release from his primary position with the University, while Neigel and Maschek are on partial releases from their respective positions.

7 The University provides designated office spaces on campus to the FSA.

8 On or about November 16, 2017, the University initiated harassment investigations of Parkinson, Neigel and Maschek. The investigations were based on written complaints (the "Complaints") made by Kim Nickel, the FSA Faculty Staff Administrator ("Nickel"), and Laura Chomiak, the FSA Staff Contract Administrator ("Chomiak"), respectively (collectively, the "Complainants"). The Complaints were filed under the University's Discrimination, Bullying and Harassment Policy (the "Harassment Policy"), which is discussed in more detail below.

9 Nickel and Chomiak are also employees of the University. At the relevant time, Nickel and Chomiak were both on full release from their primary positions with the University in order to serve as the FSA's Faculty and Staff Contract Administrators, respectively.

10 The job duties for the Faculty and Staff Contract Administrator positions are set out in the FSA's Constitution and By-Laws. The job duties of the Faculty Contract Administrator are set out in Article 5.9 of the Constitution and By-Laws as follows:

> The Faculty Contract Administrator will be responsible for handling individual faculty matters related to contract and workplace administration. He/she … will provide relevant information and advice to any Association faculty member who has concerns about workplace issues. In consultation with other members of the Executive and/or Faculty Stewards, he/she will initiate grievances when appropriate according to the Collective Agreement and the internal FSA grievance process… He/she will also supervise and provide training for Faculty Stewards.

11 The duties of the Staff Contract Administrator are virtually identical, but relate to staff members, rather than faculty members.

12 Pursuant to the Constitution and By-Laws, both the Faculty Contract Administrator and the Staff Contract Administrator are Officers of the FSA. As such, they are part of the FSA's Executive Committee, along with other individuals such as the President, the Staff and Faculty Vice-Presidents, and the Secretary-Treasurer, as noted above.

THE HARASSMENT POLICY AND PROCEDURES

13 The Harassment Policy prohibits discrimination, bullying and harassment at the University. The scope of the Harassment Policy is described as follows:

> This policy applies to all members of the university community engaged in university-related activities. It applies to all interpersonal communications, including electronic communications, such as email, posts and texts.

14 "Members of the university community" is defined as:

> The following are considered members of the University community for this policy:
>
> - All employees and students of the university;
> - Any person appointed by the university (whether or not that person is an employee), or engaged in activities arising directly out of the operations of the university;
> - Persons employed under contracts with university faculty members as the employer, who provide research or administrative services directly supporting faculty members' research activities;
> - Members of the Board of Governors;
> - Anyone residing on campus; and Service providers, contractors, independent societies and associations operating on campus, and their employees, agents and visitors.

15 The Discrimination, Bullying and Harassment Prevention Procedures (the "Procedures") set out detailed processes for handling complaints made under the Harassment Policy. Among other things, the Procedures state the University "may" initiate an investigation into a complaint, giving the option of an informal process for resolution, or a formal investigation process. The Human Rights and Conflict Resolution Advisor (the "Human Rights Advisor") determines whether a formal investigation is warranted. The Procedures specify that a referral to formal investigation would not be warranted where:

> 1. The complaint is not within the jurisdiction of the Policy;
> 2. The complaint is frivolous, malicious, vexatious or made in bad faith; or
> 3. The complaint is being or has been properly addressed by some other legal processes or UFV policy.

16 The Procedures state that where a formal investigation is initiated, the University's Associate Vice-President, Human Resources ("AVP HR") provides terms of reference for the investigator. The investigator will conduct interviews and produce a written report to the AVP HR. If a breach of the Harassment Policy is found, the AVP HR will provide a copy of the investigation report to "the appropriate vice president" who, in consultation with "the manager and a human resources designate", will decide whether to impose or recommend remedial action or formal discipline. The AVP HR has the authority to authorize modification of the Procedures.

17 The Procedures state that a respondent who chooses not to participate in an investigation may be subject to discipline or other corrective measures, and an adverse

inference may be drawn as a result of his or her failure to participate. A respondent is not permitted to have an advocate.

THE COMPLAINTS

18 Given the nature of the information included in them, the Complaints were not put into evidence before me. In the Application, the FSA describes the contents of the Complaints as follows:

> The Complaints consist of confidential internal FSA communications, confidential communications during various mediation processes, and solicitor-client communications, regarding the internal affairs of the FSA and labour relations matters involving the University. The FSA has put the University on notice that it has not waived any confidentiality or privilege regarding the confidential communications and solicitor-client communications referred to in the Complaints, and that neither Ms. Nickel nor Ms. Chomiak had or have the authority to waive the confidentiality and privilege attached to those communications.

19 The University did not dispute the FSA's description of the Complaints. There is no dispute that the "mediation processes" referred to in the Complaints involve: (1) a relationship enhancement mediation process between the University and the FSA, facilitated by Board mediators; and (2) a mediation process internal to the FSA, conducted by Debbie Cameron ("Cameron"), which was intended to improve relationships among FSA officers, and was ongoing at the time the Complaints were filed.

20 The University advised Parkinson, Neigel and Maschek of the Complaints in letters dated November 16, 2017, signed by Kim White, the University's Human Rights Advisor ("White"). White sent identical letters to each respondent, with one letter advising of Nickel's Complaint, and a separate letter advising of Chomiak's Complaint. For example, White's letter to Parkinson regarding the Nickel Complaint describes the scope of the Complaint as follows:

> The Human Rights and Conflict Resolution Office (HRCRO) at the University of the Fraser Valley (UFV) has received a request for a formal investigation into allegations of harassment from Ms. Kim Nickel, Faculty Contract Administrator. Ms. Nickel alleges that <u>while acting in your capacity as Faculty and Staff Association (FSA), President</u> you have engaged in a pattern of unreasonable behaviours that have caused her significant personal distress and <u>have negatively impacted her ability to perform the full functions of her elected role as Faculty Contract Administrator</u> (emphasis added).

21 White described the scope of Chomiak's Complaint in identical terms. This description of the scope of the Complaints was repeated in each letter. In addition, in each letter, White stated that:

- She had determined that a formal investigation was warranted;
- the University would be appointing an external investigator to conduct the investigation;
- The respondent would have 10 working days to file a response;
- The investigator would produce a written report to Dr. Eric Davis, Provost and Vice-President, Academic ("Davis"). If the investigator found the Harassment Policy has been breached, a copy of the report would be forwarded to Davis and a human resources delegate who would decide whether to impose or recommend remedial action and/or formal discipline; and
- Discussion of the investigation interviews, contents or findings with an unauthorized individual would be treated as a breach of the Harassment Policy.

EVENTS LEADING UP TO THE FILING OF THE APPLICATION

22 On November 21, 2017, White and Parkinson had a discussion about the Complaints and Parkinson stated that, in his view, the University had no jurisdiction to investigate the Complaints. White sent an email to Parkinson later that day, expressing her view that the Complaints fell within the scope of the Harassment Policy. In addition, White stated she "would strongly urge" Parkinson to not discuss the case in any manner outside of the investigation process, as any communication regarding the reduced staffing resulting from Nickel and Chomiak being on sick leave "may be seen as retaliatory".

23 In letters dated November 21 and 22, 2017, counsel for the FSA wrote to the University President demanding the University immediately cease and desist its investigations of Parkinson, Neigel and Maschek. FSA counsel asserted that, by initiating investigations with respect to complaints by two Union Officers in relation to the conduct of three Union Executive Officers, and which raised the internal affairs of the Union, the University was interfering with the administration of the Union and engaging in intimidating and threatening conduct, contrary to the Code.

24 On November 22, 2017, FSA counsel emailed Shawn Johnston, the University's In-house Legal Counsel, Labour and Employment ("Johnston"), stating as follows:

> Besides being full of confidential internal union communications, and containing information from various mediation processes that was also supposed to be kept confidential, the Nickel and Chomiak complaints against Christina Neidel (sic) and Sean Parkinson contain solicitor-client communications, which are subject to a strict legal privilege. This email is to confirm that neither Ms. Nickel nor Ms. Chomiak have the authority or power to waive solicitor-client privilege on behalf of the UFVFSA or FPSE, or to waive

> confidentiality regarding internal Union discussions and matters, and that neither the FSA nor FPSE has waived any confidentiality attaching to their internal union communications, solicitor-client communications, or to mediation processes.
>
> Consequently, it is the position of FPSE and the UFVFSA that the University should immediately return to FSA President Parkinson all copies of the Nickel and Chomiak complaints and any supporting documents, and that the University should delete or destroy any electronic copies of the complaints and any supporting documents.

25 As discussed below, the University did not hand over the Complaints to the FSA.

26 Contemporaneous with the filing of the Complaints, both Nickel and Chomiak went off work on sick leave, with no known return date. On November 20, 2017, Dr. Ken Brealey, the Associate Vice-Provost, Faculty Relations ("Brealey") emailed Parkinson and others, as follows:

> Given the two Contract Administrators have gone on sick leave with return date unknown, we need to meet, as soon as possible, to clarify how the FSA intends to proceed with maintaining the lines of communication on, carrying out requests and responses to, or means of addressing and resolving, etc. any and all issues, concerns, grievances or other initiatives previously handled between the FSA and [University] through those two offices. We are suggesting a meeting. …

27 On November 22, 2017, Parkinson advised Brealey that Vicki Bolan ("Bolan") had been appointed to the Staff Contract Administrator position and required a full-time leave of absence from her primary position with the University. In addition, Colleen Bell ("Bell") had been appointed to the Faculty Contract Administrator position and required a three-day per week partial leave from her primary position. Parkinson requested the leaves be arranged "as soon as possible".

28 Prior to commencing their sick leaves, Nickel and Chomiak left FSA property, such as computers and files, including grievance files and a termination grievance file, in their University offices. The FSA sought access to those offices in order to retrieve its files and property. In an email dated November 23, 2017, Johnston wrote to FSA counsel on this issue, stating in part:

> [I]f the FSA seeks to have the University provide access to the offices of Ms. Nickel and Ms. Chomiak, we cannot do so without considering and addressing what else is or may be in the offices and the rights and liabilities that attach; specifically personal information of Ms. Nickel and Ms. Chomiak, and UFV proprietary information (specifically in Ms. Nickel's case, as her office serves as both her FSA Contract Administrator Office, as well as her Faculty office)…

> I have contacted both Ms. Nickel and Ms. Chomiak and requested that they provide the materials requested by the FSA as soon as possible. …
>
> As a solution, I propose the following: I will contact the employee's (sic) and obtain a list of the FSA materials in their offices, specifying the list should not divulge information or identifies that the employer should not be privy to. I will then provide the list to the FSA, and the FSA can let me know what it wants provided, and can list any additional items that it is requesting. I will then work with the employee to locate and provide those materials to the FSA.

29 The same day, FSA counsel replied via email, stating the proposal was unacceptable. FSA counsel asserted the University was not entitled to an accounting or list of the retrieved material, and that neither Nickel nor Chomiak were authorized by the FSA to provide information to the University regarding FSA files and property. Ultimately, the parties were not able to agree upon a process for the FSA to retrieve its files and property from the offices of Nickel and Chomiak.

THE APPLICATION

30 In the Application, the FSA asserts the University has interfered with the administration of the FSA contrary to Section 6(1) of the Code by:

a) initiating and pursuing investigations into the conduct of the FSA's three chief Executive Officers with respect to their conduct as Union Officers, and which is alleged in the Complaints to have negatively impacted Nickel's and Chomiak's ability to do their jobs as Union Officers, all of which are internal FSA matters;

b) refusing to provide all copies of the Complaints to the FSA and to delete or destroy all electronic copies;

c) refusing to allow the FSA to retrieve its files and property from the University offices of Nickel and Chomiak; and

d) neglecting or declining to grant release time to the Union officers whom the FSA has designated to replace Nickel and Chomiak.

31 In addition, the FSA asserts that by launching investigations into the FSA's three chief Executive Officers with respect to their conduct as Union Officers, the University has violated Section 6(3)(d) of the Code by seeking, through intimidation or threat, to compel or induce the three chief Executive Officers from continuing to serve as officers of the FSA.

32 In the Application, the FSA described the matter as one "of great urgency", and expressly sought a hearing to be held "no later than Monday, December 4, 2017".

33 The FSA served the Application on the University, and also sent copies via email to Nickel and Chomiak.

34 The Application was filed with the Board at 10:59 am on November 27, 2017. At 2:29 pm that day, Johnston sent Bolan an email, attaching a letter seeking to advance the investigation of the Complaints by appointing an investigator. He confirmed the Complaints had been referred to the formal investigation process, and stated:

> As such and pursuant to Article 10.7(e) of the Collective Agreement we hereby serve notice to the FSA of the need to appoint an investigator for this matter… Given the objections of the FSA regarding the University's jurisdiction to deal with these complaints, we propose that, as a preliminary matter, the Investigator be requested to review the complaint, as well as [the Harassment Policy], and make a determination as to whether there is jurisdiction to investigate the Complaint under [the Harassment Policy].
>
> (the "Johnston Letter").

35 The FSA wrote to the Board on November 28, 2017 attaching a copy of the Johnston Letter. The FSA noted it had already served the University with a copy of the Application prior to the time of Johnston's correspondence, and had already asked the University to cease the investigations. The FSA asserted the University was escalating the matter and attempting to do an "end-run" around the Board's processes. The FSA renewed and reiterated its request for an urgent hearing. The FSA copied both Nickel and Chomiak on its letter to the Board.

III. THE INTERIM RELIEF

36 In the Application, the FSA requested an interim order that:

a) the University provide all copies of the Complaints to the FSA and confirm any electronic copies had been permanently deleted or destroyed;

b) the University grant access to the FSA to Chomiak's and Nickel's University offices so that the FSA may retrieve its files and property;

c) the University grant release time to the two Union Officers replacing Nickel and Chomiak as Faculty and Staff Contract Administrators, respectively. At the hearing, the FSA advised release time had been granted for Bell until the end of 2017, and it was only seeking interim relief in this respect regarding Bolan; and

d) the University take no further steps to investigate the Complaints pending resolution of the Application.

37 Section 133(5) of the Code provides that the Board may, in its discretion, and after giving each party an opportunity to be heard, make an interim order pending a final resolution of the application.

38 In a letter dated December 5, 2017, I granted interim relief in part and made the following orders pursuant to Section 133(5) of the Code (the "Interim Order"):

> 1. The University is ordered to give the FSA access to the University offices of Ms. Chomiak and Ms. Nickel (the "Offices") for the purpose of retrieving FSA files (including grievance files) and FSA property (including computers and tablets) in the Offices as follows. Gagan Dhaliwal, or an alternate Special Investigating Officer from the Board ("SIO") will attend at the University to access the Offices, in the presence of both a University representative and counsel for the FSA. The SIO will review files and materials in the Offices to determine which files and materials should be given to the FSA for the purpose set out above. The parties will make arrangements with the SIO for the retrieval of files to occur as soon as possible, and in any event no later than 4:00 pm on Monday, December 11, 2017.
>
> 2. The University will grant release time to Vicki Bolan as the FSA's Staff Contract Administrator, from Monday, December 11, 2017 to Friday, December 15, 2017. As noted below, on December 15, 2017, the parties will be attending at the Board for a hearing on the merits of the Application, and this aspect of this interim order may be revisited or varied at that time upon request of either party.
>
> 3. With respect to the complaints filed by Ms. Chomiak and Ms. Nickel respectively (the "Unredacted Complaints") under the University's Discrimination, Bullying and Harassment Prevention Policy (the "Policy"), the Union is to provide to Kim White, the University's Human Rights Advisor, a copy of each Complaint redacted for: solicitor-client privilege; confidential communications arising in the course of mediations conducted by the Board or by Debbie Cameron; and confidential communications of Union executive officers relating to internal Union business protected under the Wigmore criteria (the "Redacted Complaints"). The Union will provide copies of the Redacted Complaints to Ms. White as soon as possible and no later than 4:00 pm on Monday, December 11, 2017.
>
> Ms. White must return all copies of the Unredacted Complaints to counsel for the Union, as soon as possible and in any event by 4:00 pm on December 7, 2017. In addition, Ms. White, and any other employee of the University who has knowledge of the contents of the Unredacted Complaints, must immediately refrain from discussing the contents of the Unredacted Complaints with any person in any way, pending final determination of the Application by the Board, unless legally necessary in order to

> comply with the University's statutory obligations under the *Workers Compensation Act* and then only to the extent necessary to do so. If the Application is ultimately dismissed on the merits, the Union shall immediately give copies of the Unredacted Complaints to Ms. White.
>
> 4. The University will refrain from taking any further steps under the Policy with respect to investigating the Unredacted Complaints, pending final determination by the Board on the merits of the Application.

39 In addition, I stated as follows:

> Dates for hearing the merits of the Application have been set for December 13, 14, and 15, 2017 and will not be adjourned save for extraordinary circumstances. In that event, this order may be varied or cancelled on the Board's own motion.

40 The Board's test for interim relief is set out in *White Spot Restaurants Limited*, BCIRC No. C274/88 and summarized in *RBA Canada Inc.*, BCLRB Letter Decision No. B31/97 ("*RBA Canada*") at paragraph 19, as follows:

> 1. Whether an adequate remedy would be unavailable to the applicant at the final hearing without an interim order;
>
> 2. The existence of a strong link between an alleged breach of the Code, the consequences of the breach and the interim relief sought;
>
> 3. The claim must not be frivolous or vexatious and must usually be based on a *prima facie* case;
>
> 4. An interim order must not penalize the Respondent in a manner which will prevent redress if the application fails on its merits;
>
> 5. An interim order must be consistent with the purposes and objects of the Code. The discretion to grant an interim order will not be exercised absent a critical labour relations purpose or if the granting of the interim order would grant the entire remedy sought or otherwise tilt the balance in favour of one party.

41 The purpose of interim relief is to prevent the effective frustration of the applicant's rights in the period of delay between the filing of the application, and the decision on the merits: *RBA Canada,* para. 23.

1. Adequacy of remedy

42 There is no dispute that, as a result of the Complainants being away on sick leave, FSA property and files, including active grievance files, were left in the Complainants' offices at the University. The FSA states, and the University did not deny, that the University has changed the locks to those offices. Further, there is no dispute that, as of the date of the hearing on interim relief, Bolan had not been granted release time from her primary position with the University beyond December 8, 2017.

43 Clearly, there is a strong and compelling labour relations interest in a union being able to effectively represent its members. I find that to leave the FSA without access to its grievance files and property, locked in University offices to which only the University has access, until the decision on the merits of the Application is released would have a serious and prejudicial impact on the FSA's ability to represent its membership in grievances with the University. This impact would be difficult to effectively quantify or redress after a hearing on the merits is completed. The same can be said for leaving the FSA without a Staff Contract Administrator on release time in order to be able to serve as a steward for that segment of the membership. Accordingly, I am satisfied that the FSA may be without an adequate remedy if interim relief regarding access to its files and property, and release time for its newly appointed Staff Contract Administrator, is not granted. In all of the circumstances, I find the privacy and proprietary interests raised by the University can be addressed by having a Special Investigating Officer from the Board review the files in the Complainants' offices and determine whether the FSA should be given those files, while both the FSA and the University have representatives attend as well.

44 With respect to the investigation of the Complaints, there is no dispute that the scope of the Complaints relates to: the conduct of Executive Officers of the Union, in their roles as Executive Officers of the Union; and its alleged negative impact upon the ability of the Complainants to perform their jobs as Union Officers. This is in circumstances where the Complainants are on full-time release from their primary positions with the University in order to perform those Union jobs. There is also no dispute that the Complaints refer to communications that are otherwise protected by solicitor-client privilege, were made confidentially in mediation processes, or are confidential among Union Executive Officers. The University did not dispute that there is a labour relations privilege over internal communications between Union officers. In addition, there can be no dispute that the University would not otherwise have access to such communications. Further, the FSA asserts it has not authorized the Complainants to waive any of privilege or confidentiality.

45 In these circumstances, I find that the University's continued possession of the Complaints in an unredacted form, and the continuation of the investigation of the Complaints under the Harassment Policy and Procedures, until a decision on the merits of the Application is made would deprive the FSA of an adequate remedy if interim relief

in some form is not granted. The University would continue to be in possession of confidential and privileged information that it would not otherwise have access to. Further, the confidentiality of that information may continue to be breached as additional individuals, such as an investigator, the AVP HR and a human resources designate, become involved in the investigation process as provided in the Procedures. Such information, once obtained and seen, cannot be "unseen". Redaction of the Complaints for solicitor-client privilege and confidential communications would preserve the FSA's rights, while a requirement to immediately return the unredacted Complaints in the event the Application is unsuccessful on its merits recognizes the University's interests in the interim. In this respect, I note that adjudicators have ordered a party to return documentation or information to which it was not otherwise entitled, either by virtue of the confidential nature of the information or because it referred to solicitor-client communications: e.g. *Fraser Health Authority v. Hospital Employees' Union*, 2003 BCSC 807, and *Kljajic v. Vancouver (City)*, 2014 BCHRT 258, both of which were relied upon by the FSA.

2. Link between breach, consequences and remedy

46 The University did not argue there was a lack of connection between the alleged breaches of the Code, the consequences flowing from them and the remedy sought. I find the interim relief sought, with some limits, bears a reasonable relationship to the alleged breaches of the Code.

3. *Prima facie* case

47 A *prima facie* case is one that is not frivolous or vexatious, and which is "at least strong enough to justify having it proceed to hearing": *874352 Ontario Ltd. (c.o.b. Comox District Free Press)*, BCLRB No. B368/94 ("*Comox District Free Press*"), p. 4.

48 For the reasons set out below, I find the FSA's case is neither frivolous nor vexatious, and I am satisfied that the FSA has established a *prima facie* case as described in *Comox Free Press* and *RBA Canada.*

49 First, the Complaints deal with the confidential internal matters of the Union to which the University would otherwise not have any access, relate to the conduct of the respondents in their capacity as Union Officers, and the alleged impact relates to the Complainants' ability to perform their duties as Union Officers. Accordingly, an investigator would necessarily be required to access or comment upon confidential internal Union information in preparing his or her report, resulting in a breach of confidentiality. That breach would continue by virtue of the fact that, under the Procedures, a copy of the investigation report is given to the AVP HR and a human resources designate, to determine whether discipline should be imposed.

50 Second, under the Procedures, there is no right to remain silent and no right to legal representation. Further, an adverse inference may be drawn against a respondent for failing to participate, and there may be disciplinary consequences both for the alleged conduct itself and for discussing the Complaints with anyone outside the

investigation process. In this respect, I agree that the impact upon the FSA's ability to provide representation to the membership, is ongoing.

51 Third, the Complainants are on full release time from their primary positions with the University to perform work for the FSA, which somewhat limits the University's interest in this matter.

52 Fourth, the FSA promptly advised the University of its position that the University should cease and desist from continuing with the investigations. The University not only did not do so, it escalated the situation by subsequently attempting to appoint an investigator. Similarly, the University's failure to: (a) return the Complaints despite the fact that refer to privileged and confidential communications; (b) give the FSA access to its files and property in the Complainants' offices; and (c) grant release time, negatively impacts upon the FSA's ability to represent its members.

4. Prejudice to the University

53 The University says it has no interest in the FSA's internal workings, and is simply interested in fulfilling its statutory obligations under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the "*Workers Compensation Act*"), the *Occupational Health and Safety Regulation* and WorkSafeBC policies regarding workplace bullying and harassment. It notes at least one of the Complainants has filed a claim with WorkSafeBC in this regard. The University says the Complaints raise bullying and harassment issues and, by virtue of the WorkSafeBC scheme, the University is required to investigate: if it does not do so, it is not fulfilling its statutory duties and could be subject to sanction by WorkSafeBC.

54 Further, the University submits the identity of the employer of the Complainants, in the context of an occupational health and safety issue, is squarely raised in these proceedings. Accordingly, the University says the matter is within the exclusive jurisdiction of WorkSafeBC, not the Board. The University says that by making an interim order restricting the University from fulfilling its statutory obligations under the *Workers Compensation Act*, the Board would be usurping the jurisdiction of WorkSafeBC. In addition to these statutory obligations, the University says arbitral authorities support an employer's ability to investigate complaints involving union officials and internal union affairs, based on the legitimate interests of the employer.

55 I find I do not need to decide the issue of who is the employer of the Complainants for purposes of this proceeding. What is in issue in this proceeding is whether the University has breached Section 6(1) and 6(3)(d) of the Code as alleged by the FSA. These are matters that are clearly within the Board's jurisdiction. There is no dispute that the "employer" in this proceeding, and for these purposes, is the University.

56 Further, for the purposes of this decision, I accept, without deciding, that the University has certain obligations under the WorkSafeBC scheme regarding the workplace bullying and harassment, such as having a policy in place to address bullying and harassment. I note, however, that the University did not point to any legislation or

authority for the proposition that it must immediately conduct a full and formal investigation into the Complaints, regardless of their nature, and under pain of sanction. Further, the Harassment Policy and Procedures themselves allow for discretion and modification of process in this respect.

57 In addition, there can be no dispute that the University would not normally be in possession of the kind of information set out in the Complaints. Also, the dates for the hearing of the merits of the Application were set expeditiously for December 13, 14 and 15, 2017, minimizing issues of delay.

58 I find that an interim order can be crafted in a manner that respects these obligations while also addressing the relief requested by the FSA, in the terms set out in the Interim Order as quoted above.

59 Turning to the FSA's access to the Complainants' offices, the University cites the privacy rights of the Complainants or students whose personal information may be in the offices, and the proprietary interests of the University. With respect to the release time issue, the University says its ability to approve the request "is not immediate", as it must cover the work normally performed by those employees. Again, I find an interim order can be crafted in a manner that respects the University's concerns while also being responsive to the requests of the FSA, as set out in the Interim Order.

60 In all of the circumstances, I am not persuaded that an interim order would penalize the University in a manner that would prevent redress if the Application fails on its merits.

5. Consistency with Code objectives

61 I find that issuing an order for interim relief in the terms set out above is consistent with Code objectives in general and the duties set out in Section 2 in particular.

62 In summary, in all of the above circumstances, I find it is appropriate to exercise my discretion to grant interim relief in the manner set out in the Interim Order.

IV. APPLICATION FOR INTERESTED PARTY STATUS

63 On December 13, 2017, the parties attended at the Board to commence a hearing on the merits of the Application. At the start of the hearing, counsel for the Complainants appeared seeking interested party status for the Complainants, an immediate adjournment of the hearing, and requested the Board vacate the Interim Order. Counsel had not given prior notice to the Board, the FSA or the University, that he would be appearing and making these requests. Counsel stated he had only been retained that morning.

64 After considering the matter, I denied the request for an adjournment. I stated that if the Complainants sought interested party status, they must make a written

application, setting out the particulars of their request. I stated that if such an application were received by the Board, I would consider it expeditiously. I permitted counsel for the Complainants to remain at the hearing, but he declined.

65 Later that afternoon, the Board received a written application from the Complainants for interested party status. The Complainants assert they should have been made parties in this matter from the outset, noting the Board did not provide them with notice of the hearing regarding the interim relief or on the merits of the Application.

66 The Complainants submit the orders sought in the Application, and the Interim Order itself, directly affect their legal rights and interests. For example, the Complainants say the Interim Order prevents them from pursuing the Complaints through the University's processes, and has substantively changed the Complaints. In addition, they say the Interim Order authorizes the FSA to replace them in their elected positions. Further, they assert the Interim Order authorized a "search of the personal offices" of the Complainants without their attendance.

67 The Complainants assert the processes that have occurred to date in relation to the Application were without proper notice to them and, as a result, the proceedings are invalid. They say the Interim Order should be vacated and the proceedings must start anew.

68 After considering the Complainants' submissions, I issued a bottom-line decision on December 14, 2017, dismissing their application, with reasons to follow. These are my reasons.

69 The Board's test for determining whether to grant interested party status is that the applicant must be affected by the proceedings "in a direct and legally material way". "Legally material" means material to the rights of the applicant under the Code: *Marian Regional High School Education Committee*, IRC No. C166/88 ("*Marian Regional High School*"), (application for reconsideration dismissed IRC No. C170/88, petition for judicial review dismissed [1988] B.C.J. No. 1050 (S.C.)); *West Fraser Mills Ltd.*, BCLRB No. B442/93 (Reconsideration of BCLRB No. B97/93), 21 C.L.R.B.R. (2d) 236 ("*West Fraser Mills*").

70 The FSA's Application was filed on November 27, 2017. The Application sets out, in detail, the bases for the FSA's position that the University has committed unfair labour practices under the Code. The Application expressly states that the FSA is requesting interim relief, sets out the nature of the interim relief sought, and identifies the final remedies sought. In addition, in the Application, the FSA describes the matter as one of "great urgency", and expressly requested a hearing to be scheduled "as quickly as possible, and no later than Monday, December 4, 2017".

71 The Complainants were copied on the Application via e-mail. In their application for interested party status, the Complainants did not deny that they received the Application. The Complainants were again copied on the FSA's November 28, 2017 letter to the Board, in which the FSA reiterated its request for an expedited hearing and

interim relief in light of the Johnston Letter, and that such a hearing occur "no later than Monday, December 4, 2017". Again, the Complainants did not deny that they received the FSA's letter to the Board.

72 I find that, in these circumstances, the Complainants can reasonably be taken to have been aware of the nature of the relief being sought by the FSA (both interim and final), the urgency with which the FSA viewed the matter, and the FSA's repeated requests for the hearing to take place as soon as possible and no later than December 4, 2017. Nevertheless, the Complainants waited until December 13, 2017, i.e., 16 days after the date of the Application, to advise the Board of their desire to take part in these proceedings.

73 Further, during the course of the hearing regarding the interim relief, counsel for the University advised the Board that the University had contacted the Complainants to advise them of the FSA's request to access the Complainants' University offices to retrieve FSA files and property. In other words, the Complainants can reasonably be taken to have been aware that the hearing was proceeding in an expeditious manner and that the FSA continued to pursue interim relief.

74 In these circumstances, and given the stated urgency of the matter on the face of the Application, I find the Complainants' delay in asserting their purported rights is fatal to their application for interested party status. Accordingly, I decline to exercise my discretion to grant such standing.

75 In any event, I also find the Complainants have not met the legal test for interested party status. To be clear, the matter before me involves a dispute: between the FSA and the University with respect to alleged violations by the University of the FSA's rights under Section 6(1) and 6(3)(d) of the Code, and for which the FSA seeks orders and relief against the University.

76 While the Complainants may be affected by the issues raised in the Application, this, in itself, is insufficient to meet the legal test for interested party status: *Marian Regional High School*. In *West Fraser Mills*, the Board explained as follows:

> The Board will take a liberal approach to natural justice rights. However, the natural justice rights to be protected must be an interest which speaks to (i.e., is material to) the legal issue before the Board under the Code. Otherwise, the party has nothing to add to the determination and the Board's processes will simply be bogged down by parties who admittedly may be directly affected by the outcome of the proceeding, but do not have an interest in the legal issue per se.
>
> The Board's judicially approved test for interested party status is that the party must be affected by the proceedings in a direct and legally material way: *Marian High School*, IRC No. C168/88; upheld on reconsideration, IRC No. C170/88; application for judicial review dismissed (June 16, 1988) A881729 (B.C.S.C.).

> Legally material means material to the essence of the dispute under the Labour Code. "Legally refers to the rights of the applicants under the Act": *Westfair Foods Ltd*., IRC No. C154/89, at p. 10. As a result, not all parties which may be directly affected by the outcome of a determination by the Board are granted standing. For instance, in communities in British Columbia where the economy is dependent on a single mill or operation, many (perhaps even most) persons within that community will be affected by a strike or lockout determination made under the Code. Nonetheless, those persons would not be given standing, (unless they could meet the legally material test) even though they may be directly affected by the Board's determination in the form of impact on their contractual relations with the mill or their economic dependence on the income of the community derived from the mill. Similarly, the parents in the *Marian High School* case were directly affected by the outcome of the tribunal's determination, but were not granted standing because that impact, and their concern about that impact, was not material to the legal determination to be made under the Code. (pp. 12-13, emphasis added)

77 In *Compass Group Canada (Health Services) Ltd.*, BCLRB No. B222/2011, Revera, a third party who would potentially suffer economic and other losses as a result of a labour dispute involving Compass Group Canada, was denied interested party status on the basis that its interests, while affected, were not material to the determination of the dispute under the Code. In denying the application, the Board stated:

> …Under Section 2(f) of the Code, the Board must minimize the effects of labour disputes on persons who are not involved in the dispute. However, Section 2 does not mandate that the Board ensure there is no impact on third parties. Third parties, which include clients of a struck employer, are at times adversely affected by labour disputes. The resulting effect of the non-use of Revera's property and the asserted possible cost incurred under its contractual relationship with Compass is no different than other clients of struck employers whose operation of their business is affected by a labour dispute. As noted, in the passage from *West Fraser Mills* set out above, persons affected by a labour dispute may be directly affected in the form of impact on their contractual relations. However, this impact is not material to the legal determination to be made under the Code and therefore does not entitle them to standing in the Board's proceedings… (para. 11)

78 Similarly, the Board has held the mere fact that a third party's contractual relations or interests may be affected is not sufficient, in itself, to obtain interested party status: *Fortisbc Inc*., BCLRB No. B164/2013.

79 While there are factual differences between these cases and the present case, they are demonstrative of the Board's approach. The fact that an individual is affected by a proceeding under the Code is insufficient, in itself, to obtain interested party status.

80 The Complainants have made submissions regarding how they say they are affected by the proceedings. However, I find they have not particularized how their interests are affected *in a way that is material to the legal determinations to be made under the Code in this matter*, i.e., whether the University interfered with the administration of the FSA, or intimidated or threatened Parkinson, Neigel and Maschek from continuing to act as officers of the FSA, as alleged.

81 For example, as noted above, one of the ways in which the FSA says the University has interfered with the administration of the FSA is by not allowing the FSA to retrieve its files and property from the Complainants' University offices. The Interim Order required the University to allow a Board SIO to review the files and property and determine whether they should be given back to the FSA. The Complainants' offices are on University premises and are not the Complainants' property. Further, there can be no dispute that the materials retrieved, i.e. grievance files and computers, belong not to the Complainants, but to the FSA. Thus, while the Complainants may have been affected by this aspect of the Interim Order, they did not indicate how their interests were affected in a manner material to the legal determination to be made under the Code, nor do I find their interests to be affected in such a manner.

82 With respect to the granting of release time for Bolan as the newly appointed Staff Contract Administrator, the Complainants characterize the Interim Order as requiring the University to pay replacement pay for appointees who have been put in their positions, and FSA refuses to say whether they intend those replacements to be permanent or temporary. However, the issue before me is whether the University committed an unfair labour practice under the Code in not granting the release time sought and interfered with the FSA's ability to provide representation to its members. There can be no dispute that the duties of the Faculty and Staff Contract Administrator positions were not being performed as a result of the Complainants both commencing sick leave with no known return date. Similarly, there can be no dispute that the FSA reasonably requires the Contract Administrator duties to be performed in order to provide representation to its members in the grievance process. The granting of release time occurs pursuant to an express provision of the collective agreement between the University and the FSA. Thus, while the Complainants may be affected by this aspect of the relief sought in the Application, the Complainants have not identified how their interests were affected in a manner material to the legal determination to be made under the Code, nor do I find their interests to be affected in such a manner.

83 With respect to the investigation of the Complaints, it is important to understand that the merit or validity of the Complaints and the internal issues between the Complainants and the FSA are not before the Board. The Board is concerned with the alleged violations of the Code, and whether, by initiating and pursuing the investigation of the Complaints in the manner it did, the University committed an unfair labour practice. From this perspective, I find the Complainants' interests are not affected in a manner material to the legal determinations to be made under the Code.

84 For all these reasons, I find the Complainants have not met the Board's test for interested party status, and their application is denied.

V. THE APPLICATION ON THE MERITS

EVIDENCE

85 In addition to the evidence set out above, the parties provided further documentary evidence at the hearing on the merits of the Application. Also, the FSA called Parkinson as a witness. The University called two witnesses: Dianne Hicks, who is the University's Director of Human Resources and Staff Relations; and White.

86 Parkinson gave evidence that, since becoming the FSA President in 2015, his relationship with the University administration has not been a happy one. He gave examples of negative feedback or "unproductive responses" he received from the University administration in reaction to positions he took as FSA President. Some of Parkinson's examples involved Dr. Davis, who, as noted above, is the University representative who would receive a copy of the investigator's report under the Procedures.

87 According to Parkinson, the University preferred to deal with Nickel or Chomiak rather than him, both on labour relations matters and any matter involving political significance to the University. Parkinson stated, for example, that in June 2017, he contacted the Board, on behalf of the University and himself, to request the assistance of Board mediators through the Board's relationship enhancement program, in order to improve the relationship between the University and the FSA. An initial meeting was scheduled for September 2017, and Parkinson's understanding was that he and Brealey would attend that meeting with the Board mediators. However, when Parkinson arrived at the meeting, he was surprised to see Nickel and Chomiak in attendance, as well as five individuals from the University administration. Parkinson testified he had not asked Nickel or Chomiak to attend, and felt "sandbagged".

88 In cross-examination, Parkinson agreed that it is the primary job of the Faculty and Staff Contract Administrators to deal with the University on labour relations matters.

89 With respect to the Complainants being off on sick leave and thus being unable to perform their jobs as Faculty and Staff Contract Administrators, Parkinson testified that he called an emergency meeting of the FSA Executive for November 21, 2017, the outcome of which was that Bolan and Bell were appointed to the positions. Parkinson gave evidence regarding the usual practice regarding release time, whereby an employee may be released from their primary position with the University in order to perform work for the FSA. If the University chooses to replace the employee in their primary position during the leave, such as by an auxiliary staff or sessional instructor, the collective agreement provides that the leave is at full replacement cost, and that the University neither makes a savings nor experiences a cost in the replacement process. Similarly, Hicks testified that when an employee is on release, they retain their benefits as University employees, and the University invoices the FSA for the cost of a replacement.

90 With respect to Bell and Bolan in particular, Parkinson testified the University could easily and quickly replace them from the auxiliary pool. This evidence was not challenged on cross-examination. In her evidence, Hicks stated that the University was attempting to get replacement coverage for Bell and Bolan, and that it had or shortly would be posting for replacements until the end of May 2018.

91 Parkinson also gave evidence regarding his response to receiving notification of the Complaints. He testified that, based on White's letters advising of the Complaints and his communication with White in this regard, he understood he could not communicate anything about the Complaints to FSA members, and that he could be disciplined for doing so. He testified that this threat of discipline has "generated paralysis in our ability to represent members", and has also resulted in damage to his personal reputation.

92 I now turn to the evidence of the University's witnesses. Among other things, they gave evidence regarding the complaint process under the Harassment Policy and the Procedures.

93 White testified about her role as the Human Rights Advisor. White has an office at the University, and no one else access to it or to her files. Individuals may contact her for confidential consultations regarding the Harassment Policy and request assistance. In these consultations, she outlines the Harassment Policy and reviews the Procedures, emphasizing the importance of confidentiality and privacy, the provision of support, and her role as a neutral advisor.

94 White testified that when a complaint is made under the Harassment Policy, she is the only one who reviews it. Her usual process is to consider whether the issues raised require further investigation or whether there is the matter can be resolved more informally.

95 White explained that an informal resolution process is typically engaged under the Procedures where both parties are willing to participate. An informal process would not be appropriate if a party does not want to participate, or due to the severity of the issues.

96 In determining whether a complaint should be formally investigated, White considers factors such as: the impact on the other person; whether there is a negative job-related impact upon the complainant; whether it is a one-time effect or a pattern of conduct; and whether a reasonable person would know the behaviour was unwelcome and would negatively impact the complainant.

97 White testified that where she determines that an investigation is warranted, the investigator is appointed jointly by the FSA and the University based on a list of FPSE-approved investigators. The respondent is then given an opportunity to respond to the allegations. The investigator issues a report, which goes to the AVP HR. White stated she does not see the investigator's report.

98 White confirmed that the Procedures can be, and often are, modified to suit the particular case, and that it is not uncommon to relax or waive timelines.

99 Turning to the present case, White testified that Chomiak and Nickel contacted her and ultimately filed the Complaints. After reviewing the Complaints, White determined that the allegations were serious and if the allegations were true, further investigation was required. She did not engage the informal process because the Complainants did not want to do so. White then notified Parkinson, Neigel and Maschek of the Complaints in her letters of November 16, 2017, which she stated were standard form letters. She did not receive any response to the Complaints from the respondents.

THE PARTIES' POSITIONS

100 In making submissions on the merits of the Application, both the FSA and the University relied upon the submissions and authorities they cited in relation to the interim relief sought. They also made further submissions, which are briefly summarized below.

The FSA

101 With respect to the investigation of the Complaints, the FSA notes the Complaints are made by two Union Officers against three other Union Officers regarding internal Union affairs. The University, through an investigation process that the University itself puts into place, can look into the internal workings of the Union, and possibly discipline the Union Officers. Pursuant to the Procedures, the respondents are denied the right to remain silent under further pain of discipline. In the FSA's submission, this is the most serious kind of interference with the administration of a union and is contrary to Section 6(1) of the Code.

102 The FSA reiterates that the Procedures provide considerable discretion for the University in how to handle complaints, yet there was no attempt made to modify the Procedures in the present case, or to attempt to engage in any informal resolution processes. The FSA asserts that allowing the University to retain unredacted copies of the Complaints would "eviscerate the confidentiality of the Union's internal communications". In this context, the FSA says the security of White's office is of no moment because an investigator under the Harassment Policy is a third party who would be permitted to interview individuals about the privileged and confidential matters raised in the Complaints. Further, the investigator's report would be given to Dr. Davis and reviewed by Brealey or Hicks, further revealing internal Union matters.

103 The FSA immediately advised the University to cease and desist the investigations into the Complaints on the basis that the Complaints revealed confidential and privileged information internal to the FSA. Nevertheless, the University continued to pursue the investigations, and even after the filing of the Application, escalated the

matter by trying to appoint an investigator. In doing so, the University proposed three names, none of whom were on the FPSE-approved list of investigators.

104 In support of its arguments under Section 6(1) of the Code, the FSA also relies upon the difficulties it experienced in seeking to obtain release time for Bell and Bolan, and in obtaining access to its files and property in the Complainants' University offices.

105 Turning to the complaint under Section 6(3)(d) of the Code, the FSA relies upon the threat of discipline and adverse inferences associated with the investigation of the Complaints. The FSA also refers to what it characterizes as threats made by White to Parkinson that any communication with the membership about the Complaints could result in discipline. The FSA submits this has a chilling effect not only on the respondents, but on any Union members considering serving as Union Officers. In addition, the FSA relies upon the evidence of a fractious relationship between the University and Parkinson as establishing anti-Union animus.

The University

106 The University says the FSA has failed to establish any unfair labour practice. With respect to the investigation of the Complaints, the University reiterates that it did not solicit the Complaints or the information contained in them. The fact that the Complaints contain information that the FSA objects to does not remove the University's statutory obligations under the WorkSafeBC scheme to address allegations of bullying and harassment. In the University's submission, the interim order "is as far as the Board can go to 'protect labour relations interests'", and that the Code does not trump other statutes.

107 The University also relies upon arbitral authorities dealing with an employer's ability to investigate complaints where they involve union officials and internal union affairs. The University says the case law recognizes it has an institutional interest in ensuring a safe, harmonious and harassment-free workplace, particularly where all parties involved are University employees.

108 The University also asserts it has taken appropriate steps to address the FSA's concerns regarding confidentiality of the communications referred to in the Complaints. For example, it says it has thus far dealt with the Complaints in a confidential manner, and that White is the only one who has access to the Complaints. The University notes the FSA did not at any time request modification of the Procedures in this case, nor did the respondents file any response or otherwise participate. In contrast, the University proposed to craft terms of reference for the investigator that would acknowledge the confidentiality of the information contained in the Complaints. In addition, the University says nothing should be taken from the fact that the FSA redacted the Complaints to now contain virtually nothing, as the FSA had the sole opportunity to "gut" the Complaints.

109 In the University's submission, making an order that would preclude it from taking any further steps to investigate the Complaints would interfere with its statutory obligations under the *Workers Compensation Act* and would interfere with the jurisdiction of WorkSafeBC.

110 Turning to the FSA's access to the Complainants' offices, the University says access has been accomplished. It reiterates that it could not grant unfettered access to the offices and says it acted in a reasonable way prior to the interim order, being mindful of the various privacy interests involved.

111 Similarly, the University denies it committed an unfair labour practice in handling the request for release time for the newly appointed Contract Administrators. It says it handled the requests on an expedited basis, and the ability to approve the requests is "not immediate, as the University must be in a position to cover the work normally performed by those employees for the University". Further, the University approved a partial leave for Bell, and has also secured a replacement for Bolan until the end of January 2018. The University says any issues in this regard should be addressed through the grievance procedure under the collective agreement, not in an unfair labour practice complaint before the Board.

112 With respect to the complaint under Section 6(3)(d), the University notes there was no evidence of any negative relationship between University administration and Neigel or Maschek, and that this lack of evidence exemplifies "the speculative nature of the case". In terms of the investigation of the Complaints, the University notes no investigation has actually commenced and, as a result, the respondents are not faced with a threat of discipline. The University reiterates that discipline is simply one possible outcome, and that the Harassment Policy and Procedures also refer to other possible outcomes such as remedial action. Further and in any event, the University says that even if discipline is imposed upon the respondents, which is speculative, the FSA's recourse is to file a grievance.

The FSA's Reply

113 The FSA says the issue at hand is not the validity of the Harassment Policy, but the initiation and pursuit of the investigation, which results in: interference with the administration of the Union; creates an impossible situation for the three Union Officers; and constitutes intimidation. It maintains that the University has not pointed to any provision of the *Workers Compensation Act* that would penalize the University for failing to conduct a full and formal investigation into the Complaints.

114 With respect to the granting of release time for Bolan, the FSA notes Parkinson gave unchallenged evidence that a replacement for Bolan could easily and quickly have been obtained from the auxiliary pool.

115 The FSA also says it was not necessary for Maschek or Neigel to testify as Parkinson gave evidence on behalf of the Union, including evidence as to how the investigation is adversely affecting the FSA's ability to conduct its affairs.

ANALYSIS AND DECISION

116 Section 6(1) of the Code prohibits an employer or a person acting on behalf of an employer from participating in or interfering with the administration of a trade union. Under Section 6(1), the Board's focus is on the objective impact of the employer's conduct. Accordingly, the union does not need to establish anti-union animus. However, the business reasons for the employer's conduct are relevant to determining whether the employer has committed an unfair labour practice: *Valley First Credit Union*, BCLRB No. B21/2014, 239 C.L.R.B.R. (2d) 158, para. 27.

The Investigation of the Complaints

117 The University asserts that the identity of the employer of the Complainants is in issue. At the same time, the University asserts it has obligations under WorkSafeBC legislation and policy with respect to addressing workplace bullying and harassment, and relies upon these obligations as a key reason for its insistence on pursuing the investigations into the Complaints.

118 In my view, the University can only have these obligations if the University is the employer of the Complainants for WorkSafeBC purposes. However, I find I do not need to decide that issue. For the purposes of this decision, I assume, without deciding, that the University has statutory obligations regarding workplace bullying and harassment, including a duty to have a policy in place addressing workplace bullying and harassment. However, as noted and as pointed out by the FSA, the University did not provide any authority for the proposition that it was required, under pain of sanction, to immediately conduct a full and formal investigation of the Complaints in the circumstances of this case.

119 I find that in the circumstances of this case, the University over-reached in asserting its interests and interfered with the administration of a trade union contrary to Section 6(1) of the Code. My reasons for this finding are set out below.

120 This case appears to be one of first instance under the Code. While none of the cases cited by the parties was precisely on point in terms of facts and arguments raised, I find the decision of the Ontario Labour Relations Board in *Upper Grand District* to be of assistance.

121 In *Upper Grand District*, three employees of the school board, who were also union officers, filed a harassment complaint against the union president, pursuant to the

school board's harassment policy. The policy was very broad in scope and applied to "members of the school community". All parties were on full leave from their teaching duties in order to fulfill their union officer roles.

122 The school board sought to proceed with an investigation under its harassment policy, and appointed an investigator. Prior to the investigation being concluded, the union advised the school board that it objected to the school board proceeding with a harassment investigation that related to internal union matters. Ultimately, the union filed an unfair labour practice complaint, alleging the employer had interfered with the administration of the union by engaging in an investigation into internal union matters: para. 5. The school board disagreed, arguing that even if the incidents complained of in the harassment complaint pertained exclusively to the interaction of individuals engaged in their capacity as union officials, the school board still retained a legitimate interest in investigating a complaint involving its employees: para. 24.

123 In its analysis, the Ontario Board adopted a balancing of interests approach. Specifically, it recognized that the employer had an interest in maintaining a safe, harmonious and efficient workplace: para. 35. However, the Ontario Board noted there was no evidence that there was a substantial risk of the antagonism between the complainants and the respondent "spilling over" in the workplace: *ibid*.

124 The Ontario Board also recognized that the union had a legitimate interest in protecting its internal processes from employer scrutiny, stating as follows:

> On the other hand, the Federation has an obvious and strong interest in conducting its internal business independently, and without scrutiny by UGDSB. The Act, while it strives to facilitate collective bargaining, encourage communication between employers and employees, and promote co-operation between employers and trade unions in resolving workplace issues (see section 2), recognizes the adversarial nature of labour relations. That is why, for example, the Act prohibits the certification of a trade union in circumstances where an employer participates in its formation or administration, or contributes financial support… Or why, in an application for certification, the employer is not entitled to disclosure of the identity of the trade union's members… And, obviously, the adversarial nature of the relationship underscores the unfair labour practice provisions of the Act prohibiting interference by the institutional parties in each others' formation or administration… In any number of ways, the statutory imperative is to keep the institutional parties out of each other's internal business. (para. 36)

125 The Ontario Board accepted there was no anti-union animus on the part of the school board, noting the school board "simply wishes, and feels it has a duty, to investigate a complaint that has been referred to it by several employees under the policy": para. 40. However, the union had a competing legitimate interest in protecting its internal processes from employer scrutiny and did not wish to "throw open its

doors… to the prying eyes of third parties": para. 41. In this respect, the Ontario Board held as follows:

> We agree with the union's argument that any investigation by the employer of this particular complaint runs a considerable risk of exposing the union's internal workings and processes. A thorough investigation could lead the investigator into an inquiry of the union activities the individuals were engaged in when the alleged incidents of harassment occurred. … This is information that could find its way back to the employer, in the investigator's written report. (para. 43)

126 Balancing the parties' interests, the Ontario Board found in favour of the union, finding as follows:

> In our view, however, once the Federation indicated to the employer its view that the complaint was confined solely to alleged misconduct in the course of union business (an assertion not expressly denied by [the employer]) and advised UGDSB that there was an alternative process available to the complainants under the ETFO Constitution and Bylaws, the investigation ought to have been halted at that stage. That is because the Federation's legitimate interest in protecting its internal processes and affairs from disclosure to the employer outweighed UGDSB's interest in a safe, harmonious and efficient workplace in circumstances where there appears to be no substantial risk of a spill-over of the antagonism at the heart of the harassment complaint in the workplace. (para. 45, emphasis added)

127 The Ontario Board recognized that there may be situations where an employer's interest trumps a union's right to avoid scrutiny of its internal business. However, in the circumstances of the case, it found that the employer's decision to continue further with the investigation constituted interference, though inadvertent, with the administration of the union: *ibid.*

128 The University says *Upper Grand School District* is distinguishable because the school board did not appear to raise the obligations imposed by occupational health and safety legislation. While this may be so, it is also true that the internal union matters and communications referred to in the complaint in that case did not relate to confidential communications among executive officers of the union, confidential mediation processes, or solicitor-client communications. In addition, in the present case, as in *Upper Grand School District*, the University did not lead any evidence regarding a substantial risk of a spillover effect in the workplace. The University's lack of reliance on any spillover effect is further evidenced in the manner in which White characterized the Complaints in her November 16, 2017 letters to the respondents, i.e., that the respondents are alleged to have engaged in inappropriate conduct, while acting in their respective capacities *as Union officers*, and which caused the Complainants distress and negatively impacted their ability to perform *their Union roles as FSA Contract Administrators*. The University has not asserted that there is a risk of spillover

into the workplace in general or upon the Complainants' abilities to do their jobs for the University.

129 The "balancing of interests" approach was also adopted by the arbitration board in *Mount Royal Faculty Assn. v. Board of Governors of Mount Royal University* (2011), 213 L.A.C. (4th) 1 (Wallace) ("*Mount Royal*"), relied upon by the University. However, an important point of distinction is that *Mount Royal* and other cases cited by the University relate to discipline issued to union officials after the completion of an investigation, as opposed to an alleged breach of unfair labour practice provisions of labour legislation, and while the investigation remained ongoing.

130 I find that the "balancing of interests" approach adopted in these cases is instructive in the present case and is consistent with the Code context.

131 I have already assumed without deciding that, for the purposes of this case, that the University bears certain obligations under WorkSafeBC legislation and policies regarding workplace bullying and harassment. However, the FSA has a competing legitimate interest in protecting the confidentiality of internal communication between Union officers, mediation processes, and its solicitor-client communications, and there is no dispute that the Complaints refer to each of these types of communications. The evidence was that White has already reviewed the Complaints, and this information is thus already in the hands of the University.

132 In balancing these interests, several points must be considered in light of the factual circumstances before me. First, the internal and confidential information referred to in the Complaints is of a highly protected nature. Given the undisputed nature of the Complaints, it is difficult to imagine how an investigator could proceed without delving into the internal confidential and privileged affairs of the FSA.

133 Second, the University did not provide any substantive argument or evidence of spillover of the dispute into the University workplace or impact upon the Complainants' ability to perform their jobs for the University.

134 Third, as noted, the University did not point to any provision of the WorkSafeBC scheme indicating it is required to conduct a full and formal investigation in the circumstances, nor did the University present any authority for its assertion that failure to conduct a full and formal investigation of the Complaints in the circumstances would result in sanction by WorkSafeBC. In any event, the Harassment Policy and Procedures themselves provide the University with discretion as to whether to conduct a formal investigation. The University's own evidence was that the Procedures can and have been modified to address the circumstances of a particular case. There was no evidence of any attempt to modify the Procedures in the present case.

135 Further, at the time the Complaints were filed, the internal mediation process facilitated by Cameron was still ongoing within the FSA. There was no exploration or discussion of whether that process could possibly address the issues raised in the Complaints. I recognize that the respondents are Union Officers themselves; however,

the Constitution and Bylaws establish there are many other Union Officers on the FSA's Executive Committee. There was no evidence of an attempt by the University to discuss the matter with the remainder of the FSA Executive Committee in a confidential capacity.

136 Instead, the University pressed ahead with the investigation process, seeking responses from Parkinson, Neigel and Maschek. As discussed, the Procedures specify that failure to participate may result in an adverse inference being drawn, and that the respondents may be subject to discipline at the end of the process, or for communicating about the process. Further, even after the Application was filed, the University escalated the matter by seeking to appoint an investigator. The University says it acted reasonably by offering to draft terms of reference for the investigator that could deal with the confidentiality issues. In my view, this is not a sufficient answer to the fact that the University is not otherwise authorized to have such information in the first instance, particularly where there is no dispute that confidentiality and privilege were not waived by the FSA.

137 The validity of the Harassment Policy and Procedures are not in issue in this proceeding. Further, evidence of anti-Union animus is not required to establish a breach of Section 6(1). I recognize that the University did not solicit the information in the Complaints. It may well have believed it was acting appropriately in pursuing a formal investigation in the manner it did. However, on an objective standard, and based on the particular and unique circumstances of this case, I find the University's conduct in pursuing the investigation of the Complaints as it did constitutes interference with the administration of a trade union contrary to Section 6(1) of the Code.

REFUSAL TO GRANT RELEASE TIME

138 Similarly, I find that the University's refusal to grant release time to Bolan and Bell constitutes interference with the administration of a trade union. The Faculty and Staff Contract Administrator positions essentially act as chief stewards for the faculty and staff members of the bargaining unit, respectively, in relation to grievance matters involving the University. Leaving such positions vacant negatively impacts on the FSA's ability to provide representation and service to its members. This was at least in part recognized by the University in Brealey's November 20, 2017 email to Parkinson, set out above. While the University argued it takes time for replacements to be arranged, Parkinson's unchallenged evidence was that temporary replacements could be readily and quickly accessed from the auxiliary pool while longer term replacements were found. In all of the circumstances, I find the FSA has established a breach of Section 6(1) on this issue.

REFUSAL TO GRANT ACCESS TO THE COMPLAINANTS' OFFICES

139 I also find that the University's refusal to provide the FSA with access to the Complainants' offices in order to retrieve FSA files and property constitutes interference with the administration of a trade union. Given the nature of the Faculty and Staff Contract Administrator roles, there could be no dispute that Nickel and Chomiak would likely have FSA-related files, including grievance files, in their respective offices. Those offices are located on University premises and are University property. There is no evidence that the FSA sought unfettered access to the Complainants' offices or sought access to anything other than its own files and property. As a result, the competing privacy interests that the University was seeking to protect were not threatened. At the very least, the University's continued refusal to provide access meant the FSA did not have access to grievance information, including an active termination grievance. In such circumstances, it is clear there is a negative impact on the administration of the FSA and its ability to provide representation to its members.

THE FSA'S COMPLAINT UNDER SECTION 6(3)(D)

140 Section 6(3)(d) of the Code states:

> (3) An employer… must not
>
> (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union.

141 In order to find a breach of Section 6(3)(d) of the Code, an employer must: (1) engage in intimidation or threats; and (2) seek "to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union". As discussed above, I accept that the University has a legitimate interest in seeking to ensure it has a harmonious, harassment-free workplace. Considering the evidence as a whole, I am not persuaded that, in pursuing the investigations of the Complaints, the University was seeking or could reasonably be seen to be seeking, to compel or induce the respondents to refrain from continuing to be officers of the FSA. While the University and Parkinson may have had a difficult relationship, that, in itself does not establish the second part of the test under Section 6(3)(d), and the FSA's evidence falls short in this regard. The complaint under Section 6(3)(d) is dismissed.

VI. REMEDIES

142 The FSA seeks various declarations and orders. It initially sought an order for damages but withdrew that request at the hearing.

143 Based on the findings set out above, I declare that the University has violated Section 6(1) of the Code by: (a) proceeding with the investigations of the Complaints in the manner it did; (b) not granting the FSA access to the Complainants' University offices in order to retrieve FSA files and property; and (c) not granting release time to Bolan and Bell. In this respect, I order that the University grant release time to Bolan and Bell as Faculty and Staff Contract Administrators pending the return of Nickel and Chomiak from their respective sick leaves.

144 With respect to the investigation of the Complaints, I remit the matter of remedy to the parties to determine how to proceed in light of both parties' obligations under the Code and the WorkSafeBC scheme. In this respect, I note the Complainants have both filed WorkSafeBC complaints. They may have additional options available to them to have their concerns addressed. In such circumstances, I find it is most appropriate to let the parties attempt to mutually determine the appropriate steps in this regard. I strongly encourage the parties to avail themselves of the assistance of a Special Investigating Officer of the Board in doing so. If the parties are unable to reach an agreement, I retain jurisdiction in this regard.

LABOUR RELATIONS BOARD

"KOML KANDOLA"

KOML KANDOLA
VICE-CHAIR AND REGISTRAR