F**ILE: 1995/96-10**
Trial: 1994/95-08

UNIVERSITY OF TORONTO

DISCIPLINE APPEALS BOARD

BETWEEN: University of Toronto — Complainant (Respondent),

and

Ms. R. — Accused (Appellant),

BEFORE: D.S. Affleck, Q.C. (Senior Chair)
Peggy Haist
Tracey Hamilton
Joseph Minta

APPEARANCES: Richard Stanwick, for the Appellant
Linda Rothstein, for the Respondent

DATE: June 10, 1996

NATURE OF THE APPEAL

This is an appeal by Ms R. from the sanctions imposed by the jury in the Trial Division of the University Tribunal following the jury's finding that the Appellant had committed offences under the *University of Toronto Code of Behaviour on Academic Matters* (the *Code*). The Jury had considered the following charges against Ms R.:

1. THAT on or about March 23, 1993, she did represent as her own in the second term test in PSY 240S an idea or an expression of an idea or work of another, and/or she aided, assisted, abetted, counselled or conspired with another person to represent as her own an idea or an expression of an idea or work of another, contrary to sections B.I.1(d) and B.II.1(a) of the *Code*;

NATURE OF THE APPEAL (continued)

2. THAT on or about April 27, 1993 she did represent as her own in the final examination in PSY 240S an idea or expression of an idea in an academic work, and/or she aided, assisted, abetted, counselled or conspired with another person to represent as her own an idea or an expression of an idea or work of another, contrary to sections B.I.1(d) and B.II.1(a) of the *Code*;

3. THAT on or about March 23, 1993 she did obtain unauthorized assistance in connection with the second term test in PSY 240S or aided, assisted, abetted, counselled or conspired with another person to obtain unauthorized assistance in connection with the second term test in PSY 240S, contrary to Sections B.I.1(b) and B.II.1(a) of the Code;

4. THAT on or about April 27, 1993 she did obtain unauthorized assistance in connection with the final examination in PSY 240S or aided, assisted, abetted, counselled or conspired with another person to obtain unauthorized assistance in connection with an academic work, contrary to sections B.I.1(b) and B.II.1(a) of the Code.

The jury found Ms R. guilty of charges numbered 3 and 4 and unanimously imposed the following sanctions:

- a grade of "0" in PSY 240S;

- suspension from the University for a period of two years, effective from the date of the offences;

- a record of the sanction and the reasons for it to appear on her transcript for a period of three years from the date of the offences.

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE APPELLANT

Prior to the hearing, Counsel for the Appellant filed the following written submission:

1. That the Tribunal heard inflammatory allegations that a "stolen copy of a previous test" had been used and that improper and inflammatory reference had been made to a "break and enter" and to a "master key". No such evidence was presented.

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE APPELLANT (continued)

2. That the prosecutor had given a wrong and improper interpretation concerning "Hodge's Rule" which had given the Tribunal the impression that the Appellant was required to prove her innocence.

3. That the Chairman failed to adequately redress this problem thereby causing the Tribunal to misapprehend the notion of the onus on the prosecution to establish guilt beyond a reasonable doubt. Further, the accused's explanation was not adequately summarized.

4. That the prosecution failed to prove the requisite criminal intent as required by the rules of criminal procedure.

5. That submissions were improperly made that "we are not in a criminal court and we are entitled to admit hearsay as evidence". In fact, the rules of criminal procedure do apply to the Tribunal.

6. That the Tribunal heard "expert" and opinion evidence from a person who was not properly qualified as an expert in statistics and related disciplines. The jury was not adequately warned with respect to her numerous unfounded assertions and opinions.

7. That the primary complainant, a professor, was permitted to sit opposite and facing the Tribunal, part of which was composed of students, thereby potentially influencing the decision of the Tribunal and causing an apprehension of bias.

8. That the Tribunal failed to adequately consider a valid explanation for the conduct of the accused and the similarity in marks between her and the co-accused.

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE RESPONDENT

I. Issues Raised by the Appellant

In response, Counsel for the Respondent had filed the following written submission:

1. The Appellant submits that the Tribunal heard inflammatory allegations with respect to a "stolen copy of a previous test", "break and enter" and a "master key". However, no objection was taken by counsel for the

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE RESPONDENT (continued)

Appellant with respect to either the Discipline Counsel's closing submissions or the evidence of Susan Bartkiw on these points.

2. Further, with respect to the evidence of Ms Bartkiw, the Tribunal was expressly instructed by the Chair as follows:

> "I want to mention at this point the very last evidence the University tendered, which was the testimony of Susan Bartkiw, who was an administration assistant at the Faculty that at some unspecified time in the past there had been a problem of the improper use of a master key to a certain part of a restricted area of the University offices. I simply say to you that this evidence does not in my view, relate to any of the charges that have been laid against these accused. There is no aspect of these charges that suggest these accused are involved in tampering with a box or removing exams. There is simply evidence that for whatever reason, certain papers would be [*sic*] found in the place where they ought to have been.
>
> I am telling you that there is simply, in my view, no probative value upon which you should place any weight whatsoever in the evidence given by Ms Bartkiw, that at some time in the past there may have been a problem with a master key. I am directing you to simply disregard that."

3. The Appellant submits that Discipline Counsel gave a "wrong and improper interpretation concerning "Hodge's Rule" which gave the Tribunal the impression that the Appellant had been required to prove her innocence. The comment relied on was part of the opening statement of the Discipline Counsel and had been as follows:

> "We acknowledge at the outside [sic] the University must persuade you that there is no other honest and rational explanation for this remarkable similarity beyond a reasonable doubt."

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE RESPONDENT (continued)

4. Contrary to the submission of the Appellant, it was submitted that these words do not suggest that the Appellant was required to prove her innocence. In any event, the jury was instructed on repeated occasions by the Chair, by Discipline Counsel, and by Counsel for the Appellant, that the onus of proof fell on the University throughout the proceedings and required the University to prove the case beyond a reasonable doubt.

5. The Appellant submits that the University failed to prove the requisite "criminal intent" as required by the rules of criminal procedure. It is submitted that the rules of criminal procedure did not govern proceedings before the Trial Division of the Tribunal. In any event, it is submitted that the instruction given to the jury with respect to the issue of intention had been entirely consistent with any applicable criminal law principles. In this regard, the jury was charged as follows:

> "Common to all of these questions of offences under the *Code* is the question of intent and it has already been drawn to your attention that the last of the sections under "Parties to Offence" is intentional. It is an integral part of the offences charge that each student has intended to commit the offence with which he or she is charged. They must have acted, knowing that what they were doing constituted an offence. There must have been as it is sometimes put, a guilty mind. This was not a situation where accidentally one commits an offence. What you must find is that there was knowledge that what was done nevertheless contravened the *Code*. The accused must be found to have acted intentionally. Each and every element of each offence must be proved by the University beyond a reasonable doubt." (emphasis added)

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE RESPONDENT (continued)

6. The Appellant took issue with submissions made by Discipline Counsel that the Tribunal was not a criminal court and that hearsay was therefore admissible. The Appellant also contends that the rules of criminal procedure apply to the Tribunal. No authority was submitted in support of this proposition nor was any section of the *Code* identified as establishing such a principle. In fact, Section C.II.(A) 7 of the Code provides as follows:

> "The procedures of the Tribunal shall conform to the requirements of the Statutory Powers Procedures Act, R.S.O., 1980, c.484, as amended from time to time."

7. It is submitted that the *Statutory Powers Procedures Act* [sic] allows for the admission of hearsay evidence in appropriate cases.

8. It is contended by the Appellant that the jury heard "expert" and "opinion" evidence from a person who was not properly qualified as an expert in statistics and related disciplines. It is submitted that this issue was properly identified for the jury by the Chair and that the jury was properly directed as follows:

> "As a matter of law and procedure, I must tell you that there was no factual foundation given to qualify Dr. Ross as an expert in statistical analysis so that nothing she says has any weight as far as expert opinion is concerned, as to whether or not this, in fact was a degree of similarity that was not possible. I think what you can take from that is that in her experience it was a matter of great improbability that this would occur naturally."

9. The Appellant contends that the jury was not adequately warned with respect to Dr. Ross' "numerous unfounded assertions and opinion." It is impossible to respond to this submission without identification of the alleged unfounded assertions and opinions.

10. The Appellant argues that Dr. Ross had been improperly permitted to sit opposite and facing the Tribunal and this had caused an apprehension of bias or potentially influenced the jury.

WRITTEN SUBMISSIONS FILED ON BEHALF OF THE RESPONDENT (continued)

11. It is submitted that in the absence of affidavit evidence, it is impossible to respond to this submission. It is conceded that Dr. Ross sat in the Hearing Room throughout the hearing and that she did sit across from the jury while giving her evidence. However, there is no evidence that she did so during the rest of the hearing. Moreover, it is respectfully submitted that this was an objection that ought properly to have been made to the Chair during the hearing. Having failed to do so, the Appellant cannot now assert that some adverse consequence had resulted.

12. Finally, the Appellant alleges that the Tribunal failed to adequately consider the accused's valid explanation for the similarity between her paper and that of her co-accused. It is respectfully submitted that the theory of the defence had been adequately and properly put to the jury and, accordingly had been considered by them. No objection was taken to the manner in which this aspect of the charge to the jury had been made at the time.

REASONS FOR THE DECISION OF THE DISCIPLINE APPEALS BOARD

The Senior Chair, Mr. Affleck, delivered the decision of the Board dismissing the appeal orally.

He thanked both counsel for their submissions noting that the Panel had appreciated their assistance. He then noted that the Appellant's main argument on the appeal related to the use by the University's counsel of the word "stolen" before the jury at the Trial Division hearing and the inference the University had asked the jury to draw.

The Board stated that it had reviewed those portions of the transcript that counsel for the Appellant had urged it to consider and was unanimously of the opinion that the Chair at the hearing before the Trial Division had thoroughly dealt with any possible concerns arising from the statements sought to be impugned. Indeed, it did not appear that the jury had in any way been affected by those statements. The Board noted that no objection had been raised by

REASONS FOR THE DECISION OF THE DISCIPLINE APPEALS BOARD
(continued)

counsel for the Appellant before the Trial Division on those occasions when the use of the world "stolen" was being addressed.

Other arguments raised on the appeal related to the interpretation of "Hodge's Rule" and other matters; however, in the Board's opinion they had not been seriously relied upon by counsel for the Appellant. Indeed, as had been pointed out at the commencement of the hearing, the rule in Hodges' case appears to have been abandoned by the courts in Canada as a result of recent decisions by the Supreme Court of Canada.

Counsel for the Respondent had argued that the Board should alter the sentence imposed by the Trial Division of University Tribunal because one of the elements of the sentence had been a two-year suspension from the date of the offence: namely, from April 27, 1993 to April, 1995. Counsel for the Respondent had submitted that a student could not be retroactively suspended "from attendance" at the University. If it had agreed with this argument, the Board would have been inclined to order a suspension from the date that the sentence had been imposed, March 6, 1995, for one year. However, that sentence would be academic at this point in time; and, consequently, the Board saw no reason to change the jury's sentence.

"Don Affleck"
Don Affleck, Q.C. (Senior Chair)

"Peggy Haist"
Peggy Haist

"Tracey Hamilton"
Tracey Hamilton

"Joseph Minta"
Joseph Minta

September 22, 1997