FILE: 1994/95-09

THE UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

TRIBUNAL APPEALS BOARD

B E T W E E N:

UNIVERSITY OF TORONTO

Complainant
(Respondent)

- and -

Mr. K.

Accused
(Appellant)

BEFORE:	Donald S. Affleck, Q.C. (Senior Chair) Professor John Browne Fred Budnik
APPEARANCES:	Stephen Reich for the Appellant Linda R. Rothstein and Michael Hadskis for the Respondent
DATE OF HEARING:	June 1, 1994
DATE OF REASONS:	April 24, 1995

REASONS

Introduction

This appeal was heard on June 1, 1994. After hearing submissions on that date until approximately 5:45 p.m., we advised that we were unanimous in dismissing the appeal and would provide written reasons at a later date.

The delay in providing these reasons is regrettable and is entirely attributable to the Senior Chair.

Background

Pursuant to the provisions of the *University of Toronto Code of Behaviour on Academic Matters, 1991*, as amended, the appellant was charged with the following two offences:

1. That in or around October, 1991, he did alter or falsify documents or evidence required for admission to the University or uttered, circulated or made use of such forged, altered, or falsified documents or evidence contrary to Section B.1.(1)(a) of the University of Toronto's Code of Behaviour on Academic Matters, 1991.

2. That on or about April 23, 1992 he did falsify documents or evidence required for admission to the University, or uttered, circulated or made use of such forged, altered or falsified documents or evidence, contrary to Section B.1.(1)(a) of the University of Toronto's Code of Behaviour on Academic Matters, 1991.

Particulars were provided of each alleged offence. In regard to the first alleged offence, the particulars were that:

> In or around October, 1991, [the appellant] applied through the Ontario Medical School Application Service for Admission to the 1992 Interim Class of the undergraduate medical education program in the Faculty of Medicine, University of Toronto. In completing the application documents, [the

> appellant] intentionally failed to disclose all material information relating to admission and made false statements, knowing them to be false. In particular, [the appellant] intentionally failed to disclose [his] previous application, dated October 25, 1989, to the University of Toronto's Faculty of Medicine and [the appellant's] previous University of Toronto undergraduate and graduate experience. As well, [the *appellant] intentionally failed to request that transcripts of [the* appellant's] undergraduate and graduate work at the University of Toronto be forwarded in support of [the appellant's] application. Additionally, [the appellant] stated in [the appellant's] Autobiographical Letter that [the appellant] did not pursue post-secondary education until [his] attendance at York University in 1990, knowing this statement to be false.

The particulars in regard to the second offence were stated as follows:

> On or about April 23, 1992, [the appellant was] interviewed by Professor W. H. Francombe and Norman Chu as part of the application process for admission to the 1992 Interim Class of the undergraduate medical education program in the Faculty of Medicine, University of Toronto. During the interview, [the appellant] intentionally failed to disclose all material information relating to admission and made false statements, knowing that the statements were false. In particular, [the appellant] stated that [he] had not previously applied to medical school prior to [his] attempt to gain admission to medical school for the 1992/93 academic year, knowing this statement to be false. As well, [the appellant] stated that [he] left high school in 1983 and did not return to school until 1990 when [he] attended York University, knowing this statement to *be false. Additionally, [the appellant] intentionally failed to* disclose [his] previous University of Toronto undergraduate and graduate experience when Professor W. H. Francombe asked [the appellant] what [he was] doing during the seven year period between 1983 and 1990.

These charges were heard by the Trial Division of this Tribunal over a period of three days, March 9, 10 and 22, 1994. The Trial Division jury, composed of three students and two faculty members, was unanimous in finding the appellant guilty of both offences. After hearing evidence and extensive

submissions, that jury recommended that the appellant be expelled from the University of Toronto and provided the following reasons for the sanctions imposed:

> The jury recommends, by a majority of its members, that the offences committed by Mr. K are most serious and that he should be expelled from the University of Toronto. Because these are first offences, and despite their gravity, we recommend that the notation be removed from his transcript in three years. We recommend this strongly for the sake of possible rehabilitation.
>
> We recommend that the records of Mr. K 's marks in all his courses at the University of Toronto, including his good record in first year of medicine, be allowed to stand because they represent a true record of what he did achieve.

The Notice of Appeal is dated April 8, 1994.

Factual Background

A review of the evidence adduced before the Trial Division reveals the following facts.

1. In the fall of 1991 the appellant applied to enter the Faculty of Medicine of the University of Toronto for the 1992-93 academic year. He did so by applying through the Ontario Medical School Application Service (OMSAS).

2. The appellant did not complete the portion of the OMSAS application form which stated "[I]f you are re-applying to any of the Ontario medical schools indicate under school name [the names McMaster, Ottawa, Queen's, Toronto and Western were set out on the form] the year in which you previously applied".

3. The appellant had applied to enter medical schools in both 1986 and 1989.

4. In completing that portion of the OMSAS application entitled "Undergraduate Academic Record", the appellant listed his record for York University. The portion of the form headed "Graduate Studies" contained no entries.

5. In addition to the courses at York University, the appellant had, at

the time he submitted the OMSAS application form, completed five years of undergraduate study at the University of Toronto leading to a four year B.Sc. Specialist degree and two years of graduate study in a Masters of Science program also at the University of Toronto.

6. In the "Autobiographical Sketch" portion of the OMSAS application, the appellant entered under date "09/83" that "family finances forced [him] to start work". Between the dates "09/83" and "09/90", when the appellant indicated he commenced "1st year undergraduate studies in science" at York University, there is no reference to his attendance at any educational institution. During that period, 1983 - 1990, he was in fact in continuous attendance at the University of Toronto.

The instructions printed on the OMSAS application form in respect to the Autobiographical Sketch portion of that form stated:

> List in chronological order all places of residence and a brief description of your activities since age 14, e.g. occupations, details of school, university and extra-curricular activities. (underlining in original)

7. The OMSAS application form contained the following notation on the first page:

> You must request transcripts from all of your undergraduate and graduate universities including all courses ever taken at any university.

The appellant only arranged for a transcript of his academic record at York University to be submitted.

8. In addition, to the Autobiographical Sketch, applicants were asked to provide an "Autobiographical Letter". The appellant provided such a letter dated October 21, 1991 in which he stated, in part:

> After graduating with honours from junior high school I attended high school for three years instead of the usual four. Again I did well, graduating with honours and receiving an Ontario scholarship. It was at this point in time that my family finances deteriorated considerably and began causing great concern to my parents. It became obvious to me that my parents were in dire need of my help to pull them out of the

> financial mire that they were in. Much against the protests and beseeching of my parents to continue my education, I decided to postpone my postsecondary education and help stabilize our financial situation. In 1990 I decided to continue my postsecondary education. I was accepted and awarded an entrance scholarship for undergraduate studies at York University where I am still pursuing courses.

9. The appellant dated and signed the OMSAS application form immediately below a statement of certification reading as follows:

> I certify that the information and documents submitted in or with these application materials or to be submitted (all of which together constitute the application) are true, complete and correct ... and that all information material to a decision on the application has been disclosed. I undertake to provide OMSAS and relevant medical schools with full particulars in writing of any relevant change in the information or application materials occurring between the date hereof and my registration in a medical school, forthwith upon such occurrence. I understand that the discovery that any information is false or misleading or that any material information has been concealed or withheld will invalidate this application and will result in its immediate rejection, or in the revocation and cancellation of my admission and/or registration if I have been admitted ... .

10. The appellant testified at the hearing before the Trial Division. He pointed out that in the publication "M.D. Admissions 1992 - 93", issued by the University of Toronto, the statement "[E]ach application is considered on its own merit; past applications are not taken into consideration" is found at page 14. He also drew the attention of the hearing to a letter of May 31, 1990 from the Assistant Dean, Admissions, Faculty of Medicine, responding to his application for admission made in 1989 and advising that a position was not available for him in the 1990/91 academic year. In that letter the Assistant Dean stated:

> Many of the students we were able to accept have previously applied unsuccessfully to us or some other medical school and, if you wish to apply again in the future, you will be treated at that time as a new applicant.

The appellant's evidence was that these statements caused him to believe that his past was not relevant to consideration of his 1992/93 application.

11. With respect to the statements in the "Autobiographical Sketch" and

"Autobiographical Letter" portions of the OMSAS application form relating to his activities after high school, the appellant testified that he "felt" that he really was not engaged in post-secondary school education because he had a number of part-time jobs during the period between 1983 and 1990 which impaired his University attendance.

12. Based upon the appellant's cumulative grade point average at York University, he was invited for an interview at the Faculty of Medicine on April 23, 1992. The interview was with Professor W. H. Francombe, a haematologist, and Mr. Norman Chu, a student at the Faculty of Medicine. The interview took place in Professor Francombe's office at the Toronto General Hospital and, with the appellant's permission, was recorded. The transcript of the commencement of this interview reads as follows:

Francombe: This interview is certainly a part of the admissions process but its also, we take it, as an opportunity for you to ask questions of us with regard to the faculty or the curriculum or the, anything really you like and I can try my best to answer things that might pertain to the curriculum or the practice of medicine, Norman is right in the thick of things right now, so he can certainly answer any questions you have about the student body itself, so we certainly do want to give you the chance to ask questions.

Mr. K: OK

Francombe: It's also clear that you know that everyone we're interviewing has had a good record and are considered good potential students. This is part of the process. We don't wish to review everything that's in your record or you autobiographical sketch but we'd certainly like to start with those things and you know maybe start off with just, you want to give us a little bit of your background and the sort of reasons why you are at this point in your life thinking about going to medical school.

Mr. K: I guess I've always wanted to go to medical school and as I said in my letter since I was a child that's been sort of a goal however things family limitations, however, everything has settled down that way so I'm back on track and -

Francombe: So it was something you had in your mind since you were -

Mr. K.: Ya I had. Even when I was in highschool.

Francombe: Right. How did that happen? Was there anything that triggered it one way or another? A member of the family or a

friend or just something you arrived at?

Mr. K: No I guess sort of ya. The fact that one of our family members, my mother went through schooling and all that and she took a lot of medical courses and all that.

Francombe: Yes right.

Mr. K.: So it seemed natural to me that you know.

Francombe: Sure, exactly.

Mr K.: You know how it is when your parents do something you get interested so I became very interested in that.

Francombe: And then you lost some time, you made a decision did you to...

Mr. K: Well I had to.

Francombe: You had to.

Mr. K: I'm the oldest -

Francombe: Your the oldest ... right, your responsibility.

Mr. K.: Well I felt it was duty to help.

Francombe: You felt it was did you?

Mr. K.: I mean you know how it is. Family pressure so I said all right well I can take some time off, I'm still young.

Francombe: That's true, that's quite true. Very true. The family were actually keen on you continuing at that time, were they?

Mr. K.: They were. Yes. My parents were quite upset when I stopped because I would forget everything and then start up again and it is going to be hard once more.

Francombe: Right.

Mr. K.: But it didn't turn out that way.

Francombe: You can make the argument you're a bit more mature now I suppose, right?

Mr. K.: Yeah. I do feel that. I'm far in the course I've been taking actually. At least from a point of view of study and everything I'm much more suited to doing it now. As if I've set my mind to it and I'm fixated on that so I mean.

Francombe:	Sure, sure, thats good. How long did you take off to help with family finances -
Mr. K.:	Oh lets see I got out from high school in 1983 and went back to school now in 1990 so what seven years.
Francombe:	And what were you doing -
Mr. K.:	Working basically. I worked like delivery for the Toronto Star. ...
Francombe:	You are currently in the second year of York.
Mr. K:	Second year.
Francombe:	So what it's a three year program is it or what ... you don't get a degree right now.
Mr. K:	No you have your third year.
Francombe:	You have to complete three years to get a degree so you're a second undergraduate right.
Mr. K.:	Right.
Francombe:	You've not applied to medical school, this is your first time to make that -
Mr. K.:	That's right.

13. Professor Francombe and Mr. Chu testified before the Trial Division of this Tribunal that at no time during the interview did the appellant inform them that he had undertaken graduate or undergraduate studies at the University of Toronto or that he had previously applied for entry to the Faculty of Medicine. The appellant disputed that evidence and stated that he had discussed his postgraduate work with Professor Francombe and Mr. Chu near the end of the interview as the tape was running out and hence that portion of the interview had not been recorded.

14. The appellant was granted entry to the Faculty of Medicine, University of Toronto in the fall of 1992. He achieved four A's and one B in his first year and this placed him slightly below the class average.

15. On March 5, 1993 the appellant was informed that Dean Rossi, Assistant Dean, Student Affairs, Faculty of Medicine, wanted to see him. On

March 8, 1993, he attended on Dean Rossi. Dean Rossi indicated that it appeared as though the appellant's application materials were not "totally accurate and complete". What followed over a period of some two months was an attempt to carry out the provisions of part C.1.(a) of the *University of Toronto Code of Behaviour on Academic Matters, 1991*, as amended, (the "Code"). By March 15, 1993 the appellant had retained a solicitor.

16. The Vice-President and Provost advised the appellant of the academic offences with which he was charged in the summer and fall of 1993. The appellant, through counsel, requested certain adjournments so that the hearing did not commence until March 9, 1994.

The Appeal

The appellant's "Brief of Issues in Appeal" sets out the four grounds of appeal that were argued, namely:

1. characterization of the trial proceedings;
2. failure to carry out divisional proceedings thereby invalidating the trial proceedings;
3. errors in directions to the jury; and
4. the impropriety of the sanction.

Characterization of the trial proceedings and failure to carry out divisional proceedings

Much of the argument advanced by counsel for the appellant was based on the proposition that since the onus and burden of proof at the hearing was the same as in a criminal case then all evidentiary matters, all rulings and instructions by the chair presiding at the hearing and all other pertinent matters should also be governed by criminal law and any ambiguity resolved in the appellant's favour.

It was submitted that since the Chair of the Trial Division proceedings, Janet Minor, failed to apply the criminal law standards when making certain rulings during the course of the hearing that the hearing was fatally flawed.

In argument, two provisions of the *Code* were cited. Both these provisions are found in that part of the *Code* headed "Tribunal Procedures". They are:

> Section C.II.(a).7
>
> > The procedures of the Tribunal shall conform to the requirements of the *Statutory Powers Procedure Act*, Revised Statutes of Ontario, 1980, Chapter 484, as amended from time to time.
>
> Section C.II.(a).9
>
> > Except as otherwise expressly provided in rules of procedure adopted under subsection 8 [there have been none], the onus and standard of proof that an alleged offence has been committed by the accused shall be the same as in criminal cases.

The *Statutory Powers Procedure Act*, R.S.O. 1990, C. S.22 contains no provision prescribing the onus and standard of proof for tribunals in the exercise of a statutory power of decision. This is not surprising since that *Act* does not purport to be a complete code for tribunals. Indeed, it is clear from the *Statutory Powers Procedure Act* that, unless otherwise provided, a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied upon by reasonably prudent individuals in the conduct of their own affairs (see *Royal Commission of Inquiry into Civil Rights*, 1968, Report 1, Volume 1, p. 216). However, it is also clear that the Governing Council of the University of Toronto recognized that discipline proceedings approach the judicial end of the spectrum of administrative decision-making (see *Howe* v. *Institute of Chartered Accountants* (1994), 19 O.R. (3d) 483 at 495 (Ontario Court of Appeal) and the cases there cited) and therefore provided in the *Code* that "the onus and standard of proof ... shall be the same as in criminal cases", namely, beyond a reasonable doubt. This does not, however, convert the University Tribunal into a criminal or

quasi-criminal forum. It remains an administrative tribunal albeit one that cannot evoke sanctions unless persuaded beyond a reasonable doubt that a *Code* offense has been committed.

We consequently find no error by the Chair of the Trial Division hearing in failing to apply criminal law standards when deciding motions brought during the course of the proceedings.

On behalf of the appellant, it was argued that certain divisional or decanal procedures as set out in part C.I.(a) of the *Code* were not strictly followed. These procedures, according to the argument, were conditions precedent to a hearing before the Trial Division and in the context of a quasi-criminal hearing, the failure to adhere to them precisely was sufficient to vitiate the charges.

As indicated above, we do not consider the proceedings of the Trial Division of this Tribunal to be in any way subject to the label "quasi-criminal". In addition, of course, we are mindful of section C.I.(a) 11 of the *Code*:

> 11. Normally, decanal procedures will not be examined in a hearing before the Tribunal. A failure to carry out the procedures referred to in this Section, or any defect or irregularity in such procedures, shall not invalidate any subsequent proceedings of or before the Tribunal, unless the Chair of the hearing considers that such failure, defect or irregularity resulted in a substantial wrong, detriment or prejudice to the accused. The chair will determine at the opening of the hearing whether there is going to be any objection to defect, failure or irregularity.

Notwithstanding the language of this paragraph 11, counsel for the appellant argued that the proceedings before the Trial Division were not "subsequent" proceedings within the language of paragraph 11. At the opening of the Trial Division hearing and after hearing extensive argument, the Chair held that section C.I.(a) 11 applied, that there was no ambuguity, and that "subsequent" proceedings included the proceedings then before her. We concur.

Before us, counsel for the appellant placed reliance upon the reasons of Mr. George Brigden, Q.C., then a chair of the Trial Division of this Tribunal, in a case decided on July 25, 1978 and known as [1978/79-01] . In that case students were charged with an academic offence without there being any attempt

at all to carry out the divisional or decanal procedures spelled out in part C.1.(a) of the *Code*. Mr. Brigden was of the opinion that "some lower level discussions must take place between the department and the student" before procedures leading to a hearing before the Tribunal were initiated. The facts in the present case are much different: two interviews involving the appellant were held at the divisional level - one with Dr. Rossi, Assistant Dean, Student Affairs, and one with Dean Arnold Aberman.

While it can be argued that the language of the sections in part C.1.(a) of the *Code* was not followed with absolute precision, we do not consider that this is required. The language must be construed so as to be flexible enough to fit the circumstances facing the particular faculty or academic unit involved at the time. Indeed, this interpretation accords with the language employed by Mr. Brigden in his reasons in [1978/79-01] . As well, we are reinforced in our conclusion by the fact that the appellant in this case suffered no detriment or prejudice whatsoever by reason of the technical breaches of procedure that were alleged.

We would point out that the procedures in part C.1.(a) of the *Code* are clearly designed to permit a frank discussion between student and representative of the academic unit concerned. Every effort should be made by those in charge of arranging such discussions to create an atmosphere in which a frank exchange can take place. The presence of note-takers and recording devices would likely not, we suggest, be conducive to such an atmosphere.

Directions to the Jury

Counsel for the appellant submitted that the Chair's charge to the jury on reasonable doubt was inadequate. In this regard, reference was made to the formula set out in *D. W. v. The Queen* (1991), 63 C.C.C. (3d) 397 (a decision of Supreme Court of Canada) for charging a jury when credibility is in issue.

We note that that very formula was, with the permission and approval of the hearing Chair, read to the jury by counsel for the appellant (see p. 198 of the transcript of March 10, 1994). By so doing any misgivings one could have as to the language of the earlier portions of the charge were discharged.

The other concerns raised as to the Chair's charge to the jury are without any real foundation and were dealt with clearly and adequately by the chair and counsel in the presence of the jury before the jury retired for its deliberations on the issue of guilt.

Sanction

Appellant's counsel alleged, firstly, that the Chair of the Trial Division hearing committed a number of errors during that part of the hearing dealing with the question of sanction. In particular, it was argued that the Chair should have instructed the jury as to the use to be made of previous decisions of the Tribunal and that the Chair should have made it clear that the fact that this was the appellant's first conviction was to be treated as a mitigating factor "going to rehabilitation and the granting of a 'second chance'".

We have reviewed the transcript of the proceedings of the Trial Division in this respect and can find no palpable error in the directions provided to the jury by the Chair. All the factors traditionally associated with enlightened punishment were clearly articulated. We note that counsel at the hearing took no issue with the Chair's instructions on sanction although specifically invited to do so. It is also of interest to note that in its reasons for sanction, *supra*, the jury specifically refers to the fact that "these are first offences". It is apparent to us that the jury took into account all the appropriate factors in coming to a decision on sanction. The offences found to have been committed by the appellant are egregious. The recommendation of expulsion is in accord with other decisions of the Trial Division in serious cases. We do not intend to alter the jury's recommendation as to expulsion.

The second argument advanced on behalf of the appellant in respect to sanction relates to the recommendations of the jury. It is to be recalled that the jury recommended that the appellant be expelled and that the notation of that expulsion be removed from his transcript in three years.

Part C.II.(b) of the *Code* deals with "Tribunal Sanctions". Section 1.(i) of that Part provides that the sanction of expulsion from the University can be recommended by the Tribunal upon the conviction of a student. It goes on to provide as follows:

> The Tribunal has power only to recommend that such a penalty be imposed. In any such case, the recommendation shall be made by the Tribunal to the President for a recommendation by him or her to the Governing Council. Expulsion shall mean that the student shall be denied any further registration at the University in any program and his or her academic record and transcript shall record permanently this sanction. Where a student has not completed a course or courses in respect of which an offence has not been committed, withdrawal from the course or courses without academic penalty shall be allowed. If a recommendation for expulsion is not adopted, the Governing Council shall have the power to impose such lesser penalty as it sees fit. (emphasis added)

In light of this language, the appellant argues that the jury really did not intend to expel him. Counsel for the University suggests that what the jury intended was to signal Governing Council that a permanent notation might not be appropriate in all expulsion cases and was not appropriate in the situation of this appellant. Further, counsel for the University stated that the jury clearly wished to have the appellant expelled but was proposing that there be a re-evaluation of the period for which the sanction was to be recorded and this proposal was more akin to a suggestion than a "recommendation".

The jury's recommendations can be viewed in two ways. The first way is to consider the recommendation of expulsion to be the main and principal recommendation. The other recommendations being in the nature of advice for the Governing Council to consider. Support for this interpretation can be taken both from the language used by the jury and from the questions asked by one of the jurors at the time sanction was being considered. The juror asked (at p. 133 of the transcript of March 22, 1994):

> Is it within the power of the jury, or the right, to ... Let us suppose it was assigning a moderately severe or a very severe sanction to make any suggestion or request to this hearing that the University should do something, or is that improper?

The Chair responded as follows:

> You're entitled to give - or you're requested to give reasons so if in your view certain factors have resulted in your reaching a certain conclusion that may well encourage the University to do something, or another, then that's appropriate to put in.

I'm not sure if that's what you are getting at. If you're ...

The second way is to consider there to be but a single recommendation with no subordination. Under this interpretation, the conclusion would be that the jury recommended expulsion only on condition that notation of that expulsion be removed from the appellant's transcript after three years and that credit for course work be given. The difficulty presented by this interpretation becomes clear if one hypothesizes a situation in which Governing Council considers the adoption of the recommendation for expulsion but not the conditions concerning the three year notation on the transcript and the credit for course work. It could well be argued that such a penalty of expulsion alone would be more severe than that recommended by the jury and hence beyond the powers of Governing Council by reason of section C.II.(b)(i).

A close reading of the jury's reasons for sanction that are set out earlier in these reasons and the transcript of the hearing on March 22, 1994 at pages 128 to 136 leads us to conclude, however, that the jury's sole recommendation to Governing Council was expulsion. The other comments by the jury were in the nature of suggestions for Governing Council's consideration.

One of those suggestions - that the appellant be given credit for work completed in his first year of medicine - causes us some considerable concern. To permit the appellant to obtain credit for work in a program of study in which the appellant should not have been entitled to register would amount to permitting the appellant to profit from wrongdoing.

D. S. Affleck, Q.C. Prof. John Browne Fred Budnik

Chronology of Discipline Proceedings in the Case of Mr. "K"

1993/94-09	March 23, 1994	University Tribunal recommends expulsion
1994/95-09	April 24, 1995	Tribunal Appeals Board dismisses the student's appeal
	June 1, 1995	Governing Council confirms the expulsion
[1995] O.J. No. 3734	December 4, 1995	Divisional Court quashes the decision of Governing Council to expel and orders a new trial before the University Tribunal
1997/98-04	October 14, 1997	University Tribunal issues written ruling on jurisdictional objections raise by the student (2nd trial)
1998/99-06	July 31, 1998	University Tribunal recommends expulsion (2nd trial)
1998/99-07	December 4, 1998	Chair of the Tribunal panel rules on the student's request for costs (2nd Trial)
1998/99-08	April 20, 1999	The student's appeal is dismissed by the Discipline Appeals Board (2nd Appeal)
	May 13, 1999	Governing Council confirms the expulsion (2nd Expulsion)
[1999] O.J. No. 2944	July 16, 1999	Divisional Court dismisses application for judicial review
1999/00-14		Discipline Appeals Board Rules on Student's request for cost at the 2nd Appeal