PUBLIC POLICY SOURCES

Number 25

Liam Donnelly's Conviction by Prejudice: Lessons for Harassment Policy

by David Finley

Contents

A FRASER INSTITUTE OCCASIONAL PAPER

THE FRASER INSTITUTE

Public Policy Sources is published periodically throughout the year by The Fraser Institute, Vancouver, B.C., Canada.

The Fraser Institute is an independent Canadian economic and social research and educational organization. It has as its objective the redirection of public attention to the role of competitive markets in providing for the well-being of Canadians. Where markets work, the Institute's interest lies in trying to discover prospects for improvement. Where markets do not work, its interest lies in finding the reasons. Where competitive markets have been replaced by government control, the interest of the Institute lies in documenting objectively the nature of the improvement or deterioration resulting from government intervention. The work of the Institute is assisted by an Editorial Advisory Board of internationally renowned economists. The Fraser Institute is a national, federally chartered non-profit organization financed by the sale of its publications and the tax-deductible contributions of its members, foundations, and other supporters; it receives no government funding.

For information about Fraser Institute membership, please call Sherry Stein at The Fraser Institute at (604) 688-0221, ext. 590 or (416) 363-6575, ext. 590.

Editor & Designer: *Kristin McCahon*

For media information, please contact Suzanne Walters, Director of Communications,
(604) 688-0221, ext. 582 or (416) 363-6575, ext. 582

To order additional copies, write or call The Fraser Institute, 4th Floor, 1770 Burrard Street, Vancouver, B.C., V6J 3G7
Toll-free order line: 1-800-665-3558; *Telephone:* (604) 688-0221, ext. 580; *Fax*: (604) 688-8539
In Toronto, write or call The Fraser Institute, Suite 2550 – 55 King Street West, Toronto, ON, M5K 1E7
Telephone: (416) 363-6575, ext. 580; *Fax:* (416) 601-7322

Visit our Web site at *http://www.fraserinstitute.ca*

The author of this study has worked independently and opinions expressed by him are, therefore, his own, and do not necessarily reflect the opinions of the members or trustees of The Fraser Institute.

Printed in Canada.
ISSN 1206-6257

Preface

Founded, in part, in response to a growing Canadian penchant for the regulation of private behaviour, The Fraser Institute's Social Affairs Centre has a mandate to examine the rationale behind, and the implications of, social policy initiatives. Within that broad framework, a number of topics related to post-secondary education are obvious research candidates; included among them is the issue of so-called "political correctness."

During the 1990s, the imposition of both official and implicit political correctness has meant the implementation by respective Canadian university administrations of policies (often billed as either "affirmative action" or "employment equity" guidelines) covering such important matters as the hiring and promotion of faculty, the admission of (and financial aid to) students, the acceptable limitations that may be placed upon free speech within the confines of the academic institution, and the conduct of both professional and personal relations between staff members and other members of the university community.

The latter regulations usually fall under the umbrella of "harassment policy" and seek to protect those staff and students who are potentially victims of coercive behaviour of a sexual or non-sexual nature instigated by a fellow member of the university community.

Without question, sexual harassment is an unconscionable violation of an individual's right to study, work, compete, or socialize free of unwarranted physical attention. It is equally reprehensible, however, when unjustified accusations are made against innocent individuals. In such cases, the potential damage to the accused is multiplied when an investigating university misapplies its regulatory power. In the case study presented here, documenting Simon Fraser University's 1997 dismissal of swimming coach Liam Donnelly on charges of sexual harassment, it appears that the dismissal was mishandled and based upon a flawed investigation.

The Fraser Institute, while dismayed at the apparent injustice bestowed upon Mr. Donnelly, is primarily interested in this case study as, to quote the author, "a cautionary story for many universities, organizations, and societies who imagine that their own arrangements are satisfactory."

It is The Fraser Institute's expectation that other university administrations, once they avail themselves of the details of this case, will seek to reexamine the specific harassment policies in place at their respective institutions. Such anticipated conscientiousness may go a long way towards ensuring that Mr. Donnelly's experience at the administrative hands of Simon Fraser University is an exception to the rule regarding the design, implementation, and application of harassment policy in Canadian universities. Accordingly, Prof. David Finley's paper prescribes some fundamental principles that may prevent future personal and professional misery.

The author has worked independently and the opinions expressed in this Public Policy Source are, therefore, his own, and do not necessarily reflect the opinions of the members or the trustees of The Fraser Institute.

—Patrick Basham, Director,
Social Affairs Centre, The Fraser Institute

Liam Donnelly's Conviction by Prejudice: Lessons for Harassment Policy

> I am unable to imagine what further precautions the University could take to ensure that a party is accorded a fair and just procedure.
> —John Stubbs
> (Statement on May 22, 1997 endorsing the conviction of Liam Donnelly)[1]

Caveats

The author is a professor at Simon Fraser University, but speaks only for himself, claiming no authority beyond the truth and logic of the text. The author wishes to thank many providers of information, yet accepts his due diligence obligations for the contents. The author does not want to detract from the many positive achievements of individuals and units at SFU.[2] Nor does the author wish to imply that the problems described are necessarily worse than those at other universities and with other special tribunals dealing with sexual harassment allegations.

Preliminaries

Introduction

On May 23, 1997, Simon Fraser University (SFU) fired swim coach Liam Donnelly with cause, for "severe sexual harassment." SFU claimed his guilt had been proved by a three-person Investigative Panel which had found him guilty of numerous offenses including having sexually molested a student, Rachel Marsden, at least seven times during a sixteen-month romantic relationship. SFU also claimed that the Panel Report had been appropriately reviewed by President John Stubbs, who had confirmed the truth of the charges against Donnelly.

Donnelly maintained his innocence throughout, claiming that he had never even dated Marsden, that her story was a complete fabrication, that she had been the one harassing him, and that the Panel's decision was based on demonstrably false testimony. Stubbs was adamant, claiming that Donnelly's guilt had been proved and confirmed by the investigation and decision process, which had taken a year and a half since the charges were submitted. Further, Stubbs maintained that the process had met the high standards indicated in the leading quotation.

The case, which had been secretly processed up to the firing, became a media event, and questions were raised concerning the legitimacy of the decision and process. Within two months SFU reversed itself, exonerating Donnelly on all the charges for which the Investigative Panel and President John Stubbs had found him guilty. In agreeing to reinstate and clear Donnelly of all charges, SFU acknowledged problems with both the evidence and the fairness of the procedures.

1 Quotation taken from Stubbs' decision letter in the Liam Donnelly case, where he gives his views of the procedures used in this case (SFU FOI, Sept. 3, 1998, doc. 20, p. 10).

2 *Maclean's* magazine has frequently rated SFU as the top Canadian university in its category (comprehensive). This top rank was awarded both before and after the Donnelly case controversy.

The issues reach far beyond the administrative foibles of one university. Shortly after Donnelly was dismissed, Gregg MacDonald (presidential assistant at SFU) stated:

> The Harassment Policy at Simon Fraser University is not dissimilar to harassment policies at other post-secondary institutions across Canada. (June 5, 1997)

The above statement contains considerable truth. Policies, requirements, and procedures vary generally, but nearly all schools have them, and the use of panels somewhat like the ones at SFU are more common than not. As the article in the *Canadian Association of University Teachers* journal states:

> Many commentators noted that universities across the country were likely to reconsider their harassment policies as a consequence of this case. (Sept. 1997, p. 6)

John Fekete (1994) has demonstrated that many of the problems found in the Donnelly case are widespread across Canadian Universities. He documents how numerous innocent academics have been subjected to dubious and malicious prosecutions as the result of anti-harassment programs. These cases indicate that prejudice and special agendas inimical to both academic freedom and due process motivate these persecutions. Klatt (1997b), has analyzed the wide-ranging reach and dangers from the implementation of such policies without proper protection for the accused.

The issues raised by anti-harassment programs continue to be problematic in BC. Dianne Rinehart (June 20, 1998) raised numerous questions concerning the fairness of various kinds of harassment tribunals. She noted the Donnelly case and cited considerable evidence indicating that these tribunals are ideologically driven and often stacked against the accused. More recently, UBC President Martha Piper apologized on behalf of her institution for the havoc caused by their administration's credulous acceptance of the McEwen Report (Steffenhagen, Nov. 5, 1998; Klatt, 1997a).

Until the Donnelly case erupted, SFU was thought to have one of the better anti-harassment programs. There seemed to be an energetic effort to address harassment issues without the controversies that afflicted other BC universities. President Stubbs was generally well-liked and had tentatively been selected to serve another five-year term. Yet the whole arrangement was a time bomb waiting to go off. What follows might well be a cautionary story for many universities, organizations, and societies who imagine that their own arrangements are satisfactory.

Basic thesis of study

SFU has claimed that their Investigative Panel did nothing wrong and that the resulting problems were not their fault. This is reflected in the Donnelly agreement and in announcements from SFU officials. The administration still contends that their Panels acted to the best of their abilities given the information they had (SFU NR, Oct. 24, 1997; Kelleher, July 23, 1997; Munro, Mar. 23, 1998).

In contrast, I contend the following: (1) The findings of guilt were determined by an analysis that was incompetent, unfair, and prejudiced; (2) Evidence of guilt was clearly lacking; (3) There were numerous major procedural violations of the rights of the accused; (4) SFU possessed information showing that Marsden was not a trustworthy witness; (5) The dismissal of Donnelly was an unconscionable action; (6) The persecution was driven by ideological blight.[3]

3 SFU has at least weakly admitted the fourth point and part of the third point, but none of rest.

These are strong statements requiring strong support, which I will provide. This analysis will show that the inadequacy of the Report is evident without appeal to other information; therefore, SFU's failures cannot be blamed on subtle flaws or on Donnelly's lack of cooperation. In the sections "Presentation and Analysis of Panel Text," "Analysis of Report," and "Prejudicial Treatment," I demonstrate the Panel's incompetence, its prejudice, and the lack of evidence of Donnelly's guilt. The "Additional Problems with the Case" section describes known procedural failings in the handling of the case. The next section, "Donnelly's Boycott of the Panel Hearings," shows why the failures cannot be blamed on Donnelly's non-participation. The last three sections consider the causes and implications of the case.

Synopsis of public history of controversy

In late May 1997, President Stubbs announced the dismissal with cause of Liam Donnelly, the coach of the SFU swim team, supposedly for sexually harassing a student, Rachel Marsden, during a 16-month romantic affair. SFU claimed that an appropriate investigation by an internal Panel had produced sufficient evidence to justify President Stubbs' decision to terminate Donnelly with cause, and denounce him for major harassment offenses (SFU NR, May 26, 1997).

These hearings had occurred in May and June of 1996. On the advice of his lawyer at that time, Donnelly had boycotted the Panel hearings over the issue of jurisdiction, since Marsden was not a student of Donnelly's, nor a member of the swim team.[4] After receiving the Panel Report in October 1996, Stubbs requested that both Donnelly and Marsden make comments. Donnelly, who was no longer assisted by a lawyer, responded at length, supplying abundant evidence, as he contended that the findings of the Panel were false, and that the entire story of a 16-month romantic affair had been fabricated by Marsden.

Anita Braha (advisor to Stubbs and to the Panel) contended that Marsden's evidence had been determined to be valid by appropriate investigation, whereas Donnelly's evidence was untested (Jimenez, June 6, 1997; Braha, June 6, 1997; *SFU News*, June 19, 1997). On the basis of this advice, Stubbs refused to consider Donnelly's evidence. Stubbs also ignored the original evidence, and relied entirely on the Panel Report (Fournier, June 11, 1997). From this review, Stubbs found that the Panel Report had proved Donnelly's guilt, which determination supposedly justified SFU both in terminating Donnelly with cause and in proclaiming his guilt to the world.

Donnelly was notified of his firing with cause on May 23, 1997. Donnelly, who had long acted without legal representation, then obtained a new lawyer, Loryl Russell, who appealed his firing through a university-mandated arbitration process. On May 26, 1997, SFU publicly denounced Donnelly, attacking him at considerable length for his non-cooperation with the Panel and declaring that he was guilty of "severe harassment." Marsden went public the same day denouncing Donnelly as a date rapist, a charge later echoed by Stubbs.[5]

Four days after SFU and Marsden publicly denounced Donnelly, he and Russell answered back with their own press conference in which they raised numerous issues concerning the validity of

4 Although Donnelly's first lawyer raised numerous other meritorious jurisdictional challenges, my basic thesis in no way depends on the legitimacy of these legal arguments.

5 (SFU NR, May 26, 1997; Jimenez, May 27, 1997; Fournier, June 11, 1997). SFU had no qualms about publicly denouncing Donnelly even though he had the right to arbitration under SFU policies (MacDonald, June 5, 1997; SFU NR, June 19, 1997; SFU FOI, Sept. 3, 1998, doc. 20, p. 11).

the charges. They asserted that Donnelly had not even dated Marsden, and that she had been the one who harassed him. They disclosed that Marsden had sent Donnelly e-mails offering various sexual treats (both Clintonesque and non-Clintonesque), well after the time of the last claimed assault.[6]

Numerous controversies surrounded the case. Many professors attacked the lack of due process for the accused found throughout the Harassment Policy. They objected to the administration's acceptance of frivolous complaints, the biased pro-prosecution mentality, the low standards of proof, conflicts of interest, widespread secrecy, and, finally, lack of punishment for false accusations.

The arbitrators were promptly selected with hearings scheduled for August 1997. Two weeks after firing Donnelly, Stubbs went on a previously scheduled study leave and left the case in the hands of David Gagan, SFU's Academic VP. SFU and Donnelly then agreed to mediation, which started in early July. The mediation was conducted by Stephen Kelleher, who had been previously selected as the chief arbitrator. Gagan was assisted in handling the case by Gregg MacDonald (an assistant to Stubbs), and by Gabriel Somjen, an outside attorney. Donnelly was assisted by his new attorney, Loryl Russell.

During the mediation, SFU publicly announced that Patricia O'Hagan, SFU's harassment policy coordinator, had a "relationship" (nature unspecified) with Marsden, that a draft copy of the Panel Report had been improperly given to Marsden, and that O'Hagan's improprieties were known to Stubbs, who had concealed them from Donnelly. SFU also acknowledged that the case against Donnelly depended on Marsden's credibility, and that contradictions between her written representations and her testimony cast doubt on her credibility (SFU NR, July 14, 1997; Kelleher, July 23, 1997).

In the mediation, SFU agreed to restore Donnelly to his job, give him back pay for the time he was dismissed, pay him $35,000 for legal fees, and to remove all findings of harassment from his record. In addition to agreeing not to sue SFU, Donnelly acknowledged that he should have been more cooperative and that he should have stopped Marsden's office visits earlier than he did. In essence, the SFU administration conceded defeat on the issue of Donnelly's guilt on all the many charges for which the Panel had convicted him (Kelleher, July 23, 1997; SFU NR, July 23, 1997).

Soon after the settlement, SFU President John Stubbs notified the SFU Board of Governors that he was suffering from clinical depression. He promised to explain his actions on recovery (Stubbs, July 28, 1997). Despite Donnelly's exoneration, SFU still paid Marsden the $12,000 bounty that Stubbs had recommended (Gagan, July 31, 1997). Thus, SFU had the dubious distinction of paying both sides in a harassment complaint.

Revelations continued as the press later reported that Marsden had claimed the relationship with O'Hagan was very close (Jimenez, Oct. 21-22, 1997). Marsden had gone river rafting with O'Hagan and her family for four days while the case was pending. When he instructed O'Hagan to limit connections with her, Marsden wrote a highly emotional letter to Stubbs threatening to commit suicide if she was deprived of the companionship of her "best friend."

6 The *Vancouver Sun* also displayed a photograph Marsden sent to Donnelly, so that readers could view the evidence. Those interested in inspecting evidence themselves can check out one of the *Sun's* more lively front pages (Jimenez, May 31, 1997). I will refrain from providing texts of the erotic e-mails.

In late October 1997, SFU (then led by Jack Blaney), revealed that all 11 harassment tribunals formed from late 1993 through 1996 had been selected by a manner that substantively violated the Harassment Policy (SFU NR, Oct. 24, 1997). Hence, both the Panels and their results lacked standing. SFU then set out to negotiate settlements with many participants.

In December 1997, Stubbs resigned as President, but was paid over $300,000, on top of which he remains with SFU at the top of the professorial pay scale. The settlement failed to require an accounting of his role in the case, and Stubbs reneged on his July 1997 promise to explain his actions.[7] SFU has since adopted a new harassment policy, which calls on the use of outside investigators and relies more on the general disciplinary policies. There seems to be some consensus that the new policy and the new personnel have improved, although many problems remain.

Meanwhile, SFU wound up paying both sides in a number of cases and finally agreed to pay all of Donnelly's legal fees (SFU NR, May 1, 1998). In the 1997/98 swim season, SFU did well in the National Association of Intercollegiate Athletics (NAIA) competitions. In the championships, the SFU men's team finished first by a wide margin; in the women's competition, SFU finished a close second. Donnelly was named NAIA coach of the year.

Authentication of text

The report in which SFU claimed to have proved Donnelly's guilt was titled: "Report of the Investigative Panel on the Complaint of Ms. Rachel Marsden against Mr. Liam Donnelly" (Oct. 11, 1996), by Lou Hafer, Sandra Eix, and Thea Hinds. The title is erroneous, since the tribunal was supposed to be denoted as an "Investigative Committee." Still, to avoid confusion in referencing, I will employ the stated titles of "Panel" and "Panel Report," abbreviated as "PR."

Since SFU refuses to provide official copies of this document, the issue of textual authenticity must be addressed. In July 1997, anonymous copies of the PR were sent to various reporters, with circumstantial evidence pointing to Marsden as the source.[8] The *Vancouver Sun* ran two headline stories commenting on the PR, which suggests their supported belief in its authenticity (Jimenez, July 17, 1997; Jimenez and Ouston, July 18, 1997).

Moreover, the SFU Freedom of Information (FOI) office has provided three different indications that the text is, in fact, correct. First, the Office released a few paragraphs of the text which agree verbatim (SFU FOI, June 30, 1997). Second, the Office provided me with a blanked-out version with section heads intact, all of which agreed [Forsyth, Oct. 21, 1998). Third, the Office denied a reporter's FOI request on the ground that she already had this document, which refusal would have been improper if the Office knew of discrepancies (SFU FOI, Sept. 3, 1998). Finally, the varying interests of those holding the text and some additional tests provide further confidence.

Need for analysis

One general qualification is in order. Investigative tribunals should not be criticized for failing to find things out, provided the search for the truth is competent, diligent, unbiased, and not over-reaching. Suppose a tribunal exonerates a person for lack of proof of guilt. Subsequent proof

7 See the related SFU news releases chronicling the rise and fall of Stubbs (SFU NR, March 26, 1997; July 31, 1997; Dec. 12, 1997; Stubbs, July 28, 1997).

8 Evidence includes: (a) the pages identifying witnesses are missing; (b) at the time, negotiations were known to be going in Donnelly's favour; (c) Marsden was slated to go on television immediately afterwards; (d) this occurred at a time when Donnelly and his lawyer were under a gag rule that precluded their comments.

that the accused committed the action does not indicate that the tribunal did anything wrong, since proof may have been lacking at the time.

However, "proving" things that are not true is more serious. Such a failure shows that we not only lacked conclusive information, but that we over-rated or misused the knowledge we had. Valid methods might often fail to prove things that are true, but they should not "prove" things to be true when they are false. False proofs indicate more fundamental flaws than failures to find out, especially when an innocent person is wrongly convicted of a serious offense.

Hindsight issue

Panelists are not responsible for things they did not know, provided they exercised due diligence. Still, at the least, they are responsible for due care in examining what was known. To the extent that they failed to deal with available evidence in a careful and unbiased manner, serving no ideology other than individual justice, they are morally culpable.

The hindsight issue cuts both ways. The Panel should not be condemned on any issue solely because a conclusion was wrong, nor vindicated because a conclusion was right. Tribunals should be ethically exculpated if proper investigations reasonably led to the conclusions reached, provided that doubt and lack of evidence are properly resolved in favour of the accused. On the other hand, the Panel should be criticized for drawing conclusions based on improper or insufficient evidence, even when such conclusions turn out to be true.

Scope limitation

To focus criticism of the PR, I will limit my criticism in the next three major sections to material that is evident from the PR itself. Thus, these criticisms of the PR cannot be gainsaid by claims that Panelists lacked necessary information. Further, anyone who read the PR had all the information I use in the next three sections of this study. Thus, Stubbs supposedly knew everything referenced in these sections, since he claimed to have read the PR, "very, very carefully" (Fournier, June 11, 1997).

This limitation places the controversy over Donnelly's evidence in the proper perspective. I contend that the issue of Stubbs's refusal to look at Donnelly's evidence has been a red herring, drawing attention away from whether the supposed case against Donnelly was ever credible. I argue that the PR should have been rejected without needing any evidence from Donnelly. Accordingly, no information from Donnelly is used in my analysis of these issues.

My entire case is built on information contained in the PR itself, which report Stubbs had a duty to consider carefully. Stubbs himself claimed to have read the PR with extreme care and to have found all its findings to be sufficiently well-supported to merit his endorsement, to ratify all the findings, and carry out the Panel's desire to destroy Donnelly (PR, p. 20). Further, Stubbs claimed that this was the sole basis for his actions (Fournier, June 11, 1997). If the arguments of the PR were deficient, there can be no justification for the actions taken against Donnelly.

Focus on existence of relationship issue

To reduce the size of the analysis task, I will focus on one key issue: the alleged existence of a 16-month romantic relationship between Donnelly and Marsden. Thus, in the "Presentation and Analysis of Panel Text," and "Analysis of Report" sections, I am placing myself at a double disadvantage by confining my criticism to one basic issue and by using no evidence not apparent from the PR itself. The handicap will not prove burdensome.

Either/Or

Acting President Gagan pushed the view (which SFU has never repudiated), that this is a faults-on-all-sides controversy in which blame and harm should be shared, with payments to Marsden somehow compatible with the exoneration of Donnelly (Gagan, July 31, 1997; Swain, July 25, 1997). Many controversies are as Gagan described: both sides have legitimate points, and both sides exaggerate or push beyond their just claims, so a dispute arises. In such a case, any reasonable settlement must balance legitimate claims.

But this is not such a case. Marsden claimed that she and Donnelly had a 16-month romantic relationship, during which Donnelly assaulted her on at least 7 different occasions spanning the full 16-month time period (PR, pp. 2-3). In contrast, Donnelly claimed there was no romantic relationship, and no sexual activity. The Panel knew that Donnelly had categorically denied the charges (PR, p. 3). Thus, there is no way that both parties could be remotely telling the truth. This is indeed an either/or issue, not a question of degrees.

Implications of Existence of the Claimed Relationship

If the relationship did exist, it would not immediately follow that Donnelly was guilty of harassment. Such a relationship would not violate any rule, since Marsden was not on the swim team. Whether Donnelly had engaged in actions constituting harassment under well-defined legitimate rules would still be an open question.

Still if the claimed relationship existed, Donnelly would have made false representations (and would have subsequently have committed perjury in the mediation). Further, if such a relationship had been proved to exist, Donnelly's credibility would be nil and Marsden's good in looking at the remaining issues, somewhat as the Panel presumed. SFU would have had credible grounds for the actions taken against Donnelly.

Implications of Non-Existence of Romantic Relationship

All findings against Donnelly depend on the relationship existing, or Marsden being truthful, and usually both. If the romantic relationship was fabricated, the case against Donnelly fails completely. In such a case, Donnelly was the victim of a malicious prosecution based on massive lying. In addition, Donnelly was pummelled for telling the truth, since the Panel claimed that Donnelly's denial of the relationship was an "aggravating circumstance" (PR, p. 19).

If the alleged relationship is fictitious, this is no "faults-on-all-sides matter" in which everyone contributed a little. Rather, this was a major miscarriage of justice in which massive perjury was committed, and then condoned by those with an ethical responsibility to prevent it. Further, the easy belief in such a huge fiction would speak volumes about the actual quality of the anti-harassment program, as well as programs based on similar assumptions.

Method of analysis

The PR possibly stands and certainly falls by how it handles this one aspect of the case. I will now present the Panel's arguments on this crucial issue, along with my analysis of this section of their Report. The Panel's arguments come from Section 6 of the PR, "Existence of a Romantic Relationship" (pp. 10-11).

The Panel's evidence summary continues for 11 paragraphs, culminating with the conclusion that the relationship existed. From thereon in, the Panel assumed that with the existence of the relationship having been proved, all other evidence is to be interpreted in such light.

Hence, this 11-paragraph argument is absolutely essential. If the alleged relationship was fabricated, we are not dealing with a legitimate controversy that was merely tilted in the wrong direction. Instead, we are confronted with an egregious case of invidious prosecution. If the Panel is wrong on this point, the rest of their report is a true horror story in which Donnelly is repeatedly ravaged, based on an enormous fiction.

Presentation and Analysis of Panel Text

Having established the importance of the issue, I will now proceed. For each of the 11 paragraphs, I will first present the Panel Report text (PR, pp. 10-11), and then follow with my comments. The PR text will always be indented, and given in whole paragraphs.

Panel paragraph 1: General reasons for findings

> Ms. Marsden's credibility was an issue in the minds of the Panel, particularly in Mr. Donnelly's absence. She testified that Mr. Donnelly had insisted the relationship be kept a secret. There were no witnesses who had accompanied them on dates, or even seen them eating lunch together. Nonetheless, the accumulated weight of many small items of direct and indirect observation and similar fact, brought out over some 16 hours of relevant testimony and questioning of 8 witnesses and Ms. Marsden leave the Panel with no doubt that the relationship existed and that its characteristics were as she describes.

This is mostly posturing. The number of hours is largely irrelevant. Further, if the proportionate emphasis in the PR is any indication, most of the time was spent on things other than this issue. The total number of hours spent on all issues does not indicate the time spent on this question, so we have an immediate palpable fallacy. Nor is the number of witnesses significant. What is crucial is whether sufficient, high-quality evidence on this issue has been amassed. Quantity does compensate for lack of quality.

The key empirical point is the remarkable lack of ordinary observation that would usually verify the existence of a romantic relationship. This enormous difficulty with Marsden's case is barely mentioned as the Panel moves on. The short shrift given to such a huge anomaly strongly suggests that the Panel put little effort into assessing the difficulties in Marsden's story.

Panel paragraph 2: Credibility of witnesses

> As credibility is at issue here, it is important to note that the witnesses were not uniformly drawn from a homogenous social group of close friends of Ms. Marsden. Some were close friends of long standing: some were more casual acquaintances; one met Ms. Marsden for the first time while testifying. This diversity makes the sum of the evidence all the more convincing. Ms. Marsden's testimony was rich in detail. Over the entire period of questioning by the Panel, no significant inconsistencies in her testimony were found. What appears in the following paragraphs is a much abridged summary.

Diversity of Witnesses Point: First Three Sentences

The diversity of witnesses comments consist of too much general glossing. Although not all the 8

witnesses are described as friends of Ms. Marsden, such a general argument is insufficient, since it matters whether crucial points are supported only by friends. Accordingly, this issue will be revisited after the summaries of testimony have been analyzed in the "Diversity and Quality of Witnesses" section. There is far too much hype and prejudice in the phrase, "This diversity makes the sum of the evidence all the more convincing," when the Panel has not demonstrated that the evidence is convincing at all.

Endorsement of Marsden's Testimony

The PR endorses Marsden's testimony on the grounds that the Panel found "no significant inconsistencies in her testimony." This statement is cryptic and inadequate for a number of reasons.

First, we are asked to believe in the Panel's ability to ferret perjury, but are given no reason for such belief. Just how many cases of perjury have any of the Panelists detected? Had they had any training on the subject? A little humility at this point might have demonstrated that the Panel at least appreciated the difficulties, but we find no such modesty.

Second, there is no indication that the Panel looked for inconsistencies. If the Panelists failed to find something they never looked for, this is scarcely evidence that the testimony was true. Further, since Marsden had six months to prepare her testimony, efforts to expose inconsistencies might have to be diligent. Yet we are given no indication that there was any effort, let alone a diligent effort, to search for inconsistencies.

Third, the Panel never indicates the scope of their investigation in this vital area. The PR does not set out the extent that the Panel did or did not examine each of the following: (a) Marsden's representations in her original complaint; (b) Donnelly's response to Marsden's complaint; (c) Donnelly's complaint; (d) Marsden's response to Donnelly's complaint. Obviously the Panel knew about the existence of all four items. One eventually finds indications elsewhere that it looked at (a) and (b), but the Panel never states whether it even looked at (c) and (d).[9]

Fourth, the Panel fails to state whether there were inconsistencies in Marsden's written representations or between her testimony and the written representations, which are not even listed. This is a crucial omission. If the Panel had indeed spent this effort, it is not really credible that all three members forgot to mention such an important step.

Fifth, the Panel never seems to take into account that it might be dealing with a well-planned lie, for the PR describes no measures to protect against this possibility. No transcripts of the testimony were made, nor did the Panel review the recordings.

In summary, the Panel seems impressed by such superficial things as Marsden's story being "rich in detail," while failing to notice that the story was amazingly impoverished in observable detail.[10] For most of the alleged assaults, even the supposed dates of occurrence are missing. There is no indication that the Panel looked for discrepancies, so the fact that it never found them can scarcely be evidence that Marsden's representations were consistent.

9 Presumably they used (a), but there is no clear delineation as to which charges were contained there and which charges were added later. There is reference to (b), which was handled in an irregular manner (PR, p. 3). The Panel makes no reference to (c) and (d), even though they knew of the existence of such documents. There is no listing of the documents used, nor is there any chronological listing of all the charges. This is highly irregular since such listing of evidence and charges was recommended by Braha (March 1997) in her training lecture and is found in most other Panel Reports dealing with complicated cases (SFU FOI, Sept. 3, 1998, docs. 5, 12, 14, 18, 23).

Panel paragraph 3: Marsden's testimony

> Ms. Marsden testified that the romantic relationship began at the end of a dance at the Summer Swim Coaches Conference in May, 1994. From then until mid-Fall, 1994, the relationship seemed satisfying (although in retrospect she could see the beginnings of the psychological harassment). It was a friendship only, which was what she desired. They talked and went out to lunch occasionally on- and off-campus. Around November, 1994, Mr. Donnelly became worried that their relationship was attracting notice from members of the Swim Team and others around the SFU pool, and he began to insist on secretiveness and meetings at his home, away from SFU. When Ms. Marsden confronted him about this, Mr. Donnelly replied that he didn't want people to know because it would be a conflict, but didn't clarify any further.

The Panel fails to focus on the issue at hand, even when the issue is critical. Marsden's opinion of the relationship and what she desired are largely irrelevant to proving whether a relationship existed. Marsden's characterization of the relationship is totally irrelevant if the relationship did not exist. Even in assessing this most crucial issue, the Panel seems to be easily sidetracked.

What is far more relevant are things such as where she claimed they went. Who paid? Was it cash or credit? What about credit card receipts? If they ate frequently on campus, why are there no witnesses who knew them? Surely at this point, such questions are far more relevant than Marsden's retrospective claim of the beginnings of psychological harassment. This clearly gainsays the Panel's self-proclaimed effectiveness. As noted above, the Panel then asserts:

> Around November, 1994, Mr. Donnelly became worried that their relationship was attracting notice from members of the Swim Team and others around the SFU pool, and he began to insist on secretiveness and meetings at his home, away from SFU.

If what is meant is that Marsden told them these things, the Panel should say this, no more and no less. Even with Marsden, the Panel should have distinguished between what she claimed to have observed and heard, and what she attributed, which is scarcely evidence. The supposed reason for Donnelly's alleged behaviour is simply asserted as if the Panel could read minds.

The great fallacy is that the Panel is assuming the relationship existed. This is completely wrong, since this is what the Panel is supposed to be trying to prove. Such a patently circular approach indicates that the Panel is failing to give the issue fair consideration.

Panel paragraph 4: Witness #8

> Witness #8, a friend of Ms. Marsden, testified that Ms. Marsden had talked with him about her relationship with Mr. Donnelly. He did not provide a date when he first became aware that they were dating, but did mention that in October, 1994, she left a Halloween Party early in order to see Mr. Donnelly. He also observed that it became more difficult to see her socially, as she

10 For example, Marsden claimed that Donnelly had once assaulted her in his office. The date specified for this event is July of 1995. This is the only alleged offense for the months of July and August, so one would think this a memorable event. Yet in a complaint filed less than four months later, this event is located in time to only the nearest month. No further indication of date of occurrence is given. The Panel apparently assumes that a lurid description of the event makes up for lack of specificity on the date (PR, p. 2). The Panel fails to consider the obvious alternative: that this lack of specificity was due to Marsden's not being sure for which nights Donnelly had alibis.

> seemed always busy with plans with Mr. Donnelly.

The PR fails to give a clear account as to what Witness #8 actually said. He never saw Marsden and Donnelly on a date, nor did Donnelly tell him, or else this surely would be mentioned. There is no indication he had ever seen Donnelly. Just when and how did he become "aware"? Does he claim to know this himself? If so, what is his evidence?

Let us go on. How does the witness know that Marsden left a Halloween party early, "to see Donnelly?" (Is he clairvoyant?) Also, just how did Witness #8 know that Marsden was busy with plans with Donnelly? And what does "being busy with plans" mean? Was Marsden supposedly *actually* going places with Donnelly, or was she *planning* to go places with Donnelly? Or was she was brushing Witness #8 off? (Such things have been known to happen.) There is no indication of any evidence that Witness #8 saw anything that would indicate that what Marsden claimed was true.

The Panel gilds the testimony outrageously when the PR asserts that Witness #8 knew these things to be true in the section supposedly proving that the relationship existed. Further, since Witness #8 is cited as knowing things he could not know, we can not even be sure that he really observed Marsden leaving the Halloween party. Maybe Marsden simply told him that also. Still, it really makes no difference, since the witness does not report seeing anything remotely probative.

We learn right away that the Panel fails to distinguish between observation and speculation, since the PR describes the latter with language appropriate for the former. There is something terribly wrong about referring to what is to be proved as factual in the very argument that is supposed to establish that the thing is factual. It is as if a student had invoked the Pythagorean theorem in the midst of the proof of the Pythagorean theorem, only with vastly more harmful consequences.

Panel paragraph 5: Witness #7

> Witness #7, a friend of Ms. Marsden, testified that they had discussed the relationship virtually from its start in May 1994. She had just returned to Vancouver, and they were forming relationships more or less in parallel. The commonality led to long discussions about how they were handling aspects of the respective relationships, as they developed beyond casual friendships. Witness #7 testified she had no reason to doubt that Ms. Marsden's relationship with Donnelly was genuine. While Ms. Marsden seemed to genuinely like and respect Mr. Donnelly, there were times when she was troubled, wondering if he was acting in her best interest or in his own self-interest. Witness #7, too, commented that Ms. Marsden became much less available socially, due to spending time with Mr. Donnelly.

Once again, the Panel starts off by assuming the existence of what is to be proved, as circularities abound. Next we come to the drivel of the second and third sentences, which would be amusing, were this not so dangerous. What does the witness have to tell us that the Panel thinks is important? Specifically, Witness #7 had "no reason to doubt" the relationship was genuine. That somebody has "no reason to doubt" is scarcely evidence.

Moreover, such a statement by the Panel clearly indicates that the burden of proof is in the wrong place. The question should be whether Witness #7 had observed anything that would enhance belief in Marsden's story. Information of this kind is conspicuous by its absence. Witness #7 really has nothing positive to offer except what Marsden told her.

Panel paragraph 6: Witness #6

> Witness #6 recalls talking with Ms. Marsden about the relationship from Fall, 1994. As she was a member of the SFU Swim Team at the time, and coached by Mr.

> Donnelly, she deliberately cut Marsden off in order to avoid hearing details which she felt would be a conflict.

Surely this is not much and not very relevant. It suggests that the Panel was anxious to accommodate Marsden in building up the witness count on this issue.

Panel paragraph 7: Witness #5

> Witness #5, Ms. Marsden's sister, recalls being told about the reconciliation at the Summer Swim Coaches Conference within days of the event. On many occasions she observed Ms. Marsden leaving late at night to visit Mr. Donnelly, returning in the wee hours of the morning.

Even ignoring the obvious problems of bias, we find that the witness offers little of substance. Unless she is blessed with clairvoyance, the witness did not see Ms. Marsden leaving, "to visit Mr. Donnelly." That is just something the witness and Panel are assuming. Once again, speculation is elevated to evidence. Nor are we even told when during the supposed 16-month relationship these nocturnal excursions supposedly took place.

Panel paragraph 8: Witness #4

> Witness #4 worked with Ms. Marsden between October, 1994, and April, 1995, and learned about the relationship with Mr. Donnelly in the course of casual conversation. They talked about recent dates, and she observed Ms. Marsden talking to Mr. Donnelly by cellular phone, early in the morning before the start of work. Earlier, in Summer, 1994, Ms. Marsden had mentioned to her that she was dating Mr. Donnelly. Witness #4 also testified that prior to October she had often seen Ms. Marsden and Mr. Donnelly together in his office, for 2 - 3 hours at a time. Sometimes they would be conversing, other times he'd be working and she'd be studying or reading the newspaper. Mr. Donnelly definitely did not seem uncomfortable with her presence. Sometime in Spring, 1995, she'd asked Mr. Donnelly about the relationship: he'd flatly denied it. She had believed Ms. Marsden (in her words, "I found the notion of Rachel misunderstanding what their relationship was, absurd."), and assumed Mr. Donnelly denied the relationship because it would be a conflict given his position as Head Coach. Around this time, she'd realized that she no longer saw Ms. Marsden in Mr. Donnelly's office. His comment was that Ms. Marsden had been annoying him. Ms. Marsden had told her roughly the same thing, but added that Mr. Donnelly gave her specific times when she was permitted to come by, phone or visit.

Preliminary Comments on Testimony

Once again, the Panel assumes what needs to be proved. If the Panel means that Marsden told Witness #4 about the claimed relationship, then the PR should say this. Even if accurate, the testimony about the cellular phone conversation proves nothing probative. There is no evidence cited that indicates Donnelly was on the other end, or that Witness #4 heard anything that indicated a romantic relationship, or even that Donnelly ever called Marsden. Nor are we even told how often and how much she supposedly talked to Donnelly. So the Panel cites nothing probative.

Presence of Marsden in Office

Finally, after four witnesses, we have something substantive. Donnelly let Marsden stay in his office for long times. This could conceivably be something relevant that Witness #4 observed. Still, there are problems with the Panel's report of the testimony of the witness. She claims that she had seen Ms. Marsden and Mr. Donnelly together in his office 2 to 3 hours at a time. Just how did the witness do this? Was she there too? Who else was there? Did she monitor the door? All this is sloppy, but not surprising, since witnesses seem

to know things in mysterious ways. Since this Panel fails to distinguish between observation and hearsay, it is likely that much of the "observation" was augmented by things the witness guessed or was told.

The next point is that Witness #4 noted that Donnelly indicated he had banned Marsden's office visits and said that they annoyed him. The witness points out that Donnelly did eventually exclude Marsden although she assumes (based on no evidence other than Marsden's word) that the prohibition was limited. The key point is that there was a ban or strong limitation on Marsden's visits, which is actually confirmed to some degree by Donnelly's statement, by Marsden's statement to Witness #4, and by Witness #4's own observations.

Donnelly's Denial of Relationship

We find that Witness #4 asked Donnelly about the alleged relationship and Donnelly, according to this witness, "flatly denied it." Note he did not say something like: "it was over," or "not that big a deal," or "was exaggerated." He flatly denied it. So here we have contemporaneous assertion of what was to be his later position, something that carries great weight when made by Marsden, but apparently no weight when made by Donnelly.

Witness #4 said she did not believe him, which of course is really beside the point. In real courts, favourable testimony coming from a hostile witness is often regarded as better than similar testimony from friends. Yet here the Panel takes the opposite view, which is highly prejudicial.

Witness #4 asserted that "I found the notion of Rachel misunderstanding what their relationship was, absurd." Not only is this a conclusion of the witness, but witness and Panel are attacking a straw man. The issue is whether Marsden was lying, not whether she misunderstood. This example illustrates one of the many pitfalls of opinion evidence, since the opinion was based on a false assumption of what the alternative hypothesis was.

Further, we are told that Witness #4 "assumed Mr. Donnelly denied the relationship because it would be a conflict given his position as Head Coach." Thus, Donnelly's contemporaneous assertion is rejected based on the speculation of Marsden's witness, while every report of Marsden's assertion is regarded as strengthening her case. This is a completely biased approach. And once again, what the witness assumed is not evidence.

Panel paragraph 9: Witness #3

> Witness #3, Ms. Marsden's employer at the time, testified that she'd known Ms. Marsden had a boyfriend from around June, 1995. While the relationship struck her as unusual for the seeming lack of time together, there was an appropriate level of, in her phrase, "couple knowledge" for a serious relationship. She never doubted the relationship was real.

Barring clairvoyance, the PR once again gilds the testimony by claiming the witness "knew," when all this can possibly mean is that Rachel Marsden told her this. Such pervasive abuse of evidence cannot be attributed to a simple lapse or an honest mistake. The only real observation here is that Marsden appeared to spend little time with this supposed boyfriend who is not even identified as Donnelly. Although minor, this is the only coherent empirical point cited by the Panel. Yet this possibly real information is swept aside by citing what Witness #3 believes, based on "couple knowledge," which is utter babbling.

And finally once again, the witness's faith is not evidence. Her lack of doubt may be merely an indication that the witness never considered any other possibility. But more important, her opinion is not evidence. The only relevant observation

cited actually weakens Marsden's case. Still, the Panel seems to be so set on conviction that this worthless testimony is taken as evidence of Donnelly's guilt.

The next paragraph of the Panel Report goes on to Witness #1, since Witness #2 is not cited on this issue. The implication of this lack will be examined later. We now go to the next paragraph of the PR, which considers the testimony of Witness #1.

Panel paragraph 10: Witness #1

> Witness #1 testified that she'd seen Ms. Marsden and Mr. Donnelly together around SFU while she was a member of the Swim Team, but had the preconceived notion that he was just putting up with her. However, other people around the pool area seemed always to be wondering what was going on between them. Immediately at the end of her competitive career, she had gone on a single date with Mr. Donnelly, at his instigation. In the course of the date, they had discussed Ms. Marsden briefly. Mr. Donnelly described her as having a crush on him, and said that she would be angry when she found out they had gone out together. Subsequently, she had been contacted by Ms. Marsden to be a witness. She now tended to believe Ms. Marsden's version of events, but found the whole situation difficult. She stated that she liked and respected Mr. Donnelly, but that she gave Ms. Marsden's story credibility because her descriptions of his house and mannerisms matched her own experience.

Basic Implications of Testimony

The abuses of evidence get worse and worse. Gossip suddenly becomes evidence as we hear that

> . . . other people around the pool area seemed always to be wondering what was going on between them.

Also it would seem that either the Panel or the witness is engaging in hyperbole in a situation in which literal accuracy is crucial (or would be were the evidence probative). If such exaggerations are blithely reported as evidence, other less obvious exaggerations may have been taken as literal representations. And just how did Witness #1 know what these people were always wondering about? (Clairvoyance again?) Let us just leave this by noting that rumours, speculation, and what the witness was persuaded to believe are not evidence.

The only evidence that Witness #1 gave is that "Ms. Marsden's . . . descriptions of his house and mannerisms matched her own experience." Her opinion of what this might mean is not evidence. No details are presented here, and the witness does not sound terribly decisive. Even assuming witness accuracy, there are at least three other possibilities: (a) Marsden obtained descriptions from someone else who had been in the house; (b) Marsden had been in the house on some sort of visit that did not indicate a 16-month romantic affair; (c) Marsden formed her descriptions in part after talking to the witness. Yet the Panel considers none of these possibilities, nor makes the slightest effort to preclude them.

A Major Problem

Further, there is a huge weakness here that the Panel conveniently omits at this point. A later page of the Panel Report contains the following remarkable sentence:

> From a tour of Mr. Donnelly's house, Witness #1 was able to provide some verification of Ms. Marsden's description of the bedroom furnishings, but admitted that her memory was becoming confused with descriptions from subsequent conversation with Ms. Marsden. (PR, p. 14)

Instead of following up this intriguing suggestion, our Panel blissfully assures us that:

> (Her confusion, however, does not detract from the testimony of other witnesses).

Then the Panel drops the subject and goes on to other things, which is wholly inappropriate. This "confusion" indicates that much of the testimony of this witness was suggested to her by Marsden. At the least, this problem gainsays the arguments made earlier that Witness #1 helps prove the existence of the relationship.

Panel paragraph 11: Panel's summation of evidence

> From the witness testimony, it seemed clear that a relationship existed, starting in May, 1994, as Ms. Marsden testified.

Although there is plenty more to come, the remaining PR material is all predicated on the presumption that the alleged romantic relationship existed. The PR follows with material on duties of swim coaches and discussion of the exploitive nature of this supposedly now firmly-established relationship. Everything else is interpreted in terms of the relationship having been proved to exist, so that all other evidence, no matter how weak, is amplified by this supposed proof. Marsden is vindicated and should be henceforth believed. Moreover, this supposed vindication is taken as being so strong that from hereon Donnelly is assumed to be a liar who is to be condemned even for the offense of denying his guilt (PR, p. 19).

Yet this watershed decision is reached in a leap and a bound. The Panel makes no effort to show how the testimony mandates the conclusion. None of the problems are addressed at all. Nor does the Panel even indicate which of the cited items are supposed to be probative. In view of the obvious limitations of the evidence, this lack of synthesis alone should have been grounds for rejecting the findings of the PR.

Analysis of Report

Synthesis of positive evidence

If we wish to make anything out of the evidence we have no choice but to try to perform a synthesis that should never have been left as an exercise to the reader. Bringing in seven more or less true believers proves nothing per se, since seven times zero equals zero. Let us ignore the non-evidence (e.g., opinions, suppositions, puffery, etc.) and then see what we have left.

Numerous Assertions that Marsden Claimed a Relationship

What most of these numerous witnesses provide is that Marsden told them that such a relationship existed. This fails to prove that what Marsden said was true. If we generously assume that the witnesses were truthful and accurate in their memories, all that such testimony shows is that Marsden claimed that such a relationship existed, which could be consistent with such a relationship existing or such a relationship being fabricated by Marsden. Such evidence fails to discriminate between the two possibilities.

There was also evidence that Donnelly had denied the relationship and no evidence whatsoever that Donnelly had admitted to the alleged relationship to anyone, even in any unguarded moment long before the charges were made. What reason should there be to assume that one has more credibility than the other? Further, as a person with an honourable career, being the accused,

and with by far the most to lose, Donnelly should have been given some benefit of the doubt.

Numerous Conclusions of Witnesses

A second class of evidence is conclusions of witnesses, which simply are not evidence for a number of reasons. Real courts in reputable countries invariably exclude such evidence, yet the Panel seems to think this is a higher form of evidence, which is totally wrong. This suggests that the Panel was being given incredibly bad advice by Anita Braha.

There are many reasons for excluding such evidence, which should scarcely require enumeration. Allowing such evidence permits anything that formed the opinion to sneak in, whether it be repeated gossip, prejudice, inattention, poor reasoning, or reasoning based on insufficient information. If witnesses have reasons based on fact, it is the tribunal's duty to elicit the facts and then determine whether these facts support the conclusion.

Real evidence is better if it comes from someone who has no opinion on the larger issue being contested. In such a case, the person with no axe to grind is more likely to give a neutral account of what happened. Relevant admissions from a somewhat hostile witness are more credible than lavish testimonials from true believers.

Actual Evidence

There are some bits of actual observation that go beyond what someone believed or assumed; they will now be reviewed.

a. Witness #8 (maybe, it is not clear) saw Marsden leave a Halloween Party early, yet there is no evidence as to where she went or whether Donnelly was there.[11]

b. Witness #5 claims that Marsden left at night and returned in the wee hours of the morning. There are four major weaknesses here: (1) the source (Marsden's sister); (2) the lack of specificity (as to when and how often); (3) the lack of observation where she actually went; and (4) the lack of any observation of Donnelly's actions.

c. Witness #4 observed Marsden talking on the telephone, but there is no indication that Donnelly ever called Marsden. Further, the Panel offers no evidence that Donnelly was on the other end of the line, let alone that he said anything that would indicate the existence of a romantic relationship.

d. Witness #4 observed that Marsden stayed in and around Donnelly's office a lot (although circumstances and times were unclear). Yet Witness #4 also testified to subsequent limitations or exclusions, backed by observation, a statement from Donnelly, and a statement from Marsden.[12]

e. Witness #1 offers supposed indirect evidence, which proves little if valid to begin with. But on top of this, the witness at least partially recanted saying that she had difficulty distinguishing between what Marsden told her and what she actually remembered.

Overall, this is extremely meagre. The only item of substance is (d), but as noted before, there are

11 Actually, this would not be enough. If Marsden had gone to one of Donnelly's usual haunts, one might normally expect him to be present, so there would have to have some additional evidence that Marsden was expected or welcomed.

12 It is very strange that only one witness is cited on what should have been an easily observable series of events. Further, if the Panel is trying to use this to impeach Donnelly's credibility, there should be a citation concerning Donnelly's claim on this issue.

both weaknesses and counter-balancing information. The office visiting is not pinned down solidly. Only one witness testifies to this, and how she knew this to the extent claimed is never explained. This failure is compounded by the Panel's consistent inability to distinguish between hearsay, speculation, and actual observation.

Contrary evidence

Even in the midst of Marsden's own evidence, there were three important clues that could have alerted the Panel to the possibility of a manufactured relationship.

Relationships in Parallel

The first counter-indication is the "forming relationships in parallel" of Witness #7. This awkward phrase suggests the possibility that Marsden first invented the relationship to impress her returning friend. As far as the Panel determines, the alleged relationship with Donnelly does indeed coincide with the return of the friend. The relationships supposedly just happened to go in parallel paths (but of course with no double dating). Although speculative, the alternative is more coherent, relying less on gratuitous coincidence than what the Panel takes for truth.

Coaching of Witness

The Panel obtained evidence that Witness #1 was apparently coached to a considerable degree by Marsden, so that at least some of her corroborative testimony had been planted by Marsden. Witness #1 had enough integrity and mental independence to recognize what had happened and to communicate this to the Panel.

What do the Panelists do with this? They are so biased that even as they mention it, they brush it off by saying that it does not affect the other witnesses. This is doubly wrong. First, the case for the existence of the relationship depended on Witness #1. She was one of the supposed independent witnesses, resulting in the diversity of accusers. She was the only one of the seven cited witnesses who was supposedly testifying mostly to things other than what Marsden had said. But if Witness #1 was coached, then surely her positive testimony should be disregarded.

Moreover, the Panel made no apparent effort to determine how much this witness had been coached. Nor did the Panel question other witnesses on this issue. Having found that one witness was coached by Marsden, the Panel should have considered whether other witnesses had been similarly coached as Marsden "helped them remember." Yet the Panel simply ignored the possibility and moved on. There is no indication in the Report that the Panel was very curious about the coaching of Witness #1, let alone other witnesses. This is inexcusable.

A Discrepancy

Although beliefs of witnesses are useless as primary evidence, they sometimes can help in challenging witnesses. With this in mind, let us repeat the following statement of the Panel's summary of Marsden's testimony:

> It [the relationship] was a friendship only, which is what she desired. They talked and went out to lunch occasionally on and off-campus.

This is anomalous, since the terms "friendship only" and "romantic relationship" appear to be mutually exclusive, especially in this context. Suppose we try to put a favourable construction on this discrepancy by assuming that this was presented as being a somewhat light romantic relationship that heated up later on, and somehow this shading got lost. Still there is a discrepancy somewhere. Either the Panel was very sloppy, or Marsden was inconsistent.

If, from May to October of 1994, the relationship was one of "friendship only," then there was not a 16-month romantic relationship as indicated elsewhere throughout the report. Further, much of the case seems to depend on the permitted office visiting, yet the cited testimony largely confines this permitted office visiting to the supposed "friendship only" period, which anomaly the Panel simply ignores.

It gets worse. We find that the first of the supposed 7 assaults is alleged to have occurred at the conference when the relationship began. So the story is as follows:

1. Donnelly and Marsden patched up their former quarrel at the coaches' conference and initiated a romantic relationship at that time (noted throughout the Panel Report).

2. At the same conference, Donnelly supposedly sexually assaulted her, and this is one of the many offenses for which the Panel convicts him (PR, p. 2).

3. Marsden showed her displeasure at this assault by telling her returning friend about her new romance and by hanging around Donnelly's office as much as possible.

4. Marsden later characterized the relationship as one of friendship only, despite claiming she was molested at the very start of the relationship.

Now here are significant contradictions found simply by comparing the overall allegations to a paragraph highlighting Marsden's testimony. Yet this contradiction is not even acknowledged, let alone dealt with in a satisfactory fashion. One has to suspect that contradictions not evident from the Report were also missed, and that the Panelists found no contradictions because they failed to search for them.

Diversity and quality of witnesses

Nature and Source of Evidence

The Panel asserts that the testimony is "all the more compelling" because of the great diversity of witnesses and their supposed lack of closeness to Marsden. Independence of witnesses might indeed be important if they were supplying independent observations of something indicative, but in other cases such independence adds little. If four witnesses had claimed to have seen the same probative piece of evidence (e.g., Marsden and Donnelly tête-à-tête on fajita night at the Lone Star), independence of witnesses would enhance the quality. However, if the four witnesses testified that Marsden told them that she and Donnelly once went to the Lone Star, the independence of the witnesses adds nothing. With the vast majority of items, independence of witnesses is meaningless since Marsden is the ultimate source for the information provided.

Examination of Panel Assertion

Still, let us indulge the Panel and look at their supposed reasons for believing that supposed independence of witnesses adds great credence to the accusations against Donnelly. First, Witnesses #7 and #8 are friends of Marsden of long standing, who also serve as character witnesses (PR, p. 15). Then Witness #5 is the sister of Marsden, something the Panel conveniently omitted in their discussion of quality of witnesses.

Witness #3 seems elsewhere to have been Marsden's principal supposed confidante in the case (PR, pp. 15, 16). Thus it is difficult to ascribe much independence to her. But still it does not really matter, since Witness #3 never even met Donnelly and is not cited as confirming anything other than what Marsden told her (see "Panel paragraph 9" and PR, p. 24).

We next turn to Witness #6. Although no indication of closeness is given in the Panel Section 6, it is noted elsewhere (PR, p. 24) that this witness was a long-standing friend of the Marsden family, and that her relationship with Rachel Marsden had become closer in the last four years. Hence, this witness clearly was not independent.

Finally, we come to Witness #1, the last of the 7 cited witnesses, with perhaps the best apparent claim to being independent. Yet we have already seen that this witness volunteered that her testimony had been coached by repeated conversations with Marsden. This obviates any claim that her "independence" enhances Marsden's case.

In summary, of the 7 witnesses cited to prove the supposed existence of the relationship:

a. One was a friend and supposed confidant of Marsden who had never met Donnelly.

b. Two more were long-standing friends of Marsden who never met Donnelly.

c. Another was a long-standing family friend of the Marsdens as well as being a close friend of Rachel Marsden.

d. Another was a friend of Marsden who doubled up as a character witness.

e. Another was the sister of Rachel Marsden.

f. Another admitted that her testimony had been extensively coached by Marsden.

This accounts for all seven of the cited witnesses. Thus, the Panel's claim that independence of witnesses makes the case "all the more compelling" is utterly bogus.

A Further Anomaly

One more item in the diversity of witnesses argument needs to be considered. In trying to tout the diversity of witnesses claim, the Panel asserts "one [witness] met Ms. Marsden face-to-face for the first time while testifying" (see "Panel paragraph 2").

Careful readers might wonder which one that could be, since each of the 7 witnesses repeat what Marsden told them in person. All seven witnesses are indeed represented as having repeatedly talked to Marsden before the hearing.

Therefore, the above statement must refer to Witness #2, who is not even cited in the supposed proof of existence of the relationship.[13] Thus, an uncited witness is used to gild the supposed independence of witnesses used to establish the existence of the relationship. When we see that all three Panelists overlooked such a patent fallacy, we have strong reason to believe that the evidence analysis was nothing more than a belief-justifying ritual.

Basic points in Donnelly's favour

The question being considered here is whether the Panel obtained and displayed sufficient evidence to convict Donnelly. Therefore, in this analysis it is unnecessary to prove whether failures are due to lack of existence of the evidence, or failure in those gathering and assessing the evidence. With this basic principle in mind, I will note three positive points in Donnelly's favour, all of which can be argued from the Panel Report itself.

13 Her purpose was to regale the Panel with stories about Donnelly's high school sex life, none of which involved anything other than consensual and open relationships (PR, p. 13). There apparently is no limit to how far back the Panel can go. Georgy Porgy better stay away.

Lack of Observation

The Panel notes that in this supposed 16-month relationship, no one ever saw them dating. Then the Panel drops the point, accepting Marsden's assertion that this was because Donnelly wanted it secret. Yet according to what the Panel recited of her own story, the alleged relationship did not become secret until November 1994. So we have (according to Marsden) a 6-month relationship that was open, yet during which no one saw them on a date. This is a thin story, even for the last 10 months. Surely someone would have seen them together. But the first part is truly remarkable: they were supposedly dating openly, yet no one ever saw them on dates.

The Panel gives a mild nod to the overall difficulty, yet goes on and on about testimony of witnesses that have little or nothing to say other than what Marsden told them. The PR blithely accepts Marsden's unsupported assertion that Donnelly imposed secrecy, yet fail to grapple with the 6-month period when the alleged relationship was supposedly open, during which no one saw them on a date. In lieu of seeking such evidence or wondering about its absence, the Panel decided that such evidence can be replaced by testimonials from believers.

Donnelly's Denial

If Donnelly had dated Marsden, he would have been foolish to deny it, since this would not have been an offense under the policy. Even if guilty as charged, Donnelly's best and safest line of defense would have been to admit that the relationship existed, but to claim that nothing abusive or non-consensual occurred. Marsden's story was clearly vulnerable on other grounds, such as the claim that she kept coming back for more even after supposedly being abused.

By denying the existence of the relationship, Donnelly was shifting the battleground from things difficult to prove, even if true, to things that would ordinarily be easy to prove, if true. This makes sense only if Donnelly was certain that evidence of the relationship did not exist. The only way he could be really certain was that the relationship was a fabrication, just as he claimed. The Panel completely ignores this point, despite their knowledge of Donnelly's denial.

Lack of Physical or Documentary Evidence

A gaping hole in the case is the lack of physical evidence. In real relationships of this supposed duration, abundant evidence would normally exist. Consider the sorts of things that could easily establish the existence of a relationship.

a. Receipts documenting where they went (show, restaurant, etc.);

b. Written note, letter, or card (or even e-mail);

c. Photograph, recording, or video;

d. Traceable present (e.g., Donnelly buying her something);

e. Phone answering message or recording.

One has to assume that if Marsden had such evidence she would have used it, so that the reason for her not using it was that it did not exist. This non-existence of such evidence immediately follows if the relationship did not exist, and, similarly, is extremely difficult to explain under the premise that the relationship did exist.

Yet the Panel completely ignores this huge difficulty in Marsden's case. In the Panel Report section supposedly proving the existence of the relationship, no physical or documentary evidence of any kind is referred to. None of the types of things listed above are used in any way in the

supposed proof of the case, yet the Panel does not even note their absence.

Review of all evidence

Let us briefly review what we have as evidence and what can be reasonably inferred from it. I will list the points by categories along with comments concerning its probable worth.

1. All the material on beliefs, suppositions, rumours, etc. is simply not evidence, at least in real courts in reputable countries. It should be ignored.

2. If contemporaneous assertion is evidence, then it is clear from hostile witnesses that Donnelly also made a contemporaneous assertion to the contrary, so there is at best a standoff here.

3. The Panel assertion that Marsden's testimony was adequately tested is simply an assertion without any support. Further, there is considerable internal evidence in the Report that indicates the Panel was ineffective in their examination of Marsden on this issue, and failed miserably to press her on numerous major difficulties.

4. As noted above, the empirical evidence scarcely proves anything other than that Marsden hung around Donnelly's office for some time period. Even this point is not pinned down, being based on imprecise testimony from one witness. In addition, the same witness provides evidence that Donnelly eventually banned the office visits.

5. The remaining observations are of negligible import. Marsden (maybe) left a Halloween party early, Marsden went out, Marsden talked on the telephone, with no observed links to Donnelly, let alone anything indicating a romantic relationship. The key factor in all these remaining observations is that no witness ever observed Donnelly doing anything.

6. The evidence of Witness #1 involving the description of Donnelly's bedroom is of doubtful value to begin with, but then fails completely due to the problem of Marsden's coaching of the witness, which problem was raised by the witness herself.

7. Donnelly's denial should be given high credibility because it makes strategic sense only if it is true.

8. The absence of any witnesses of dates over an alleged 16-month relationship is a major point in Donnelly's favour, especially since Marsden claimed that the relationship was clandestine for only the last 10 months.

9. There was no physical or documentary evidence (cards, notes, pictures, etc.) that would implicate Donnelly. This is a huge point in Donnelly's favour.

The only points that favour existence, even on balance, are possibly 3, 4, and 5, but as explained previously, one has to be generous to the Panel to count points 3 and 5 as being probative at all. Point 4 is the only real point in Marsden's favour, albeit a weak one in view of all the limitations. Point 6 is scarcely a point in Marsden's favour, since her own witness indicated that her testimony was coached by Marsden, which suggests manufacturing of evidence. This is the total of all evidence cited by the Panel to prove the existence of the relationship.

In contrast, the last three points are significant. Point 7 is at least a good point against the existence of the relationship. Point 8 is very strong, and point 9 is almost compelling in itself. A real relationship of the type described should have been easy to prove, either by direct observation or

even more clearly by authenticated documentary evidence. The reason for the inferior evidence is that the superior evidence did not exist, and the reason for the lack of superior evidence is that the relationship did not exist.

This analysis shows that the Panel never came close to proving an absolutely essential part of their case. Out of prejudice and gross abuses of evidence, the Panel leapt to the conclusion that there was strong evidence of a romantic relationship, when real probative evidence was conspicuous by its absence. Further, the dearth of certain kinds of evidence strongly indicated that the relationship was a fabrication invented and perpetuated by Marsden.

Prejudicial Treatment

Basic prejudices

Prejudices are reflected throughout the Panel Report. When Donnelly says something, people just hear what Donnelly says (at best). When Marsden tells people things, the hearer often "learns" or "becomes aware." Even in addressing the issue of whether a relationship exists, the Panel cannot resist tossing in gratuitous prejudicial remarks such as "beginnings of psychological harassment."

Opinions, conjectures, rumours, and assumptions are regarded as valid evidence whenever they can be used to hurt Donnelly. Even such babbling as "couple knowledge" is regarded as valid evidence, so long as it supports Marsden. In short, it seems that Marsden has punched the right ideological and emotional buttons and this was sufficient.

Throughout the Report we find much cant and social commentary about power symmetries that male persons with any authority over female persons are supposed to feel guilt pangs about. In a case such as this, such material (even if valid) has little relevance, since the two versions are too far apart to depend on such nuances. Yet such material had great potential for reinforcing prejudices against Donnelly. This failed to stop the Panel from doting on this material to such an extent that real evidence on crucial issues is given far less attention.[14]

The framing fallacy

Whenever there are competing theories, evidence should be evaluated not according to whether it fits a particular theory, but whether it fits one theory much better than an alternative. Also, the alternatives must be clearly defined and understood. In addition, one should assign low potency to evidence that could have numerous credible explanations outside a given theory.

These principles were ignored by the Panel. First, the PR assumes many things to be probative by stuffing them into the frame of Donnelly's guilt without considering reasonable alternatives. For example, the Panel notes that Marsden's grades fell over a certain time period and attributes this to Donnelly's current or past abuse, when there could be numerous other reasons for such a grade decline, such as course difficulty, lack of interest in subject areas, random variation, other personal

14 For example, we have more than a page on Donnelly's non-attendance at these hearings (PR, pp. 4, 5), five whole pages on supposed reasons for jurisdiction, which is full of numerous remarks prejudicial to Donnelly on the factual issues (PR, pp. 5-9), and a purely figurative diatribe on the sufferings Donnelly supposedly inflicted (PR, p. 12).

problems, and just the distracting nature of the controversy in the Fall of 1995.[15]

Further, the Panel fails to consider whether things it was told make more sense if Marsden's story is fictitious. According to Marsden, Donnelly elected to assault her in his office, even though she frequently visited him at his home. This is most strange if true. But it is not as strange if fictitious, since it could help Marsden's case by making Donnelly conceivably guilty of abusing his office, to which bait the Panel dutifully bounded, not even wondering why the event in question is located in time only to the nearest month (PR, p. 6).

The Panel rarely puts evidence into the frame of Donnelly's denial to see how it fits. Instead, the Panel often contends that their ability to stuff certain evidence into Marsden's case indicates that Marsden's claims are true. But the fallacy gets worse. When considering an alternative, the PR ignores Donnelly's claim of no relationship, and conjures up a straw man of the breakdown of an existing relationship (PR, p. 16). The Panel then claims that their knocking down this straw man helps prove Donnelly's guilt.[16] This argument is not only unfair, but intellectually dishonest, since the Panel knew that Donnelly had claimed there was no relationship (PR, pp. 3, 19).

Selective emphasis

The emphasis on evidence changes greatly depending on the issue at hand, so that evidence that cuts two ways is allowed to cut one way only. This technique is invariably used to enhance Marsden's case. The following are examples of this approach.

First, if the subject is Marsden's reliability, she is a thoughtful, reliable person. If the subject is Donnelly's supposed abuse, she becomes a truly pathetic creature unable to break off a 16-month relationship that is horribly distasteful to her and during which Donnelly assaults her at least 6 times, yet she keeps coming back for more.

Second, indications from a witness that Marsden was 50 to 60 pounds overweight, bloated in appearance, and with severe acne are indications merely of how badly Donnelly must be abusing her (PR, p. 15), but the PR fails to consider whether the timing is right, nor does it question whether Donnelly's alleged pursuit of a person in the described condition was likely.[17]

Third, witnesses' beliefs in Marsden's story and credibility are cited as evidence for Marsden's credibility, but are not cited as evidence of bias of witnesses that might reduce one's belief in the reliability of their observations. Further, the Panel fails completely to consider the possible negative implication of a parade of believers who provide so little tangible evidence.

15 In addition, there are other problems with the supposed grade decline evidence. The last semester of the three was the semester of the controversy, which obviously would be so distracting that one scarcely needs a date rape at the beginning to explain a grade decline. So we have two semesters left, one of which is a 2.97. Surely the Panel is making a leap in thinking that a decline that may have been from 3.17 to 2.97 suggests (let alone needs) a trauma of any kind.

16 They do not even knock down the straw man very well, but the point is that they had no right to set up the straw man in the first place.

17 The whole theory of the weight gain has all sorts of difficulties, one of which is that the only offence alleged during this time period was the supposed final incident of rape which Marsden claimed occurred during the middle of the period of the supposed weight gain, not immediately before. Also, the specifics (50- to 60-pound gain, bloated, severe acne) were observed only by this one witness, which is strange. And of course, even apart from these difficulties, this whole line of evidence is scarcely probative.

Fourth, the Panel is terribly concerned with the influencing of witnesses, for which it condemns Donnelly on speculation arising from someone having seen the potential witness go toward Donnelly's office (PR, p. 18). Yet evidence of witness coaching by Marsden was shoved aside, even when volunteered by one of her own witnesses (see "Diversity of Witnesses Point: First Three Sentences").

Fifth, the witnesses are touted as being distant in the section dealing with independence of observation, yet closeness of witnesses is taken as a plus and emphasized much more strongly when the same witnesses endorse Marsden's character ("Panel Paragraph 2," and PR, p. 15). In supposedly proving the existence of the relationship, Witness #4 is described merely as someone who worked with Marsden for six months, yet when cited on Marsden's character, she is described as having known her for three years.

Sixth, prior hostility to Donnelly going back to the Hyack Swim club and Marsden's not making the swim team is considered evidence of Donnelly's bad character, but not evidence of biases or ulterior motives of witnesses and accusers arising from prior disputes (PR, p. 12).

Seventh, rumours and beliefs of a romantic relationship between Marsden and Donnelly are taken as evidence of an existence of a romantic relationship (despite indications that Marsden had fostered the rumours). Rumours and beliefs of Marsden's stalking Donnelly are considered as evidence of a poisoned environment, an offense which persons creating the offense are summarily convicted without being asked to give any evidence on their own behalf (PR, p. 19).

Eighth, the Panel accepted at face value the charge that Donnelly just happened to harass Marsden the day before her closing speech (PR, p. 18). The Panel never noted that the coincidence was remarkable. As usual, there is no legitimate evidence that the alleged event took place, since the supposed witness never testified. Yet Donnelly was duly convicted on this charge without any of the judges even questioning the convenience of the timing.[18]

This asymmetrical approach to evidence analysis demonstrates that the Panelists were not really weighing the evidence. Rather, they were stuffing it into the framework of their preconceived notions. The supposed evidence analysis is little more than a facade for prejudice.

Argument from fantasy

The PR often gives the impression that this was a congregation of the faithful condemning a heretic. We find praise of harassment workshops and chastisement of Donnelly for not having learned the valuable lessons contained therein (PR, p. 20). Whether this deficiency is supposedly due to non-attendance, inattention, or hardness of heart is not made clear and really does not matter: the point is that Donnelly is not of the faith. A further indication of how far the Panel went in indulging the prosecution is reflected in the following paragraph:

> Ms. Marsden stated that she felt that the Athletics and Recreation building, and particularly the pool area, was Mr. Donnelly's territory in keeping with his position as Head Coach of the Swim Team. Ms. Marsden went on to state that, to a lesser extent, she has this feeling anywhere at SFU. While the Panel discounts Mr. Donnelly's ability to exert significant influence

18 This belies the contention made by some that Stubbs was the victim of a skilful fraud. Marsden made up her story as she went along, and she frequently contradicted herself and over-reached, as in this instance, but the prejudices were too great for her over-reaching to arouse suspicion.

> on the academic side of the University, the perception remains. (PR, p. 19)

We could justify persecution of witches in the same way. Let us paraphrase: "While the Panel discounts these witches' ability to cause diseases, the perception remains." Or why not even, "While the Panel discounts the existence of an international Jewish conspiracy, the perception remains." Yet here such argument from fantasy becomes evidence of Donnelly's guilt rather than Marsden's over-reaching. Nor does the Panel notice the hints of Marsden's power-tripping attitude that are reflected in the above statement.[19]

Class guilt

The Panel reports that Marsden submitted in evidence a handbook publication called *Gender Equity in Coaching*. The Panel then tells us that

> Chapter 6 of the handbook, "Sexual Harassment in Sport," deals at length with relationships between male coaches and female athletes. It notes that there is a high likelihood of abuse of power in such a relationship. (PR, p. 8-9)

Consider the following hypothetical example. An aboriginal person is on trial for killing his wife, and the defense claims she was killed by an intruder. Lacking evidence of planning, motive, or efforts at concealment, the prosecution claims that the defendant killed his wife in a drunken rage. The defense contends that the defendant was not a drunkard, was not drunk at the time, and was not a wife-beater. But in arguing for conviction, the prosecution presents a summary of a study showing that drinking and wife abuse are serious problems among aboriginal people.

Surely, the Courts would not allow such "evidence," but if they did, one can only imagine the cries of outrage that would spew forth from various friends of justice. Nor would the cries be inappropriate. Regardless of the merits of the "study," it should never be allowed in evidence, because of its severe prejudicial effect. One could reasonably conclude that a judge who allowed such material to be admitted was deliberately unfair to the accused.

But if equal justice is to be served, the same right to be protected from prejudice must also apply to male swim coaches accused by their former pupils. The material shows that not only were the amateur adjudicators exposed to extremely prejudicial material, but that fairness to the accused was conspicuous by its absence. The Panel's citing of such "evidence" speaks for itself.

Intimidating behaviours

Another charge on which the Panel convicted Donnelly, and for which Stubbs upheld the conviction, was that of "intimidating behaviours." The charge consisted of various items supported by little or no evidence. For example, one claim was that Donnelly had telephoned Marsden at her place of work; it would take a presumption of guilt to infer intimidation from Donnelly's merely having called, but what is worse is that there is no remotely reliable evidence that Donnelly called at all. The relevant passage goes

> She [Witness #3] reported this [phone call] to Ms. Marsden who felt it was probably Mr. Donnelly. Subsequently, Ms. Marsden played for Witness #3 an answering machine message which she said was Mr. Donnelly: Witness #3 stated that the voice had sounded similar but she had no way to be sure. (PR, p. 17)

The holes in this "evidence" are abundant, but we need not go through all of them, since despite be-

19 Nor did John Stubbs clue to this possibility when Marsden requested that she participate in selecting the new swim coach (SFU FOI, Sept. 3, 1998, doc. 20, p. 13).

ing led, Witness #3 failed to make a positive identification. Further, there is no proof that the comparison voice played by Marsden really was Donnelly's voice. Finally, the citing of what Marsden "felt" as evidence is so bizarre that it demonstrates how snugly she was enpouched. Having shown the worth of this evidence, I will now turn to the last three paragraphs of this section in which the reasoning, conclusion, and gratuitous insult are displayed.

> Only the allegation that Mr. Donnelly called Ms. Marsden's place of work in an attempt to locate her is directly supported by testimony and evidence presented to the Panel. On balance of probability, and given further testimony and written submissions which go to a pattern of intimidating behaviour, the Panel concludes that this allegation is on balance of probability true. The Panel concludes that there is no evidence to dispute the allegation that Mr. Donnelly followed Ms. Marsden in his car.
>
> Finding: Based on testimony and evidence, the Panel finds that, on balance of probability, the allegations of intimidating behaviours outlined in Ms. Marsden's complaint are true.
>
> The Panel is particularly disturbed by the ongoing pattern of intimidating behaviour on the part of Mr. Donnelly. (PR, p. 18)

We should be grateful that the Panelists have given such a clear window into their minds. The Panel claimed to have tested evidence for only one of the items, which evidence is patently full of holes: it depends on a voice identification that failed, would have been invalid even if it succeeded, and would not constitute proof of intimidation even if valid. The Panel finds Donnelly guilty of following Marsden in his car because of lack of evidence he did not do it, thus discarding the fundamental principle of presumption of innocence.[20]

Despite the absence of evidence and lack of hearings on these charges, Donnelly is convicted, merely on the Panel's contempt for him. Their "reasoning" goes something like this: He is really bad, so he must be guilty of these additional things. This shows that he is even worse, so we are greatly disturbed at his continual bad conduct. There is a terrible illogic in all this because no matter how bad accused persons may be, it does not follow that they are guilty of any specific offense.[21] Conviction in this manner demonstrates that fairness was totally absent.

Anything goes

Witness #3 was a roving expert, supplying the "couple knowledge" determination of the existence of the relationship from observing one member of the alleged couple. She also helped the Panel conclude that Marsden's being overweight showed that Donnelly was molesting her. But it gets worse. She is treated as an authority on date rape, being cited as follows

> Witness #3 states that Marsden began to open up to her in October, 1995, and confided details of the final incident of rape. Witness #3 also commented that in her experience, it was not unusual for a rape victim to delay reporting the rape. She described a friend who had been the subject of a date rape and had delayed reporting it because she'd felt that her story would not be believed. (PR, p. 16)

20 Further insight will be provided later in "Specific Biases in Donnelly Case."

21 Even the Nazi leaders tried at Nuremberg were found to be innocent, and were innocent, of *some* of the charges against them, despite their well-deserved reputations. One cringes at the thought of the ammunition those denying the holocaust would have been given had the judges at Nuremberg adopted the illogic of this Panel and of John Stubbs.

Though I find it difficult to express proper contempt for this "evidence," I will try. In the first place, the Panel shamelessly gilds the testimony with all sorts of attributions implying that what Marsden said is true. This is not even evidence of contemporaneous assertion, since Marsden claimed that she had been assaulted for the last time on September 3, 1995. Witness #3 has no expert qualifications in this area, so her opinion is not evidence.

The testimony described in the last quoted sentence is patently irrelevant to the case at hand, and enormously prejudicial. The mere allowance of such testimony shows that Anita Braha was not conducting a fair trial. Such testimony tells us nothing about Donnelly, but its use is highly informative about the immorality of Braha, and Panelists Hafer, Eix, and Hinds. The acceptance of such evidence speaks with authority about the leader who reviewed the use of such material "very, very carefully," yet could still assert that he was, "unable to imagine what further precautions the University could take to ensure that a party is accorded a fair and just procedure."[22]

Summary

As has been shown above, the Panel's handling of evidence is biased throughout. This was shown by the pervasive slanting of evidence and through the use of extremely prejudicial material. The abuses indicate an effect, proving that the Panelists and their advisor were biased against Donnelly and contemptuous of his rights to a fair trial. Further, the abuses suggest a cause whereby the use of prejudicial material and interpretations gave the Panelists the illusion they were seeing cumulative evidence of Donnelly's guilt when all they were seeing were reflections of their own bigotry.

22 Imagine the feminist outrage if a male accused of date rape supported his contention that the alleged victim was lying by calling a witness to testify to an unrelated case of a woman falsely claiming she was raped.

Additional Problems With the Case

Additional problems with evidence

Not having access to the original testimony and submissions, I cannot evaluate whether there were additional problems. Although audiotapes were made, the University refuses to let anyone other than their own lawyers listen to them. So we do not know how accurately the Panel represented what witnesses said. Still, we can see abundant misuse of evidence along with abundant evidence of prejudice against Liam Donnelly. There is good reason to believe that the Panel was equally prejudiced and incompetent in handling things that we could not see. Since the Panel imposed virtually no standards for rules of evidence, it is unlikely that it imposed any standards for examination and interpretation of witnesses.

Another very suggestive problem is that the Panel Report never systematically lists the evidence used in their report in any way, even though such lists were usually provided in other cases, and Braha recommended such listing in her training lecture (Braha, March 1997). Despite this anomaly, John Stubbs did not look at the original evidence, claiming it was not his job, even though in another case he claimed to have read original evidence (Fournier, June 11, 1997; SFU FOI, Sept. 3, 1998, doc. 11, p. 1). Of course, with the widespread secrecy, Donnelly would not have known that these actions were inconsistent with procedures in other cases.

Contradictions

SFU had in its possession information indicating that Marsden was not a trustworthy witness. In the arbitration the SFU representatives admitted that

> The findings of the harassment panel were based on Ms. Marsden's credibility. Inconsistencies between her statements before the panel and her response to Mr. Donnelly's harassment complaint cast doubt on her credibility. (Kelleher, July 23, 1997)

Despite the moderate wording, the clear implication is that both mediator and SFU concurred that these problems were of such a magnitude as to defeat any case against Donnelly. Hence, these admissions are decisive against anyone defending SFU. But we can go further.

The visibility, the number of people involved, and their reputations make the possibility of conspiracy in this issue unlikely. The statement refers to a specific document that is in the hands of a number of people with varying interests. David Gagan, Gregg MacDonald, attorney Gabriel Somjen, and mediator Stephen Kelleher would not leave their reputations available for shredding at the whim of Marsden, Stubbs, and Braha. Kelleher specifically claimed to have read the document in question, and he works in a field where his reputation is crucial to his future success.

Still, it is somewhat unsatisfying to rely strictly on such secondary inferences. Moreover, some might wonder at how significant the contradictions must have been. Therefore, I will here describe just one of the "contradictions" in some detail. Although some elements of this incident have been reported in the press, the basic importance is being publicly revealed here.

Donnelly in his November 23, 1995 complaint of harassment against Marsden, referred briefly to his having received and being billed for an unordered subscription to *Playboy* magazine. At that time, Donnelly did not specifically allege that

Marsden had placed the order. He merely indicated that this was one of a number of suspicious things that had happened. To this item, Marsden had the following to say in her Dec. 2, 1995 response to Donnelly's complaint:

> *Playboy* subscription (!)
>
> When I saw this item I have to admit that must have laughed for about a minute. It provided excellent comic relief to a serious situation. I can guarantee that I am not responsible for this. Although I know Liam's residential address (from being to his house several times), I don't know his postal code. Also, I noticed that his address is wrong on the statement (which was already circled on the copy that I received).

Then, in her opening statement to the Panel on May 9, 1996, Marsden alluded to the *Playboy* subscription incident as follows:

> . . . I also filled out a subscription to *Playboy* magazine in Liam's name with the hope that he would be able to take out his sexual frustrations on the magazines instead of on real women.

In the first statement, Marsden denied the action vehemently and elaborately. Moreover, she also made up another lie (claiming not to know Donnelly's postal code) to support the false denial. Thus, Marsden lied blatantly in her submission to the harassment office, apparently in the erroneous belief that the forgery could not be traced. The obvious reason for the new story was that the forgery had been traced.

This alone should have blown the whole case.[23] Moreover, this is only one of a number of cases where Marsden was or should have been caught lying, simply on the basis of her own statements. It would seem that Anita Braha in particular has much to answer for here, since she had undoubtedly read the Dec. 2 submission, and both read and listened to the May 9 statement.

The contradictions reside in materials and testimony provided by Marsden. No evidence from Donnelly, no observation of demeanours, and no cross-examination was necessary. All that was required was for someone to review Marsden's submissions to determine whether her representations were consistent with each other and the findings of the Panel Report. There was no rule preventing this step, and normal prudence and fairness would dictate that such a search should have been conducted.

The contradictions were not hard for a competent searcher to find. Loryl Russell became Donnelly's counsel in late May 1997 and despite being otherwise busy, she presented the contradictions to the SFU mediation team in early July of the same year. In contrast, SFU possessed all the information for nearly a year before Donnelly was fired. The most charitable interpretation is that those dealing with the case never found the contradictions because they never looked for them.

Procedural anomalies

Improper Panel Selection Procedures

The so-called Investigative Panel lacked standing because it was illegally appointed. Stubbs and O'Hagan had ignored their own rules for over three years (from late 1993 through 1996), so that the Donnelly Panel and 10 others were appointed by procedures that substantively violated the

23 Other problems are raised by the statement, such as why this action should produce such mirth. Also, the comment about "several visits" to Donnelly's house varies with descriptions elsewhere that have long visits in his house being frequent. The claim about not knowing the postal code is not very plausible under any circumstance, yet it demonstrates the technique whereby one lie supports another.

rules. This was admitted by SFU in October 1997 in a press conference by Jack Blaney, SFU president (SFU NR, Oct. 24, 1997). The result was that all adverse findings were thrown out, and solutions were obtained by direct negotiations between the respondents and SFU.

Although the SFU announcement was made in October 1997, there is convincing evidence that the problem was known to Stubbs and others much earlier. The Olewiler Report, an SFU internal investigation, shows that problems were corrected, starting in January 1997 (Olewiler, Oct. 20, 1997). As a result, all tribunals appointed during 1997 were appointed according to the rules.

To correct all the appointment procedure problems, a number of actions had to be undertaken, including the election of the person who was to appoint the Investigative Committees. Since Stubbs knew how the previous tribunals were selected, he had to know that these so-called Investigative Panels had been formed in clear violation of the rules. In the Donnelly case, the anomaly was particularly serious since Marsden's self-styled "best friend" had selected the Panel members (see "The Marsden-O'Hagan Relationship").

New Charges

The Panel allowed Marsden to introduce new charges during the hearings, which violated Policy provisions that required advance notification on all charges and made no provision for new charges (SFU Harassment Policy, Jab. 22, 1991, 9.1). Further, the introduction of new charges during a trial violates a fundamental right of accused persons. Not content to leave the sport wholly to Marsden, the Panel even made up a "poisoned environment" charge of their own (PR, p. 19). Yet there's worse. From the Panel Report we read the following:

> Ms. Marsden also states that in conversation with Witness #6 on June 28, 1996, she was told that other lifeguards have been covering for Mr. Donnelly at workouts. (PR, p. 18)

This gem of evidence is supposed to show that Donnelly was spending more time in planning his fiendish persecutions of Marsden. And of course, this point, such as it was, was strictly hearsay, since Witness #6 never testified to this "evidence" herself. But let us move on to something more relevant to the issue raised above.

The Panel Report frequently refers to a document called "Exhibit #36" in which Marsden charged Donnelly with additional ongoing acts of harassment (PR, p. 18). Yet the last hearing was held on June 27, 1996, one day before the described conversation. Thus, the new charges in Exhibit #36 were submitted after the last hearing, so that no hearings whatsoever were held on these charges (see also "Intimidating Behaviours"). Donnelly was apparently not even informed of these charges until after he was found guilty of them. Despite such a palpable violation of due process, Stubbs upheld Donnelly's conviction on these charges (SFU FOI, Sept. 3, 1998, doc. 20, p. 11).

Marsden-O'Hagan Relationship

The director of the Harassment Office, Patricia O'Hagan, and Rachel Marsden developed a close personal relationship (which has been variously described by the parties concerned) despite O'Hagan's well-recognized responsibility to remain neutral. When whistle-blowers alerted Stubbs to this problem, he devised an elaborate cover-up, in which SFU put out false information about the reasons for O'Hagan's departure and paid for her silence. Even worse, he concealed the problem from Donnelly, while claiming that scrupulously fair procedures had been followed.[24]

Advance Distribution to Marsden

Marsden was given an advance copy of a preliminary version of the Panel Report, in clear and obvious violation of the rules. This procedural violation has been admitted but never explained (SFU NR, July 14, 1997). Further, Stubbs concealed the violation from Donnelly throughout the decision process, and Braha gave the press a version of the history of the appeals process that conspicuously omitted this known procedural irregularity (Braha, June 6, 1997).

Conflict of Interest

As Stubbs acknowledged, due process required that he perform an independent review of the Panel's findings. Yet in this review he was advised by Anita Braha, who as legal adviser to the lay Panel had guided and substantially influenced the process whereby Donnelly was found guilty. Thus, Stubbs allowed Braha to advise him on the acceptability of her own work. This obvious conflict made a mockery of Donnelly's right to an independent review.[25]

Private Correspondence

Stubbs concealed from Donnelly a letter from Marsden concerning the problems arising from the efforts of Stubbs to limit her relationship with Patricia O'Hagan (Jimenez, Oct. 21, 1997; Horwood, Oct. 21, 1997). In addition to being generally improper, such concealment was materially wrong because: (1) it allowed Marsden to make secret arguments and threats; (2) the letter revealed actions that were prejudicial to Donnelly, who had the right to challenge them; (3) the letter contained material that challenged the view of the Panel that Marsden was a highly rational person who adjusted readily to the break-up of relationships (PR, p. 16).

24 SFU announced the problem during the mediation (SFU NR, July 14, 1997). Further information confirming the extent of the relationship was revealed by circulation of a letter that Marsden had written to Stubbs concerning this relationship (Jimenez, Oct. 21, 1997) and a follow-up interview with James Ogloff (Jimenez, Oct. 22, 1997). Additional insight can be gleaned from the information SFU finally released on the investigation leading to O'Hagan's departure (SFU FOI, Sept. 30, 1997). Despite the heavy censorship, one who is armed with the necessary background knowledge can infer that Stubbs, Braha, and Judith Osborne, Associate Academic Vice President and former harassment office director who was assigned by Stubbs to investigate problems with the actions of O'Hagan, were all involved in dealing with the problem of the Marsden-O'Hagan relationship. Within the FOI package: doc. 2, p. 2 refers to the Marsden-O'Hagan relationship; doc. 2, p. 3, item 5 refers to Osborne meeting with Marsden and her support person; doc. 3 shows that the cover story on O'Hagan's departure was negotiated by lawyers with a 48-hour ultimatum being used; doc. 5, p. 1 shows that O'Hagan's silence was purchased. Appendix A to the Osborne Report is the letter from Marsden to Stubbs discussed in "Private Correspondence" below (Horwood, Oct. 21, 97; SFU FOI, Sept. 22, 1998).

25 The conflict is readily apparent, yet SFU has never given any rationale as to why such an obvious compromise of independence in reviews was deemed to be acceptable (Clark, July 13, 1997).

Donnelly's Boycott of the Panel Hearings

Some people contend that although the events were unfortunate, they were caused by Donnelly's non-participation in the Panel hearings, a terribly wrong thing for him to do that somehow justifies or mitigates the subsequent actions taken against him. Although tempted to argue the validity of Donnelly's non-participation, I will merely demonstrate the following.

1. Donnelly's actions were legal according to the Policy in force.

2. Donnelly's actions were morally and ethically defensible.

3. SFU acted improperly in having the Panel decide Donnelly's challenge.

4. The Panel's lack of standing completely undermined SFU's position.

5. The anomalies cannot be blamed on Donnelly's non-participation.

Legality of Donnelly's action

There was no rule that required Donnelly's participation. No one in authority ever presented him with a command to participate, nor did SFU ever cite a rule or principle that required his participation. SFU never charged him with an offense (real or imagined) of non-participation. Even Anita Braha (June 6, 1997) stated that "the University does not coerce parties into participating in the process either as a complainant or respondent." She later referred to Donnelly's not exercising his "right to participate," and that, "he failed to exercise his right to proceed." Neither she nor anyone acting for SFU ever claimed that Liam Donnelly had a duty to participate. Thus, not only was Donnelly's action legal, but the legality was recognized.

Morality of Donnelly's actions

Donnelly was a person of limited means, confronted by an empire that can and does spend the taxpayers money lavishly to further its special agendas. The University Administration can keep dubious cases going, just to establish a tough reputation. It can exploit the employee's resource disadvantage in many ways.

Anyone accused of rape (no matter how absurd the charges) would be crazy to participate in hearings without a lawyer. Hence, the costs to Donnelly could have been extremely large, and Stubbs felt no obligation to award legal fees even to successful defendants (see "Prior Considerations" and "Attitude Towards Innocent Professor" below). If Donnelly felt (as well he might) that he could not afford to pay for two defenses, he had the ethical right to save his resources for the most competent and fair tribunal. If the University wishes to require such participation, it should meet the cost. To require participation without paying the cost is an arbitrary confiscation of an employee's wealth.

Dispute over jurisdiction

The dispute over jurisdiction was legitimate. Many university employees and students live with or have relations with other employees or students. Are all such relationships to be regulated by the University? Does the University have the right to pry into its employees' personal lives more than do other employers? Most professors and faculty associations would answer with an emphatic "no," yet this Panel answered in the affirmative, based on some fuzzy comments on their concept of community (PR, p. 6; and see "Social Views of the Panel" below).

Donnelly was never given any legitimate arguments why the challenge to jurisdiction was wrong. No legal authority, no relevant case law, no binding employee agreements were cited to support the views given. There was nothing more than the opinion of the sort of reach that three politically correct amateurs would like to impose.

Further, their consideration of this issue was likely to cause panelists to see the defendant as a person who: (a) is trying to escape guilt based on technicalities; (b) does not share their values; and (c) has insulted their competency. Moreover, to consider jurisdiction, panelists have to presume guilt, which may compromise their subsequent ability to assess whether the defendant actually is guilty; this seems to have occurred here. To avoid all such problems and to obtain a credible decision, SFU should have obtained a legal ruling from a competent independent authority.

Lack of standing of Panel

As was explained in "Improper Panel Selection Procedures" earlier, the Panel was selected in a way that substantively violated the rules. This was known to Stubbs before he fired Donnelly. Therefore, Donnelly was entitled to a new trial at which he could present whatever relevant evidence he liked. Stubbs and Braha were utterly hypocritical and dishonest in attacking Donnelly's non-adherence to protocols, while concealing SFU's substantive violation of explicit rules on the formulation of the tribunals.[26]

Effect on actions

Suppose (contrary to my beliefs) I concede for sake of argument that: (a) the Panel did have jurisdiction; (b) that Stubbs would ordinarily be justified in rejecting previously available evidence submitted after the hearing; and (c) that Donnelly should have expected these results. Still, these highly generous concessions do not come close to justifying what was done, since Donnelly is ethically responsible only for those diminutions of rights that legitimately followed from his non-participation. Braha, O'Hagan, Stubbs, and the Panel are responsible for the rest.

Donnelly's actions did not authorize SFU to run roughshod over rights that could be protected without his participation. This included the right that any case against him be based on a fair and competent evaluation of relevant and reliable evidence, with prejudicial material excluded from the decision process. Nor did Donnelly surrender the right to an impartial review of the PR.

As the previous sections have shown, Marsden's case should have failed for lack of evidence, even without Donnelly's counters. My demonstration does not depend on evidence submitted by Donnelly. Hence, the moral and ethical failures inherent in this egregiously wrongful dismissal cannot legitimately be attributed to Donnelly's non-participation.

26 I will accept that the Panelists are to be excused for not knowing their tribunals were illegally constituted. My criticisms are based on how they acted within their beliefs of having standing.

Aftermath

Summation of wrongs

The preceding sections have demonstrated the following major problems with the Donnelly case, problems which were all known or should have been known to cognizant SFU officials without any need to rely on additional evidence subsequently provided by Donnelly.

1. The case was incredibly weak, with a conspicuous lack of evidence in areas where evidence should have been abundant were the case true. These weaknesses were transparent from the Panel Report.

2. In its Report, the Panel clearly demonstrated incompetence in the analysis of evidence, thus showing that its work could not be trusted. Since this incompetence was repeatedly manifested in dealing with a crucial issue, the effects were highly significant.

3. The Panelists clearly demonstrated prejudices against Donnelly, reflected in their biased treatment of evidence and their endorsement of outrageously prejudicial material.

4. SFU officials had in their possession materials that included numerous instances where in her evidence and submissions Marsden had contradicted herself, showing at least that she was unreliable and most likely indicating that the entire case was manufactured.

5. There were numerous violations of fair procedures, including favouritism by O'Hagan, improper selection of Panel members, major conflicts of interest, illegal distribution of the draft PR, and Stubbs's private correspondence with Marsden.

Any one of the five reasons (none of which depended on Donnelly's evidence) should have been sufficient to preclude the action taken. Yet knowing all this, John Stubbs not only fired Donnelly with cause, but proclaimed Donnelly's supposed guilt and attempted to humiliate him publicly before his appeal was heard. All this was done even while Stubbs was concealing numerous substantive flaws in the procedures. This was an action so unconscionable that the Board should have pursued firing Stubbs with cause rather than giving him a golden handshake.

Limited acknowledgment

After exonerating Liam Donnelly, David Gagan, in speaking for SFU, came up with the following apology:

> The university regrets that not only Mr. Donnelly, but other persons have been subjected to this ordeal, and we certainly don't want to see it happen again.
>
> . . . The university has accepted some responsibility. Donnelly has accepted some responsibility, and we have attributed some responsibility to Ms. Marsden. (Swain, July 25, 1997)

As an apology, the above seems to lack something: it has a certain hammerlian quality about it. We are not really told who the other injured people are supposed to be (Stubbs? Marsden? who knows?). In addition, this sounds too much like a sort of faults-on-all-sides controversy in which Donnelly himself still must bear much of the cost and blame. This was not a reasonable attitude in light of what had been revealed during the mediation, and especially in view of what Donnelly had been put through already.

Meanwhile, although John Stubbs lost his presidency, he has scarcely had to answer to his ethical failures. He received a severance package of well over $300,000 without actually being severed, since he was also allowed to continue at the top of the professorial pay scale.[27] Despite the numerous indications of malfeasance, there was no official inquiry. The official version of history agreed to by the Board and Stubbs is that Stubbs merely elected to resign (SFU NR, Dec. 12, 1997). In a far cry from his ruthlessness towards Donnelly, David Bond, SFU Board Chair throughout the controversy, was maudlin and apologetic as he depicted Stubbs as a person who should be pitied more than censored.

SFU continues to apply secrecy rules aggressively to thwart public access to documents that would reveal the extent of the misconduct. Key documents are cordoned off. The agreement purchasing O'Hagan's silence continues to be honoured. No public explanation for the affair has been given by SFU. Stubbs has reneged on his promise to explain. The cover-up continues.

Continued unfair treatment of Donnelly

The unfair treatment of Donnelly has continued. Though MacDonald, Gagan, Somjen, and SFU president Blaney have treated him with far more respect and fairness than did Stubbs and Braha, they have only upgraded him from evil enemy to somewhat honourable opponent. In particular:

1. In the mediation, SFU coerced Donnelly into agreeing to certain things that were irrelevant or wrong, just to make SFU look less bad; in addition, the SFU's admission of wrongdoing was extremely limited in light of what has since been found out.[28]

2. Even after her lying was revealed, SFU still paid Rachel Marsden $12,000, a despicable insult to Donnelly that can and will be used to injure his reputation. SFU has exacerbated this problem by imposing secrecy rules to conceal the extent of Marsden's known dishonesty.

3. Donnelly has received no compensation beyond legal fees. This is in marked contrast to the awards that SFU extended to supposed victims, often on amazingly flimsy pretexts.

4. Donnelly has never received an apology from any of the individuals responsible for his false conviction. Even worse, there has been no institutional apology to Donnelly or other accused individuals whose most basic rights were trashed under the program.[29]

The continuing double standard

On the basis of what we have observed in this case, there seems to be a set of people who are wrapped in the mantle of political correctness. SFU goes out of its way to protect this group, even from legitimate actions by their victims. If the wrongdoing of these privileged people becomes

27 This sort of double dipping is supposedly banned, but the NDP ruled that it was acceptable in this case through a combination of grandfathering and generous interpretations of the rules (Steffenhagen, April 18, 1998). Stubbs also retained his seat on the Board of BC Hydro.

28 For example, Donnelly was made to agree that SFU needed to have a harassment policy, which was totally irrelevant, since no policy has remotely required anyone to agree that there should be such a policy, and it would be a gross violation of individual liberty were such a provision adopted. Also, the agreement that he breached the policy by non-participation was bogus (see "Legality of Donnelly's Actions"). I find it sad that SFU used its position of power to extract these shabby little sops.

29 I do not believe in forced apologies, but one might hope that some of those involved would have been moved to take such actions. An institutional apology is in order, especially since even the supposedly haughty UBC can admit its ethical shortcomings in this area (Steffenhagen, Nov. 5, 1998).

too visible to ignore, negotiations are held with the university endeavouring to minimize their pain. The gross abuses of process by Marsden and those who abetted her were treated as minor peccadilloes not requiring the university to take any action, nor did it interfere with Marsden receiving her ill-gotten award.

On the other hand, those who fall afoul of the holy crusade are treated as enemies. SFU's lawyers continue to fight such people, even when they are known to be innocent. Victims of false accusations receive no compensation for suffering, lost time, or effects on their reputation, and they have to beg for legal fees. Unlike supposed victims of harassment, the falsely accused are not entitled to have their persecutors punished. As the price for having their legitimate rights restored, the innocent accused are forced to waive their rights to further redress.

The attitude of the Board members has been revealing. When told that Donnelly was the villain, they endorsed the all-out effort to destroy him. When the facts began to reveal that his persecutors were the real villains, the Board went all-out to let them down as gently as possible. The Board's gentleness towards Stubbs is in marked contrast to SFU's brutal treatment of Donnelly (SFU NR, Dec. 12, 1997; Bailey, Dec. 13, 1997; Jimenez, Dec. 13, 1997). None of the three people most responsible—Braha, Marsden, or Stubbs—were required to face charges for their misconduct. This outrageous double standard strongly suggests that political correctness precludes any coherent implementation of even-handed justice.

A comparative case

As a contrast, I cite a case at Waterloo University. In this case, Professor Paul Westhues was the victim of dubious charges, an unmerited panel finding, and an unjustified ruling by the provost. As a result of all this, the arbitrator ruled that all penalties should be removed, and that Westhues's legal fees should be paid (Mercer, Feb. 10, 1998). In addition, Westhues was granted a 6-month paid research leave to recuperate from the strain of defending himself. Although a 6-month research leave is not a Stubbsean reward, neither is it trivial. At the least it gives the professor a semester's worth of course releases; the value is substantive.

Yet when we examine the arbitrator's report, we see clearly that the Westhues and Donnelly cases are not in the same league. The penalty being appealed at Waterloo was a one-month suspension (though the insult probably hurt more than the money), which was nowhere close to what Donnelly faced. Moreover, in Westhues's case, there were indications of decency and fairness by their provost, such as his opposition to forced apologies and his overturning of findings their panel failed to justify. Nor were there indications of significant turpitude in the handling of the case. Even so, Westhues was legitimately compensated for his suffering, whereas at SFU, only accusers receive such compensation.

Possible Causative Theory

Thesis: The unjust conviction, dismissal, and denunciation of Donnelly were due in general to political correctness and to biases in favour of women and students.

Prior considerations

Generally, anti-harassment programs have been seen as feminist programs with the object of preventing powerful males from exploiting weaker females (particularly students). Although lip service was paid to other forms of harassment with the formal statements worded in a gender neutral way, it was still clear from many circumstances that this was the principal reason why anti-harassment programs were emphasized and supported.[30]

Indications from Policy

The Harassment Policy (HP) itself suggested an attitude that was pro-accuser. I have previously documented the numerous indications of bias in the policy itself (Finley, June 4, 1997). Here I will cite the section on sanctions:

> **10.1** The President shall impose an appropriate sanction for the harassment, may provide a remedy for the complainant, or may exonerate the respondent. The appropriate criterion for a decision in this process is "proof on a balance of probabilities," the standard in civil litigation. Considerations affecting administration action should include: the severity of the harassment; whether the harassment was intentional or unintentional; whether the offense is an isolated incident or involves repeated acts of harassment; mitigating or aggravating circumstances affecting either party.
>
> **10.2** The range of sanctions may include, but are not limited to: dismissal, expulsion, suspension, or public or private reprimand, depending on the seriousness of the offense and the respondent's relationship with the University.
>
> **10.3** Where a complaint is found to be justified, reasonable efforts will be made to protect the complainant from any subsequent harassment, discrimination, or reprisal which might arise as a result of the complaint. Possible remedies may include written or oral apology, reassessment of academic work (e.g., examination, essay, thesis), or transfer out of a particular class or worksite. The President might also order a person to cease having any contact with the other party.
>
> **10.4** Where a complaint is found to be unjustified, the President may provide a remedy for the respondent. (SFU HP, Jan. 22, 1991, Sec. 10)

The way 10.2 follows 10.1 suggests that findings of harassment will be the normal result and that relief for the falsely accused is a relatively minor issue. The examples in 10.3 suggest that successful complainants will be students injured by their

30 The Academic Women supported Stubbs (albeit lukewarmly) as late as the end of July 1997 when the Panel Report was extant, the cover-up of the O'Hagan improprieties was admitted by SFU, the contradictions in Marsden's testimony had been acknowledged, and SFU had conceded defeat in the arbitration (Stewart, July 29-30, 1997). The Director of Women's Studies proclaimed that Stubbs was completely justified in his actions, first because Donnelly had to be guilty since the Panel had found him to be guilty (Cohen and Ross, July 23, 1997), and second, that Stubbs was justified in attempting to destroy him for having defied the Harassment Panel, Donnelly's never having even been charged with such an offense notwithstanding (July 31, 1997). Her remarks illuminate the underlying fanaticism that drove the program.

teachers. There are abundant sanctions for convicted defendants, but no sanctions for false accusers. Finally, not only does 10.4 appear as a terse afterthought, but the operative word is "may" in contrast to the "shall" of 10.1.

Comparison with Student Discipline Policy

Lest anyone think the apparent biases of the HP as implemented by Stubbs was normal to University discipline policies, it is useful to compare the HP to the student discipline policy (SFU Policy T10.03, Sept. 1, 1994). The difference is striking. Accused students have a number of important basic protections that were absent from the HP. Some notable examples follow.

The student discipline policy provides for a clear avenue of appeal and requires the President of the University to indicate and describe the right of appeal in the disciplinary letter (T10.03, 7.2). The HP had no such provision, and in many cases Stubbs omitted any reference to the possibility of appeals (SFU FOI, Sept. 3, 1998, docs. 6, 11, 13, 15).

The student discipline policy provides that penalties imposed by the President are not effective until an appeal is waived or has come down in the student's disfavour (T10.03, 7.3). In contrast, Stubbs routinely implemented penalties and announced determination of guilt before appeals were heard, with the Donnelly case being a notable example.

The student discipline policy provides that only convictions can be appealed, whereas under the HP accused persons were not necessarily exonerated when the Panel found in their favour (SFU Policy T10.04, May 11, 1998; see "Attitude Toward Innocent Professor" below).

The student discipline policy appears to limit previous offenses from being brought up in the hearing until after guilt is determined (T10.03, 6.4), whereas under the HP, complainants were effectively allowed a virtually a free hand in attacking the character of the accused (SFU FOI, Sept. 3, 1998, docs. 14, 15; PR, p. 13).

The student discipline policy provides that witnesses are not allowed to hear other witnesses before testifying. In more than one case under the HP, this unfair practice was permitted. In at least one case, this arrangement severely compromised the rights of the accused (PR, pp. 17-18; SFU FOI, Sept. 3, 1998, doc. 15, p. 6).

The student discipline policy provides that all hearings have to be audio-recorded for use in appeals (T10.03, 5.12). In the HP, this fundamental protection was conspicuous by its absence, and was seldom provided, even in major cases.[31]

Gender biases

In the 1994 to 1997 time period, all the Harassment Office employees were females. This includes the 7 different people employed by the office. In addition, both the people chosen to appoint Investigative Committees in 1997 were female. There were 6 sexual harassment cases (all of which had male defendants and female accusers) at SFU during the 1993 through 1996 time period. All 6 panels had female majorities. In all cases, the initial findings of the Panel were to convict the accused

31 After numerous inquiries on this point, my information indicates that transcripts were made in only one of the 11 cases. In 9 cases, there appear to be no recordings. In the Donnelly case, recordings were made, but only as a convenience to Anita Braha who had difficulties taking notes. They were not made available to Donnelly for appeal. I have been told by the FOI director that SFU lawyers listened to them shortly before conceding defeat in the arbitration. No transcripts were made, and the Panel made no use of the recordings in their deliberations.

males.[32] In all these cases, substantial rewards for the complainants and major penalties for the accused were recommended.[33]

In the Donnelly case, the female preponderance posed dangers of prejudice against the accused. For obvious reasons, most women are more likely to see themselves as the victim of rape than as victims of false accusation of rape. Although such facts do not necessarily swamp judgment, it could be dangerous if combined with other biases, or if reinforced by prejudicial procedures.

In the PR, gender labelling is rife, despite serving no legitimate purpose. Since gratuitous attaching of gender appellations could reinforce gender prejudices, this practice suggests a lack of care in seeking neutrality. Scholarly writing removed gender appellations long ago. Newspapers and most legal writing also shun this prejudicial practice. Thus, it is indicative that this antiquated style was re-introduced in a setting where gender prejudice was a hazard.

Implementation biases

The Policy itself was bad enough, but Braha and Stubbs filled in gaps in such a way as to make things harder for the accused. Most of the protection provided to students in their disciplinary cases could have been provided to defendants in harassment cases, but Stubbs and Braha elected to omit them (see "Comparison with Student Discipline Policy" above). In addition, they imposed a purely arbitrary rule that in all appeals of Panel Reports, accusers would get two comment opportunities to the defendant's one. They also put in a 2-to-1 majority rule criterion for conviction, rather than requiring a unanimous decision, when the Policy was silent on the issue (Braha, March 1997).

They contended that appeals should be mainly based on the premise that the Panel was right on the facts with no review of the actual evidence, even though such restriction was never stated in the Policy (Fournier, June 11, 1997). Stubbs further extended the disadvantages of the accused through special arrangements, such as having O'Hagan select the Panelists, attend the hearings, and advise the Panelists. None of these roles were authorized by the Policy, and one of these roles was expressly prohibited by the policy.[34]

Further, there was a process that selected on ideology. Panelists were chosen largely from friends, or friends of friends of Patricia O'Hagan.[35] More often than not, these people had served as volunteer harassment counsellors. Thus, both direct selection and self-selection biases tended to choose Panelists who were more likely than average to be prejudiced against the accused.

Specific biases in Donnelly case

All three Panelists were selected by Patricia O'Hagan, who was biased in favour of Marsden. O'Hagan would have been well aware of the Pan-

32 See SFU FOI, Sept. 3, 1998, docs. 5, 7-10, 14, 23, which covers four of the cases. In case 2 and case 9 (the Donnelly case) the original reports were omitted from the FOI package.

33 In the other five cases not involving sexual harassment allegations, a contrast is seen. Once there was even a male majority Panel (in a case of male versus male). Further, these cases show an even break-down with two acquittals, two convictions, and one mixed finding. Further, the recommended penalties were modest. In none of these five cases was anyone fired or suspended.

34 Michelle Medlicott, who succeeded O'Hagan in January 1997 as Harassment Policy Coordinator, refused to perform these incompatible roles, which is to her credit.

35 Some of those selected were good choices, but in general the selection approach tended to result in Panels with pro-accuser biases in sexual harassment cases.

elists' attitudes, and the past form of Sandra Eix,[36] which did not bode well for males accused of sexual harassment. In addition, both Lou Hafer and Eix had been volunteer harassment policy advisors, so the process resembled selecting juries from among the police auxiliary.

Attitude of Thea Hinds

The third Panelist was Thea Hinds, whose ideological proclivities are well known.[37] Her attitude is best indicated by her description of the determination of guilt. First, we have Thea Hinds instructing us on how legal systems work:

> The aggrieved parties have the same footing whether they are involved in a civil, criminal, or a harassment case. In each scenario, the onus is on the respondent to defend herself/himself. (Hinds, Sept. 29, 1997)

Some people pointed out that Hinds really did not have things quite right, at least in this part of the world. But let us continue. One person answered the above statement by addressing how courts often proceed when a defendant refuses to partici-pate:

> False. Normally when a person chooses not to defend himself/herself, the court appoints a "friend of the court" to do so. The constitutional case involving Canada and Quebec's right to secede is a perfect example of this. Quebec refused to participate. The court appointed a lawyer to act in Quebec's interest. As far as I know, the Harassment Panel did no such thing, and they should be ashamed they did not. (Shuck, e-mail, Sept. 29, 1997)

To any person remotely having the requisite abilities to judge others, the above statement should be lucid enough. The writer is saying the Panel should have appointed someone to act as an advocate for Donnelly. The Panel clearly did not do this, nor does the PR indicate that the idea was even considered. Hence, the only question is whether the Panel should have done this. Yet after quoting the above statement from Shuck, Hinds replied as follows:

> FALSE. There were repeated written attempts to obtain "participation" from several individuals. The assumptions that some faculty make about what and what did not occur and what was and was not said, are really quite astounding! An apology would be nice, but I won't expect one. Thea (Sept. 30, 1997)

The above statement reveals nothing about the issue at hand, but it indeed reveals all we need to

36 Four months before, Eix had served on the Panel of another trial that resembled a commando raid more than a judicial procedure (SFU FOI, Sept. 3, 1998, docs. 14, 15). Three separate complaints against the same individual were filed within 6 days of each other, even though one was at least two months past the standard six month deadline stated in the Policy and another was filed four years past this deadline. Waivers of submission time delays were immediately granted by the selfsame Stubbs who later denied the 7-month waiver requested by Donnelly. All three trials were held on the same day, which was 9 days from the filing of the third complaint. The three trials were run back-to-back in a marathon session in which the accusers were allowed to listen to each other's testimony before testifying themselves. Not unexpectedly, the Panel discovered a "pattern of behaviour," which pattern they claimed justified an extreme penalty. Despite the seriousness of the case, this Panel failed to record its proceedings. Although Eix deserves only a small portion of the blame for this travesty, which was mainly the fault of O'Hagan and other administrators, the point is that she went along with it and agreed to an extreme verdict against a person who had been denied fair treatment and was eventually found by SFU to have committed offenses far less than what this panel had determined.

37 O'Hagan and Hinds served together on a controversial committee that investigated supposed problems with graduate student supervision. Only one of the 8 members seemed to have much experience with graduate student supervision. The only male on this committee happened to be the chair of the Panel described in the previous note.

know about the abilities and attitude of Thea Hinds and the selection criteria for Panel members. Her statement also indicates the sort of abuse that Donnelly might have encountered had he made the mistake of dignifying the Panel hearings with his presence.

Social Views of Panel

In attempting to address the question of jurisdiction, the Panel treats us to their perception of the University, and the employees' responsibility to SFU:

> By daily example, the University attempts to convey to all who work and study here that being a member of the University community is to be taken in the sense of membership in a civic and professional community, in opposition to any notion of a strict employer/employee/client relationship. One has only to participate in the daily process of University life to see that consultation is widespread, with an effort made to include all members of the community. With this notion of civic membership and rights there is also a notion of responsibility, in the sense that the members of the community are expected to act in a way that reflects well on the University. (PR, p. 6)

The whole tenor of the above remarks reflects an attitude that most faculty, staff, and students would never endorse as a disciplinary precept. Few professors would ever write such drivel. More important, no faculty association or union would ever agree to such an open invitation to 24-hour monitoring as this. The Panel fails to cite the policy endorsing such a mandate, possibly because there is no such policy. According to the Panel, these are self-evident truths. The statement tells us far more about the vapid ideologies of three specially-selected panelists than about protocols governing university relationships.

Attitude of Lou Hafer

Some of Hafer's comments that illuminate his thought processes are given in the following interview report by Marina Jimenez:

> The panel has also been criticized for its lack of knowledge about administrative law. Hafer, however, said panel members were advised by Anita Braha, SFU's lawyer, and by Dr. Patricia O'Hagan, the harassment coordinator at the time. "There's a notion that we were people ignorant of the rules, proceeding blindly," Hafer said. "In fact, we had good, sound advice on policy and the principles of natural justice." He said his training as a scientist helped him form and test theories, weigh the evidence and assess the credibility of witnesses. (July 3, 1997)

Just how Hafer could evaluate the soundness of the advice received, not being an expert in the areas himself, is (like so many of his leaps and bounds) unexplained. The comment about his training as a scientist helping him is utter rubbish in light of what was actually done. The PR is so patently unscientific that the statement by Hafer appears to be shameless puffery.

These statements were made before O'Hagan's partisanship was announced. Once this was revealed, being advised by her was no longer a boon, and we failed to hear any more as to how the Panel benefited from her wisdom. O'Hagan herself later claimed that she never advised the Panel at all (Oct. 18, 1997). One wonders which of the two truths our true believers now believe.

Attitude of John Stubbs

Prior Indications

Despite Stubbs having a generally good reputation in the academic community, there were a number of public indications prior to the Donnelly case that suggest that Stubbs held extreme

views on the issue of harassment. This was indicated by the following actions:

1. Proposing (at his previous university) policies based on the so-called "zero-tolerance" doctrine with its enthronement of fanaticism, which proposals were met with strong (and successful) faculty opposition (Lee, Jimenez, and Goldhar, July 16, 1997).

2. Proposing in 1994 to make the SFU Harassment Policy even more onerous by making up new offenses, inserting more ideology, and eliminating remedies for respondents, while retaining the lack of penalties for false complaints (Stubbs, Mar. 8, 1994).[38]

3. Dismissing an employee with cause for alleged spouse abuse, based on evidence that not only failed to meet judicial scrutiny, but inspired judicial mirth (Williamson, May 1, 1996).

4. Arbitrarily disciplining a professor for an "offense" that was a lawful exercise of free speech violating no SFU rule (Cole, Feb. 6, 1997).

Such actions suggest that Stubbs was a zealot in this area. We will next see that attitudes reflected in his opinions indicate this tendency.

An Early Revealing Comment

In a relatively simple early case, a Panel found that the complaint was unmerited, and gave no indication that the respondent had done anything wrong at all. Yet Stubbs wrote the following in his review letter:

> I appreciate the time and energy you [the complainant] spent having your complaint heard through the Harassment Policy. I take harassment as a very serious issue that requires the University to take pro-active steps to stop and prevent harassment from occurring on campus. Thank you for bringing your complaint forward to the Harassment Office and I would like to express my regret that your experience of Simon Fraser has been negatively affected. (SFU FOI, Sept. 3, 1998, doc. 2, pp. 1-2)

I will mercifully ignore the literary qualities of the above and ask what went on here. Although this Panel found no evidence of harassment, Stubbs still felt obliged to apologize to the complainant. Such abasement for acquitting the accused was inappropriate and in stark contrast to the hostility that Stubbs usually showed towards accused persons.

Posturing in Opinions

Despite his role as judge with an obligation to be fair, Stubbs made the following statement within the realm of the 11 cases:

> I wish to make it very clear that I do not condone harassment of any kind and that I take the University's responsibility to endeavour to provide a harassment-free environment as a matter of the highest priority. I expect all members of the University community to comply with their obligations under the University's Harassment Policy. (SFU FOI, Sept. 3, 1998, doc. 11, p. 4)

38 Stubbs claimed the proposal was the work of various people in the supposed anti-harassment community, none of whom are identified by name. Some of the offenses under this proposed policy were: (a) leering; (b) making disparaging remarks because an employee holds a part-time position; (c) computer pornography; (d) spreading unfounded rumours; (e) offensive posters. Another offense was "being excluded from meetings ..." Apparently, the authors meant to say that excluding persons from meetings was a form of harassment. This suggests that the authors (whoever they were) not only lacked language competency, but were out of touch with the realities of university life.

Stubbs was so proud of this prose that he used it verbatim two other times (always when handing out a big penalty), with the last being the Donnelly case (SFU FOI, Sept. 3, 1998, docs. 15, 21). The problem is not merely the vapidity, but the utter lack of judiciousness. Stubbs was acting in a role that should emphasize fairness over zeal. If one goal should have transcended others, it should have been the goal of protecting the rights of the accused. We never find Stubbs proclaiming that he "does not condone unfairness to the accused of any kind." The contrast indicates the reversal of priorities wherein political correctness becomes a brief for tyranny.

Attitude Towards Innocent Professor

Another case demonstrates how biased Stubbs was against professors accused by students (SFU FOI, Sept. 3, 1998, docs. 18, 19). In this instance, a professor accused of prejudice was cleared by the Panel assigned to her case. In real courts, the matter would have been over, since only convictions can be appealed. Also, as has been noted previously, students charged with disciplinary offenses enjoy this protection, which is found in most civilized judicial systems.

Stubbs acted as follows. First, he delayed transmittal of the Report for 5 weeks without giving any reason. Then he proposed 3 more submittals, two from the complainant and one from the respondent, after which he would make up his mind. This was not a procedure mandated by the policy, but was a procedure invented by Braha and Stubbs.

The professor then protested about being subjected to further delays after being cleared by the Panel. She also criticized certain pro-accuser provisions of the policy. She indicated that she had already answered all charges, had cooperated fully, and had nothing to add to the Panel's findings. Despite her obvious chagrin, her critical comments were restrained with no hectoring.

Stubbs counted this as the professor's response. According to his own procedures specified in his letter, the student was to have one week to respond, whereupon Stubbs would render his decision. By responding quickly and not waiting for the student's first comments, the professor had expedited the procedure. Stubbs should have been able to wrap up the case within a couple of weeks of the time from which the professor submitted her response.

This was not to be. The student's reply came in 9 weeks after the professor's response, which Stubbs found acceptable. But this was not all. The student had criticized Patricia O'Hagan, so Stubbs decided he had to obtain a formal response from O'Hagan, which took 3 months from the time of the student's first comments. Stubbs then decided the student could respond to O'Hagan's response, which tacked on another 4 weeks. Then Stubbs took another 6 weeks to exonerate the professor.

This professor had been put through a long and awful experience through no fault of her own. The whole concept that acquittals can be overturned based on administrative blunders is so wrong that even to subject the professor to this possibility was immoral. Yet more was to come. Although he exonerated the respondent on the charges, Stubbs had the following to say:

> My task in arriving at this decision was made more difficult by the refusal of [the professor] to participate in the process I established to receive submissions from the parties. Although, I appreciate that parties may feel they are engaged in a process against their will, I am disappointed by the tenor and content of [the professor]'s response to this process. I expect more respect for these processes from members of the University community. (SFU FOI, Sept. 3, 1998, doc. 19, p. 7)

On top of everything else, his factual premises are entirely wrong. One can easily trace through the

record that the entire seven-month delay from the Panel's findings of innocence to the official decision by Stubbs was produced by delays caused by the complainant, by O'Hagan, and by Stubbs himself.[39] His statement was an unmerited gratuitous insult, designed to punish a defenceless professor for criticizing his implementation of the anti-harassment program.

Moreover, Stubbs then refused to award the professor her legal fees.[40] Not only this, but aside from the formal exoneration, Stubbs had nothing good to say about a professor who deserved both sympathy and praise for resisting pressure from a student trying to strong-arm a grade change. This attitude is in marked contrast with his generosity to successful student complainants. Despite her integrity, the professor was perceived as being politically incorrect, which Stubbs saw as a legitimate reason to increase her suffering.

Pattern of Behaviour

We see that complainants were indulged even when their complaints were without merit. In contrast, respondents were treated as enemies. Gratuitous posturing replaced analysis and judiciousness. A professor who had been found innocent was castigated wrongfully and gratuitously for her supposed poor attitude. Such actions were not merely mistakes or normal judgment errors, but are indications that Stubbs's ability to judge fairly was severely blighted by ideology.

Biases of Braha

Anita Braha is known for her feminist advocacy (Clark, July 13, 1997). She came to BC from Ontario where her main claim to fame was making a huge case of attacking a professor who had allegedly ogled a female swimmer. In BC she was best known as a major promoter and strident advocate of the since-discredited McEwen Report (Nuttal-Smith, July 31, 1995; Steffenhagen, Nov. 5, 1998). She has also been involved in various organizations that promote changing the legal system to become more receptive to their version of feminism. She is a regular contributor to the *Bill Black Reports*, NDP planning documents in the so-called "Human Rights" area.

Although such activities are within her rights, her background is one that should give a male swim coach considerable pause if he is looking for objective treatment in a harassment complaint made by a female swimmer. There is no indication that Braha ever advocated for a male accused of sexual harassment in any kind of dispute. Although a person with her background could possibly adapt to a neutral role, the risks of bias would be greater than normal.

More important, there is considerable evidence that Braha's ideology actually did translate to unfairness in practice. The first line of evidence is her involvement in the actions described earlier in this study, where a lawyer, more than other people, should have known better. Four general indications of bias are:

1. Her outlandish rules of evidence that were greatly to Marsden's advantage (see "Presentation and Analysis of Panel Text" above).

2. Her admission of outrageously prejudicial material, which would never be condoned were the gender roles reversed (see the "Prejudicial Material" section, in particular, "Class Guilt" and "Anything Goes" subheadings).

39 One must note that some of the delay in O'Hagan's answering may have been a delay in Stubbs deciding she needed to answer. Nevertheless, all the delays were attributable to Stubbs, the complainant, and O'Hagan, and none were attributable to actions of the professor.

40 Blaney later reversed this act of pettiness.

3. Her sanctioning of such irregular and unfair procedures as allowing Marsden to introduce new charges throughout the hearings.

4. Her advice and participation in covering up the problems with the behaviours of O'Hagan and Marsden as described earlier.

Braha's press conference advocacy

A second major line of evidence of Braha's bias is her comments to the press shortly after the case became public. As advisor to the Panel and advisor to Stubbs in his judicial role, she had an ethical duty to treat Donnelly fairly. Yet a lack of fairness on each major issue can be shown, based on the *Vancouver Sun* article on SFU's June 5, 1997 press conference (Jimenez, June 6, 1997) and her own article (Braha, June 6, 1997).

Determination of Donnelly's Guilt

Braha knowingly overstated the extent, care, and reliability of the case against Donnelly. Some specific indications of her extreme partisanship were:

1. Generalized glossing on Marsden's truthfulness and good faith, despite the known problems in this area.

2. Hiding a possible monetary motive by participating in an effort to deceive the public on the $12,000 payment to Marsden (Bula, June 7, 1997; Jimenez, June 11, 1997).

3. Exaggerating the importance of testimony under oath without mentioning such obvious limitations as no penalties for false claims and the lack of transcripts.

4. Claiming the use of "rules of evidence," which was sheer puffery in light of the actual evidence used and her lack of any reference to an appropriate standard.

5. Claiming Marsden's evidence had been tested by oral testimony and examination under oath while ignoring that this was untrue for some of the charges for which Donnelly was convicted.

Rejection of Donnelly's Arguments

Braha promoted dubious reasons for excluding and ignoring Donnelly's evidence. Some examples were:

1. Attacking Donnelly for presenting evidence to the public when, in fact, Donnelly had gone public only after both SFU and Marsden had publicly assailed him four days earlier.[41]

2. Claiming that Donnelly's evidence was untested, while ignoring that significant portions of this evidence had been admitted to by Marsden and thus required no such testing.

3. Overemphasizing Donnelly's non-participation as if it were the transcendent issue.

4. Failing to reveal the problems with the formation of the Panel, which were grounds for a new set of hearings during which Donnelly's evidence could be validly presented.

41 This myth has been pushed by others supporting the persecution of Donnelly, such as Margaret Cohen, Douglas Ross, Judy Rebick, and Joey Hansen (Cohen and Ross, June 23, 1997; Rebick, Sept. 97; Clarke, Oct. 27, 1997). Rebick and Hansen were particularly inventive. The truth is that Donnelly struck back only after both SFU and Marsden publicly ravaged his reputation. SFU and Marsden denounced Donnelly at length on May 26, 1997. Donnelly did not strike back in any significant way until 4 days later (Jimenez, May 27-29, 31, 1997; Clark, May 29, 1997). Donnelly hit more effectively, abetted by having truth on his side, something for which he need not be apologetic.

5. Giving the false impression that Donnelly had been notified of all the charges against him, which was clearly not the case.

Braha's Description of Procedures

Here Braha and SFU tried to give the public the impression that procedures and safeguards were better and more consultative than they really were. Some examples are the following.

1. Stating, "As you can see, the university follows an extremely judicial approach to the hearing of these complaints" (Braha, June 6, 1997), yet providing no evidence that crucial elements were judicial at all. This quotation tells us more about the audacity of Braha than about the process.

2. Touting the post Panel Report submission procedures while failing to mention that major anomalies had occurred in this particular case (see "Advance Distribution to Marsden," and "Private Correspondence" above).

3. Implying that Panel selection procedures were unbiased, even though members had been chosen by a person whom Marsden had styled the same year as her "best friend."

4. Arranging for Gregg MacDonald, a male executive, to be the SFU spokesperson, when in fact he had no real knowledge as to what had occurred.

Hearsay Testimony

In marked contrast to the practices of real courts and labour arbitrations, Braha allowed extreme and abundant uses of hearsay evidence. Nevertheless, Braha asserted that Donnelly's evidence was inherently inferior because: (a) his sources were not under oath before the Panel; (b) his sources were not examined by the Panel; and (c) his sources did not have their demeanours observed.[42] Yet in hearsay testimony: (a) the *sources* are not under oath; (b) the *sources* are not examined, and (c) the *sources* do not have their demeanours observed. If Braha believed that these features were essential, she should have banned hearsay evidence. Her failure to do this indicates that these three reasons for excluding Donnelly's evidence were not genuine.[43]

Importance of Cross-Examination of Witnesses

Braha misled the public on the issue of cross-examination of witnesses. According to the *Vancouver Sun*

> But SFU lawyer Anita Braha said Donnelly's submissions were not presented during the campus hearing, and therefore can't be considered official evidence. Donnelly was not sworn in and cross-examined, the way Marsden and her witnesses were. (Jimenez, June 6, 1997)

If Braha actually said this, she was simply lying, since Marsden and her witnesses were never

42 Both here and in her training class (Braha, March 1997), Braha touted the importance of observation of demeanour, a dubious emphasis, since lay people over-rate their abilities to deduce truthfulness from demeanour. A practised liar is often better at sensing and showing wanted demeanours than an outraged innocent person who resents the whole process. Further, tests by demeanour often amplify prejudice. To the politically correct, a female accusing a supposedly more powerful male of harassment will appear to have a truthful demeanour, whereas the accused will have the demeanour of a liar. Such persons will mistakenly think that these reflections of their own prejudices are convincing evidence.

43 One cannot meet the above argument by contending that Stubbs could reject Donnelly's evidence on procedural grounds alone. The point is that Braha was gilding the argument through advocacy of standards for Donnelly's evidence that had not been applied to Marsden's evidence.

cross-examined. Even if the above paraphrase is not quite right, Braha did say:

> Mr. Donnelly has not been subjected to cross-examination; the investigating committee has not been able to question Mr. Donnelly and assess his demeanour and his credibility in the way it did with the complainant. (June 6, 1997)

Although not an outright lie, the above statement seems crafted to leave the false impression that Marsden was cross-examined. Braha often referred to Donnelly's evidence not having been "cross-examined," while frequently referring to Marsden's evidence having met the test of "examination" (Braha, June 6, 1997; *SFU News*, June 19, 1997), even though, as explained earlier, in some instances the Panel merely read and ratified the charges.

Summation of Braha's Actions

Braha's abundant and palpable lack of neutrality suggests that she had supported Marsden throughout the case. The most plausible explanation for this bias is that it conformed to her ideology that Donnelly should be guilty. Thus she set out to help "prove" that he was guilty. Given her control and the biased selection of lay panelists, this was easy to do, at least to their satisfaction and that of Stubbs.

One of the ironies was the contrast between Braha and Somjen, who acted as advocate for SFU in the arbitration and mediation. As an advocate, Somjen had less ethical obligation to act fairly to Donnelly, yet he nevertheless exhibited far greater fairness than Braha, who was supposed to be unbiased. Despite her obligation to be neutral, Braha not only acted in essence as a brief for Marsden, but she often exceeded even the bounds of fairness for an advocate.

Cumulative effect

Unrestrained zealotry was the etiologic force in the Liam Donnelly case. This explains why an ideologue like Braha was given such unchecked power, and why a Thea Hinds could be deemed fit to judge others. Those involved believed that their devotion to the cause guaranteed results to such a degree that normal checking and consulting should be eliminated. Political correctness superseded the values that would normally have prevented the debacle from occurring.

The six people involved—Braha, Eix, Hafer, Hinds, O'Hagan, and Stubbs—believed Donnelly to be guilty because it fit their ideology that he should be guilty. Consequently, no one looked at the actual evidence with careful and unprejudiced consideration. They failed to notice the absence of evidence in key areas, because they all wore the same blinders. Being true believers in a common ideology, they failed to produce the healthy clash of ideas that would have revealed the multitude of problems with the case.

The organization had much in common with the "star chamber": the recruitment of friends, the exploitation of secrecy, the concentration of power, and the perception that loyalty to the program was the greatest good. The success of the program was to be measured by its effectiveness in nailing supposed harassers. This was in marked contrast to the open process with checks and balances needed to ensure that false convictions were not pushed through the system.

John Stubbs failed to note the dangers of Braha's biases because he shared them. He endorsed the Panel Report out of his blind faith in the products of this holy program. Because of his ideological blight, he failed to see what Marsden saw clearly: that the program was ideologically driven and that those involved were pushovers for anything that stroked their ideology.

But it got worse. When Stubbs learned that O'Hagan had acted improperly and Marsden irrationally, his principal concern was to cover up the problems. When he learned that the Panels had been illegally appointed, his reaction was to protect the cause by concealing the anomalies. This case refutes claims that anti-harassment programs are benign. Far from being a myth, political correctness is alive and is extremely dangerous to those innocent people whom the zealots perceive as enemies.

Implications

Some specific lessons

One major practical benefit of this analysis is to provide a guide for what *not* to do. Those dealing with harassment programs or cases could draw cautionary instruction from this case. To summarize points that may be gleaned, I have provided a list of suggestions for policies, all of which are related to the issues and problems of the Donnelly case. These points are given in the Conclusions section.

Allocation of blame

There can be no legitimate defense for violating the basic rights of the accused in the manner shown to have occurred. There can be no legitimate secret defenses involving additional evidence against Donnelly, since SFU had the clear duty to display the evidence used to convict him. On the other hand, actions that I have attributed to incompetence and prejudice could have been deliberately malevolent, and thus ethically worse than portrayed here.

Still, subject to this limitation, I would like to note the following.

1. Other than O'Hagan, harassment office employees appeared to have been competent and to have behaved reasonably under the circumstances.[44] The problems came from the top, not from the bottom.

2. Three mitigating factors limit the culpability of the Panelists, who are not nearly as responsible for the travesty as Braha and Stubbs. First, their obvious lack of ability speaks to a bad selection and training system more than to their turpitude. Second, they were victims of bad legal advice from Braha, which they lacked the expertise to question. Third, the extent to which the PR reveals anomalies argues for sincerity, even as it argues against other virtues. Yet even if their sincerity is granted, the Panelists are at fault because they indulged their prejudices to the extreme detriment of an accused person, which is an ethical offense in and of itself.

3. Attempts to allocate blame between Stubbs and Braha are pointless. Never has the phrase, "joint and several" been more appropriate.

44 Information in a *Vancouver Sun* article indicates that one employee showed moral courage in reporting O'Hagan's misconduct (Jimenez, Oct. 22, 1997). My exculpation does not apply to O'Hagan herself, although her guilt appears to be less than that of Braha and Stubbs. The current director of the harassment office, Brenda Taylor (who was hired in 1998), was not responsible for any of the problems described in this report.

4. The problems cannot be attributed to John Stubbs' mental illness since many of his behaviour patterns were established long before the Spring of 1997, the claimed time of the onset of his clinical depression. Further, there have been no claims that Braha, the Panelists, O'Hagan, and those who gave Stubbs too much of a free hand also suffered from clinical depression.

5. Governmental influences have not been analyzed here, but even if causative, they would not provide an ethical defense for the wrongs that occurred, nor excuse those who assented to the wrongdoing without any apparent protest.

J'Accuse

The actions taken against Donnelly were unconscionable. No one should ever be subjected to the sort of evidence used against him, let alone convicted by it. Acceptance of such evidence as proof in a case of a professional death sentence would have been utterly reprehensible, even if no other problems were present. Further, his dismissal was undertaken with knowledge of numerous known major violations of fair procedure as well as abundant indications his accuser was lying. The ethical failure is immense.

There has been little ethical accountability. Although Stubbs lost his presidency, he was given a sweetheart deal, better than the average even for an executive who was removed without cause. None of the main perpetrators: Braha, Eix, Hafer, Hinds, O'Hagan, or Stubbs, have offered the slightest apology for their actions. Nor have any of the Board members repented for their lax supervision of Stubbs and their rubber stamping his attempt to remove Donnelly.

Nor has SFU accepted moral accountability as an institution. There has been no formal investigation of what went wrong, and the Administration still maintains that the Panel was blameless. SFU continues to fail in its ethical obligations to Donnelly by protecting his persecutors, while awarding him nothing for suffering that was maliciously inflicted.

Nor has SFU apologized to Donnelly or to the other victims of the hysteria. The lack of contrition indicates that although SFU has moved somewhat away from the fanaticism of the Stubbs regime, it has not moved far enough. Those responsible are unrepentant. The dangers for innocent victims of false accusation persist.

Conclusions

One possible benefit from this study is to learn not to make the sort of mistakes that were made in the Donnelly case. Accordingly, I am setting forth some basic principles that could prevent future disasters. This is not a full prescription, but a list of necessary safeguards suggested by the Donnelly case. This list could be useful in evaluating existing policies at many universities.

Basic principles

1. A basic premise of all discipline policies should be that protection of the rights of accused persons is a core value, not to be subordinated to other values.

2. The scope of policies should be well-defined and properly limited, with personal matters and criminal offenses left to the police and the courts.

3. Individual justice should be paramount and must not be corrupted to "send messages" or advance social agendas.

4. The policy should recognize that false accusations are both possible and dangerous and need to be discouraged with appropriate deterrents for false charges.

5. Administrator responsibilities for due process should be defined with appropriate penalties for malfeasance, including severe penalties for wilful malfeasance.

6. Implementation of severe punishments (e.g., suspension or dismissal) should require high standards of proof, such as clear and convincing evidence.

7. Standards and procedures should protect defendants from prosecutorial misconduct. This probably implies strict limitations on private prosecutions.

Selection and training of Panel

1. Panels should be selected according to procedures that do not select for particular ideologies, either through deliberate choice or through self-selection.

2. Selection for competency should be encouraged, provided that competency is defined in an ideologically neutral way.

3. Prospective panelists should successfully complete a training course on the principles of evidence.

4. The training should be ideologically neutral with properly mixed examples and viewpoints.

Preliminary arrangements

1. Charges must be set in advance, with no significant changes or new charges allowed.

2. Rulings on such matters as jurisdiction, adequacy of allegation, and timeliness should be made in advance and in writing by an independent legal authority.

3. The Panel deciding the case must be given a clear mandate as to what must be proved in order to find the defendant guilty.

4. The basic scope of the inquiry must be mandated according to policy, not left to the tribunal.

5. The tribunal must be clearly instructed that the burden of proof is on the accusers, and

that the benefit of the doubt goes to the accused.

Trial or hearing procedures

1. Sound rules of evidence should be followed. Standards should be close to those used in courts, or at least at the same level used in serious cases of labour grievance arbitration.

2. Prejudicial material should be strictly excluded.

3. Opinions of witnesses as primary evidence should be excluded (except for properly qualified experts).

4. There should be penalties for false testimony, which are made known to all witnesses. Further, it should be a duty of the University to proceed against false witnesses.

5. Hearings should be recorded and transcribed with transcripts freely available to defendants appealing adverse findings.

6. Accusing witnesses should be strictly barred from having access to or listening to each other's testimony.

7. In any trial in absentia a "friend of the tribunal" should be appointed to act for the defendant.

8. Evidence on alleged suffering of complaining witnesses should be excluded from the trial of the accused. (If necessary for damage awards, a later hearing should be held.)

Decision and writing of report

1. The Panel must not communicate with either party or administration officials or lawyers except through written communications supplied to both parties.

2. The actual scope of the investigation must be clearly stated, with all documents used properly listed, and any important limitations properly noted.

3. The Report must discuss all significant issues and give adequate reasons for the opinions given. This includes adequate treatment of any challenges to the views taken.

4. The Report must be linked to the evidence with appropriate citations.

Review standards

1. Findings of innocence by the Panel should be final; further complaints by accusers should be directed to the University.

2. The review must be independent in appearance and fact, which among other things implies lack of previous involvement in the case.

3. If the reviewer is assisted by a lawyer, the lawyer must be identified and must meet all independence standards required of the reviewer.

4. Review standards must be clearly stated and followed. Limitations must be known and impose acceptable risk.

5. The Review must include some checking of accuracy of the Report's representations of evidence.

6. In replying to the Panel Report, the rights of the accused should be at least equal to the accusers, and perhaps greater since if item 1

in this list is followed, the accused is the appellant.

7. Significant problems discovered in the review should be adequately investigated, even if it means that more elaborate procedures are needed.

8. In any key witness case, the testimony and representations of the key witness should be carefully reviewed for consistency and plausibility.

Review report standards

1. At a minimum, the Review should express and support opinions on the scope of the review, the competency of the procedures, the fairness of the procedures, and the adequacy of the conclusions.

2. Any substantive questions raised by an appellant must be candidly, fairly, and adequately answered.

3. Even when accepting the Report on balance, the Reviewer should candidly discuss any significant known problems with the Report.

4. Rejection of findings of guilt should be regarded as a legitimate event, provided adequate reasons are given. Such rejection should never be equated with being soft on harassment.

References

Bailey, Ian, Dec. 13, 1997. "SFU president resigns over harassment scandal." *Edmonton Journal*, A9.

Braha, Anita, March 97. Harassment seminar. (Videotaped lecture). Instructional Media Centre, SFU.

_____, June 6, 1997. "'Natural justice' obligations met, SFU says of firing." *Vancouver Sun*, A19.

Bula, Frances, June 7, 1997. "SFU okayed $12,000 for harassment complaint" *Vancouver Sun*, A1.

Canadian Association of University Teachers, Sept. 97. "Simon Fraser Swim Coach Reinstated." *Bulletin* (44:2, 1).

Clark, Gordon, May 29, 1997. "Fired SFU swim coach to sue for wrongful dismissal, *The Province*, A2.

_____, July 13, 1997. "SFU's harassment lawyer under fire." *The Province*, A16.

Clarke, Allison, Oct. 27, 1997. "Harassment complaints down at Simon Fraser." *The Peak*, p. 4.

Cohen, Margaret Griffin, July 31, 1997. "If John Stubbs goes, women and minorities will lose." *Vancouver Sun*, A11.

_____, and Douglas Ross, July 23, 1997. E-mail to SFU forums (from Cohen. Subj.: Op Ed).

Cole, Douglas, Feb. 6, 1997. "The bookstore imbroglio." Letter: *SFU News* (8:3).

Fekete, John, 1994. *Moral Panic: Biopolitics Rising*. Montreal and Toronto: Robert Davies Publishing.

Finley, David, June 4, 1997. "Deficiencies in harassment policy." manuscript.

Forsyth, Ian, Oct. 21, 1998. "Request to authenticate a record." Letter to David Finley. SFU.

Fournier, Suzanne, June 11, 1997. "Not my job to read evidence: SFU boss." *The Province*, A6.

Gagan, David, July 31, 1997. E-mail to various SFU forums (Sent by Pauline Swain. Subj.: Donnelly mediation).

Hafer, Lou, Sandra Eix, and Thea Hinds, Oct. 11, 1996. "Report of the Investigative Panel on the complaint of Ms. Rachel Marsden against Mr. Liam Donnelly." SFU.

Harassment Policy (HP). See SFU Harassment Policy.

Hinds, Thea., Sept. 29, 1997. E-mail replying to comments made by Leslie Ballentine. Circulated to SFU Faculty Association and APSA forums (Subj.: Re: fact finding mission).

_____, Sept. 30, 1997. E-mail replying to comments made by Shuck. Circulated to SFU Faculty Association and APSA forums (Subj.: Re: the truth!).

Horwood, Holly, Oct. 21, 1997. "Marsden back in limelight." *The Province*, A13.

Jimenez, Marina, May 27, 1997. "SFU swim coach fired in sex-harassment case." *Vancouver Sun*, A1.

_____, May 28, 1997. "Fired coach vows to fight accuser, SFU." *Vancouver Sun*, A1.

_____, May 29, 1997. "Swim team stands by its fired coach." *Vancouver Sun*, B1.

_____, May 31, 1997. "Coach presents lurid evidence to get SFU job back." *Vancouver Sun*, A1.

_____, June 6, 1997. "SFU defends firing swim coach," *Vancouver Sun*, B1.

_____, July 3, 1997. "SFU panel's chief defends firing coach." *Vancouver Sun*, B1.

_____, July 18, 1997. "SFU report relies on speculation, lawyers say" *Vancouver Sun*, A1.

_____, Oct. 21, 1997. "'Best friends' relationship in harassment case revealed." *Vancouver Sun*, A1.

_____, Oct. 22, 1997. "Former SFU official was victim of obsessive behaviour, she says." *Vancouver Sun*, A1.

_____, Dec. 13, 1997. "Province to review $315,000 settlement for SFU president." *Vancouver Sun*, A1.

_____, and Rick Ouston, July 17, 1997. "Leak finally reveals secret report condemning Donnelly." *Vancouver Sun*, A1.

Kelleher, Stephen, July 23, 1997. "Recommendations of the Mediator." SFU News Release.

Klatt, Heinz-Joachim, 1997a. "The surreal world of a Canadian university." *The Montana Professor*, 7(1), 13-20.

_____, 1997b. "Sexual harassment policies as all-purpose tools to settle conflicts." *Sexuality and Culture*, volume 1, 45-69.

Lee, Jeff, Marina Jimenez, and Kathleen Goldhar, July 16, 1997. "SFU chair refuses to stand by president's actions in sex case." *Vancouver Sun*, A1.

MacDonald, Gregg, June 5, 1997. "News conference statement." SFU News Release.

Mercer, Peter, Feb. 10, 1998. "In the matter of an appeal: reasons for decision." Adjudicators report in Westhues case. University of Waterloo.

Munro, J.M., Mar. 23, 1998. Letter from President's Office to David Finley. Subject: Investigative Committee Members. SFU.

Nuttall-Smith, Chris, July 31, 1997. "UBC Poli Sci Dept Report Confirms Harassment," *The Peak* (SFU student newspaper: original source: *The Ubyssey*, UBC student newspaper).

O'Hagan, Patricia, Oct. 18, 1997. "The Marsden/Donnelly case and me." *Vancouver Sun*, A23.

Olewiler, Nancy, Oct. 20, 1997. "Harassment Policy fact finding review." SFU Freedom of Information Document, 10 Dec. 97.

Panel Report (PR). See Hafer, Eix, and Hinds, Oct. 11, 1996.

Rebick, Judy, Sept. 97. "Sexual politics 101." *Canadian Forum*.

Rinehart, Dianne, June 20, 1998. "Harassment cases raise issue of men's rights." *Vancouver Sun*, A1.

SFU Freedom of Information document, June 30, 1997. A decision by SFU in response to requests for the Panel Report.

_____, Sept. 30, 1997. Documents relating to Patricia O'Hagan's position as Harassment Policy Coordinator.

_____, Sept. 3, 1998. Investigative Committee reports and President's decision letters for 11 harassment cases heard in 1993-1996.

_____, Sept. 22, 1998. Appendices to Osborne Report. Access Request 98-021.

SFU Harassment Policy, Jab. 22, 1991. GP 18, Rev. A. (superseded in 1998).

SFU News, June 19, 1997. "Independent arbitration board established to review controversial Donnelly dismissal." Unsigned article.

SFU News Release, Mar. 26, 1997. "SFU president appointed to second term."

_____, May 26, 1997. "Swimming coach dismissed for sexual harassment."

_____, July 14, 1997. "Donnelly mediation talks underway."

_____, July 23, 1997. "Text of Liam Donnelly/SFU Mediation Agreement."

_____, July 31, 1997. "SFU President granted medical leave."

_____, Oct. 24, 1997. "SFU takes action to fix past harassment errors."

_____, Dec. 12, 1997. "John Stubbs to resign as president of SFU."

_____, May 1, 1998. "SFU reports on harassment cases."

SFU Policy T10.03, Sept. 1, 1994. "University Board on Student Discipline."

SFU Policy T10.04, May 11, 1998. "Senate Committee on Disciplinary Appeals."

Shuck, Bruce J., Sept. 29, 1997. E-mail to SFU Faculty Association and APSA forums, addressing e-mail comments by Thea Hinds. (Subj.: Re: fact finding mission).

Steffenhagen, Janet, Nov. 5, 1998. "UBC head apologizes for sexism report fallout." *Vancouver Sun*, A1.

_____, Apr. 18, 1998. "SFU severance deal exceeds new guidelines." *Vancouver Sun*, A9.

Stewart, Mary Lynn, July 29-30, 1997. Academic Women statements: E-mails sent to SFU forum.

Stubbs, John, Mar. 8, 1994. "Harassment Policy GP-18: Proposed Revisions." SFU.

_____, July 28, 1997. "President asks board for medical leave." SFU News Release.

Swain, Diana, July 25, 1997. "Liam Donnelly wins appeal." CBC-TV Broadcast Transcript.

Williamson, Lloyd, May 1, 1996. "Yeomans vs. SFU: Reasons for Judgment." Supreme Court of British Columbia. Vancouver Registry No. C950828.

About the author

David Finley is a Professor of Accounting in the Faculty of Business Administration at SFU. His research interests have been in applications of mathematical statistics to auditing and more recently on strategic game-theoretic aspects of auditing and the interpretation of audit evidence. He has published in such journals as the *Accounting Review*, the *Journal of Accounting Research*, *Auditing: A Journal of Practice and Theory*, and *Contemporary Accounting Research*.

Recently, he became interested in academic freedom issues, which led to his criticisms of harassment policies and procedures and his continued interest in the Donnelly case. Finley now serves in the SFU Senate. Although unsure whether his election to this body was an honour or a punishment, he has been favourably impressed with the healthy diversity of opinion found there. Finley also writes limericks on both traditional and contemporary themes, and he has authored a one-act verse play based on a fourteenth century story that deals with a harassment complaint.