**FILE: 1989/90-05**

UNIVERSITY OF TORONTO

ACADEMIC TRIBUNAL

B E T W E E N:

| | | |
|---|---|---|
| THE UNIVERSITY OF TORONTO (Respondent) | ) | Counsel: John Laskin |
| -and- | ) | |
| Ms. S. (Applicant) | ) | David Porter |

REASONS FOR DECISION OF CHARLES ANTHONY KEITH, VICE CHAIR, ACADEMIC TRIBUNAL

This is a preliminary application made on behalf of Ms. S. with respect to the jurisdiction of this Tribunal to proceed to hear and deal with certain charges which have been laid against her under the University's Code of Behaviour on Academic Matters ("the Code"), and alternately with respect to the validity of one of those charges.

Ms. S. was registered as a student at Erindale College for the 1988-1989 academic year in the fourth year of a sociology and psychology program. At the end of that academic year, which would have been her graduating year, she left the University of Toronto and in the fall of 1989, registered at the Faculty of Education at Queen's University.

On December 8, 1989, Ms. S. was notified by letter from the Vice-President and Provost of the University of Toronto that the following charges had been laid against her under the Code:

1. "That in or about the spring of 1989, you did use or possess an unauthorized aid, being an essay ordered from Custom Essay Service, contrary to Section E.1. (a) (i) of the University of Toronto Code of Behaviour on Academic Matters. The Essay was ordered on or about March 17, 1989, and picked up and paid for on or about March 28, 1989, and was used or possessed in connection with an essay entitled "Incest Prohibition; A Study of the Universality of the Incest Taboo", submitted for credit in ANT 100Y in the spring of 1989."

2. "That in or about the spring of 1989, you did submit for credit in the course ANT 100Y an essay entitled "Incest Prohibition; A Study of the Universality of the Incest Taboo", which essay was purchased by you from Custom Essay Service. You therefore, represented as your work the work of Custom Essay Service, contrary to Section E.1. (a) (ii) of the University of Toronto Code of Behaviour on Academic Matters."

The hearing into these charges was scheduled to proceed on Monday, April 30, 1990. Counsel for Ms. S. , however, gave notice of his intention to challenge the jurisdiction of the Tribunal, and the validity of one of the charges; accordingly, the hearing was adjourned sine die and the present motion was argued before me on May 3rd, 1990.

The submissions made on behalf of Ms. S. may be shortly stated:

1. The jurisdiction of the Tribunal must ultimately be found in the enabling legislation. There is nothing in that legislation which confers jurisdiction to discipline **former students** of the University. The Tribunal has therefore no jurisdiction to deal with any charges against Ms. S. as she was not a student at the University at the time the charges were laid.

2. If the Tribunal does in fact have such jurisdiction, it should not deal with the first of the two charges alleging use or possession of an "unauthorized aid" in view of the vagueness and imprecision of that term.

It is therefore convenient to deal with the first of the two submissions at the outset. The Code was approved by the Governing Council of the University of Toronto on June 20, 1985, ostensibly pursuant to the powers conferred on it by the University of Toronto Act, 1971, S.O. 1971, Chapter 56 ("the 1971 Act"). The following are the sections of the Code which have particular application to the resolution of the matter before me:

**"Section C - Application of the Code**

This Code applies only to students, **former students,** graduates, and members of the teaching staff of the University. Offences under the Code relate to the honesty and fairness of the teaching and learning relationship. **Thus the essence of an offence by a student is the seeking of credit or other advantage by fraud or misrepresentation rather than on the basis of merit.** The essence of an offence by a teacher is dishonesty or unfairness in dealing with the work or record of a student. . ."

**"Section D - Interpretation**

1. **Unless otherwise provided herein,** words defined in Section 1 of the University of Toronto Act, 1971, as amended from time to time, have the same meaning in this Code as in that Act.

2. In this Code, unless the context otherwise requires:

   (d) "Academic work" includes any academic paper, term test, proficiency test, essay, thesis, research report, project, assignment or examination whether oral, in writing, in other media or otherwise;

   (n) "Member" or "Member of the University" means a student or a member of the teaching staff or teaching assistant in the University and includes a group.

   (r) "Student" means a member of the University currently or previously engaged in any academic work which leads to the recording and/or issue of a mark, grade or statement of performance by the appropriate authority in the University;"

**"Section E - Offences**

1. In order to protect the integrity of the teaching, learning and evaluation processes of the University, it shall be an offence for any member, either at the University, at another educational institution or elsewhere,

(a) (i) to use or possess an unauthorized aid or aids or obtain unauthorized assistance in, or to personate another person at any academic examination or term test or in connection with any other form of academic work;

(ii) to represent as that of the member in any academic work submitted for credit in or admission to a course or program of study or to fulfil a requirement for any degree, diploma or certificate any idea or expression of an idea or work of another;"

(The emphasis is mine)

In order to attempt to determine whether or not the requisite statutory authority exists which would permit the Governing Council to enact the above quoted provisions, it is necessary to begin with a consideration of the University of Toronto Act, 1947 ("the 1947 Act"), which by Section 79 (3) vested a general disciplinary jurisdiction respecting all students of the University in a body called the Caput, which itself was in turn given specific authority to delegate in any particular case or by general regulation to the council or other governing body of the university, college, faculty or school to which the student in

question belonged. The 1947 Act did not specifically define the term "student"; however, by Section 41 a general power was conferred upon the Governors of the University with respect to matters not expressly dealt with in the Act.

The 1947 Act was repealed in 1971, and replaced by the 1971 Act. The term "student" was specifically defined in Section 1 (1) (l) as

> "any person registered at the University for full-time or part-time study in a program that leads to a degree, diploma or certificate of the University or in a program designated by the Governing Council as a program of study at the University".

Section 2 of the 1971 Act continues the Governors of the University of Toronto as a corporation to be known as the "Governing Council of the University of Toronto." The Governing Council is by Section 2 (14) vested generally with the government, management and control of the University and without limiting the generality of the foregoing, with the specific power to, among others,

> (f) "determine and regulate the standards for the admission of students to the University, the contents and curricula of all courses of study and the requirements for graduation;
>
> (j) "provide for the granting of degrees including honourary degrees, diplomas and certificates . . .;

(o) "do all such acts and things as are necessary or expedient for the conduct of its affairs and the affairs of the University."

By Section 9 (1) of the 1971 Act, the council and the Caput established under the 1947 Act and their respective powers are continued, unless and until otherwise provided by the Governing Council.

For the sake of completeness, reference must also be made to the University of Toronto Act, 1978, (S.O. 1978, Chapter 88) which by Section 2.1 (2) (l) re-defines the term "student" as

> "any person registered at the University for full-time or part-time study in a program that leads to a degree or post-secondary diploma or certificate of the University or in a program designated by the Governing Council as a program of post-secondary study at the University."

It is this definition which therefore must be considered for the purposes of the present discussion.

I think that it may fairly be concluded as a result of a consideration of the provisions above cited, that the legislature has vested in the Governing Council of the University of Toronto a complete and unfettered power with respect to the government, management and control of the University and of its

affairs, which would necessarily include an unrestricted disciplinary jurisdiction consistent with the aims and objectives of the University. The question to be determined therefore is whether or not the statutory definition of "student" must be narrowly interpreted so as to exclude any person who was not at the date of the laying of a charge under the Code currently in attendance in a program at the University for that academic year.

Putting the problem another way, the jurisdiction of the Tribunal would not have been challenged, as I understand the submission, had the subject charges been laid prior to the termination of the 1988-1989 academic year, as it is clearly accepted that for that period of time, Ms. S. was "registered" as a student at the University. I was informed by counsel that the University has declined to confer an undergraduate degree while the present disciplinary proceedings are pending. I understand it to be common ground, however, that had the degree been conferred, she would have been unquestionably subject to the jurisdiction of this Tribunal as a university graduate. Has the Tribunal therefore lost jurisdiction because the charge was laid after the end of the academic year in which she was registered and in attendance in a program at the University but prior to the conferring of a degree? Or, to put it still another way, is a student no longer "registered" if not in current attendance?

A matter essentially similar to the one before me was examined by the Divisional Court in U. v. The Governing Council of the University of Toronto (April 3, 1981, unreported)[1] in which the issue was whether or not there was jurisdiction in the Governing Council under the 1971 Act as amended to discipline a graduate of the University for alleged misconduct which occurred while he was a student. The Divisional Court found that under the terms of the 1947 Act, no body was specifically directed to exercise disciplinary jurisdiction over graduates for misconduct occurring while they were students, but that by reason of Section 41 of that Act, such authority must necessarily have been vested in the Board of Governors, and subsequently, under Section 2 (14) of the 1971 Act, in the Governing Council. In concluding that the Governing Council had jurisdiction under Section 2 (14) (o) of the 1971 Act, the Divisional Court adopted the following passage from the reasons of the Judicial Board under review:

> "We would consider it self-evident that the granting of degrees is perhaps the basic and fundamental purpose of the University. It is clearly a matter of crucial importance to the University to maintain the integrity and reputation of the degrees that are issued, and it would be our view that such activities on the part of the Governing Council would clearly come within the classification of actions that are necessary or expedient for the conduct of the affairs of the University."

---

[1] See [1981] O.J. 524

I find this reasoning persuasive and applicable to the case before me. Surely one of the fundamental aims and objectives of any University is to ensure, as far as possible, the highest level of integrity in the teaching and learning process, and that the degrees conferred upon its students will therefore command the utmost of respect. It must therefore fall within the authority of the University to carefully examine any situation which might result in the granting of a degree tainted in some respect by misconduct. In my view it therefore makes no difference to the jurisdiction of the Tribunal that a person charged under the Code is not in fact currently in attendance at the University. A student continues to be "registered" within the meaning of the Statute, in my respectful view, until a degree has been granted or until the student's connection with the university is formally terminated by withdrawal or expulsion.

It was further urged upon me, however, that the decision of the Divisional Court in U. should not now be regarded as authoritative or persuasive in view of the decision of the Court of Appeal in Chalmers v. Board of Governors of the Toronto Stock Exchange (1989) 70 O.R. 2nd 532, where the Court found that the purported disciplinary action taken by the Governors of the Toronto Stock Exchange against a former employee of a member firm was ultra vires the powers of the Exchange.

At page 534, Mr. Justice Finlayson states in his reasons for judgment on behalf of the Court

> "The issue becomes, is the appellant still subject to discipline with respect to conduct during his employment by a member firm notwithstanding his resignation and withdrawal from the brokerage business before the institution of discipline proceedings?"

He goes on to state at page 538 that the Courts will intervene where it appears that a domestic tribunal or self regulatory body has purported to confer on itself, through a by-law, jurisdiction not provided for in the statute which created or incorporated it, and after reviewing a number of decided case, summarizes the law at page 541 by stating that while by-laws of domestic tribunals or self-regulatory organizations may be declared ultra vires, before the Courts will do so, the by-law must be in some way in conflict with the governing statute or with the purposes underlying that statute. In an extremely relevant passage, he continues,

> "what is significant is not what they regulate but whom they regulate. Their authority is restricted to those who have voluntarily submitted to that authority. It follows from this that the ultimate sanction of the tribunal against one of its members is expulsion. In reality, it is not just the ultimate sanction, it is the only sanction. The tribunal can fine or suspend a member if he or she has agreed to be subject to such penalties, but if he or she ignores their imposition the only unilateral recourse of the tribunal is expulsion".

Again at page 542, he continues in the same vein

> "The theme of the respondent's submissions was that unless it could retain jurisdiction over former employees of member firms, any such employee could frustrate disciplinary proceedings by the simple act of resigning. That may well be, but keeping in mind what has been said above, all that an employee achieves by voluntarily removing himself from the business he is engaged in is the maximum penalty that his misconduct could produce, save for the stigma of a finding of misconduct. This is not an insignificant benefit by any means".

This is precisely the opposite of what the applicant seeks here. She states through her counsel that she has successfully completed the post-graduate course at Queen's University leading to the degree of Bachelor of Education but cannot be awarded that degree until she has been awarded her under-graduate degree at the University of Toronto; that degree has in turn been withheld because of the pending discipline proceedings. As a "former student", she says that she is not subject to those disciplinary proceedings; therefore, they ought to be withdrawn so that her under-graduate degree can be awarded. This is not the position of someone voluntarily removing herself from the jurisdiction of the University. Quite the contrary, it reinforces the impression that she is still "registered" as a student and seeks the ultimate reward which that status brings, namely the conferring of a coveted, reputable degree.

In my respectful view there is nothing in the decision of the Court of Appeal in Chalmers which in any way operates to call into question the general authority of the Governing Council in matters of discipline found to exist by the Divisional Court in U. . I therefore hold that the Tribunal has jurisdiction to proceed with the hearing of the charges which have been laid against the applicant.

With respect to the second point advanced by the applicant, it is urged upon me that the first of the two offences is expressed in impermissibly vague terms. It refers to the use or possession of an "unauthorized aid", in the absence of any definition of that term anywhere in the enabling statute or the Code. In counsel's submission, the accused cannot by reading the section containing the basis for the alleged offence, namely Section E.1. (a) (i) of the Code, know whether or not any given course of conduct is or is not in fact prohibited. The Section is therefore void for vagueness and for the prosecution to proceed against the applicant under that Section would amount to a violation of the applicant's rights which are protected under Section 7 of the Charter of Rights and Freedoms.

In Regina v. LeBeau, ([1988] O.J. 51, C.A. No. 337/86, 403/86) the Court of Appeal dealt with a similar submission with respect to a section of the Criminal Code. It found that it could not be said that no sensible meaning could be given to the words of the Section in question and that accordingly it was for the Courts to say what meaning the statute could bear. It found that on the facts of the case there was no doubt that the respondents knew that the acts they proposed and carried out were in breach of the section in question and that to succeed on the basis of vagueness, a person would have to show that the statute is vague in all of its applications, as for example if there were no specified standard of conduct. Further, the "void for vagueness doctrine" is not to be applied to the bare words of the statutory provision, but rather to the provision as interpreted and applied in judicial decisions.

In many respects the Code is analogous to a municipal or other by-law. In Regina v. Bennett Paving and Material Limited (Ontario Court of Appeal, October 23, 1989, unreported), the Chief Justice of Ontario in speaking for the Court noted that "mere uncertainty as to the scope of a by-law will not suffice to make it void." The vagueness must be so serious that a reasonably intelligent man, sufficiently well informed if the by-law is technical in nature, is unable to determine the meaning of the by-law and govern his actions accordingly. He goes on to refer with

approval to earlier decisions both in Ontario and elsewhere which held that the test to be applied is whether the words of the section in question are such that it cannot be said that no sensible meaning can be given to its words, and that a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing hypothetical applications of the law.

The substance of the charges laid against Ms. S. relate to the alleged purchase and use of an essay to be submitted for credit as if it were her own work. I am satisfied that any reasonably intelligent fourth year university student reading the provisions of Section E.1. (a) (i) of the Code would understand, particularly in the context of the other provisions of the Code, that such conduct would be contrary to the aims and objectives of the University as set out in the Code. Notwithstanding the absence of any precise definition of the term "unauthorized aid" I am not persuaded that the section in question can be considered to be void for vagueness. In view of my decision, it is not necessary to proceed to an examination of whether there is a violation of Section 7 of the Charter.

Accordingly, the application is dismissed in all respects, and the matter referred to the Secretary of the Tribunal for the purpose of arranging to proceed with the hearing. Any question of costs arising under Section I (2) of the Code is hereby reserved to the Chair of the Tribunal which ultimately hears and disposes of these charges.

Before concluding these reasons, I must express my very sincere gratitude to counsel for the thoroughness and clarity of their presentations, and for the case books which were filed.

May 31, 1990

C. ANTHONY KEITH, VICE-CHAIR
ACADEMIC TRIBUNAL

**NOTE:**

Following this decision on the preliminary motion, by agreement between the parties, the matter was referred back to the Dean for the imposition of sanctions. The student admitted the offense and formal charges were withdrawn.

Judicial Affairs Officer - May 2004