Case No.: 709

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C [redacted] S [redacted]

DECISION

Hearing Date: June 20, 2017

Members of the Panel:
Mr. Bernard Fishbein, Chair
Professor Ann Tourangeau, Faculty Panel Member
Ms. Susan Mazzatto, Student Panel Member

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Tina Lie, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Maryan Shahid, Summer Student, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S [redacted] (former student) (for adjournment request only)
Mr. Vincent Rocheleau, Articling Student, Shirtliff-Hinds Law Office (for adjournment request only)
Professor Luc De Nil, Vice-Dean, Students, School of Graduate Studies

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances ("ADFG")
Ms. Krista Osbourne, Administrative Clerk & Hearing Secretary, ADFG
Mr. Sean Lourim, Office of the Governing Council, IT Specialist
Ms. Nora Gillespie, Senior Legal Counsel, Office of the Vice-President and Provost, University of Toronto

Not In Attendance:
Dr. C [redacted] S [redacted], former Student

[1] These proceedings relate to charges under the University of Toronto ("the University") *Code of Behaviour on Academic Matters, 1995* (the "*Code*") brought by the Provost of the University against Dr. C[redacted] S[redacted] ("Dr. S[redacted]"). The charges were initially filed on March 12, 2013 and relate to the thesis submitted by Dr. S[redacted] for the degree of Doctor of Education (Ed.D.) in 1996. Unfortunately, the charges have had a long and complicated procedural history which has been summarized previously in the many prior interlocutory and case management decisions (which I, or the prior Co-Chairs, presided alone without a full panel of the Tribunal – and all of which are attached as Appendix "A"). Rather than review that long history in any great detail, we have attached as Appendix "B" to this decision, a six-page Chronology of Proceedings which the University prepared. However, in order to understand what happened at the hearing on June 20, 2017, it is necessary to go into more detail at least with respect to the most recent events.

The Hearing of June 20, 2017 – The Request for Another Adjournment

[2] At a prior hearing on April 18, 2017 (with full written reasons issued on May 17, 2017), I dismissed Dr. S[redacted]s motion that I recuse myself for a reasonable apprehension of bias. I also dismissed Dr. S[redacted]'s motion that the University Discipline Counsel be disqualified for an alleged conflict of interest (which had already been dismissed at the earlier hearing of December 1, 2016 – which Dr. S[redacted] did not attend – with written reasons dated December 16, 2016), but did permit Dr. S[redacted] to raise again and argue his motion that the charges be dismissed as a result of an alleged abuse of process by the University – although it should be done together with the hearing of the merits of the charges. At that time, in order to finally commence a hearing on the merits of the charges but also to allow Dr. S[redacted] (who was working in Chicago but was present for this hearing) to attend such hearings (as he

indicated was his wish), as well as to accommodate his schedule as well as my schedule and those of the University and Dr. S[redacted]'s then counsel, after some debate and discussion, hearing dates of June 20, 21, 22 and 26 were agreed upon by all parties (and subsequently confirmed by the Tribunal).

[3] As he is fully entitled to do, Dr. S[redacted] chose to file an application for judicial review of my decision failing to recuse myself and intended to seek to adjourn these now scheduled hearings until his judicial review application had been determined. As a result, when advised of this, the University sought another case conference to deal with any request for such an adjournment. At the case conference held on June 1st, I declined to adjourn the hearing (with reasons issued on June 8, 2017). Apparently, Dr. S[redacted] then determined to file an urgent motion at the Divisional Court seeking to stay these proceedings and preventing the scheduled hearings from continuing until his application for judicial review had been determined. A hearing took place before the Divisional Court on Friday, June 16, 2017. Although Dr. S[redacted] was not present and Dr. S[redacted] was represented by different counsel before the Divisional Court than before the Tribunal, we were told (and there was no dispute) that the Court was not advised that there were any medical (or mental health) issues with Dr. S[redacted] and certainly not that he was disabled or incapacitated from giving instructions. In fact, we were advised (and again with no dispute) that an affidavit of Dr. S[redacted] sworn either that morning or the day before was filed with the Divisional Court. The Divisional Court Judge reserved her decision and indicated she would issue her decision on the following Monday, June 19, 2017.

[4] On June 19, 2017, the Divisional Court Judge advised that she was dismissing Dr. S[redacted]'s stay application and granting the University's cross-motion to dismiss the judicial

review application on the basis of prematurity with reasons in writing to follow. (Those reasons were subsequently issued on June 21, 2017.)

[5] On Tuesday, June 20, 2017, the Tribunal hearing commenced as previously scheduled and agreed upon. Dr. S was not in attendance. Counsel for Dr. S advised that Dr. S had "mental health issues" and also she now had conflicting and therefore no clear instructions – she was therefore requesting an adjournment as she was unable to continue. The Tribunal pressed counsel for more information – Where was Dr. S? Was he in some form of acute crisis? Was he hospitalized? Was he presently under medical supervision? Without in any way trying to be disparaging, counsel could provide no further information than the medical notes and psychiatric assessment that Dr. S had earlier provided in 2016 (discussed and reviewed in the earlier interlocutory decisions about whether and how to proceed). The panel offered counsel an opportunity to reach Dr. S to provide more information – counsel could only reach Dr. S by cell phone. She attempted to but was unsuccessful.

[6] Not surprisingly, the University strongly opposed any further adjournment of these charges on many grounds. During the course of the University's submissions, Dr. S returned counsel's telephone call. In order for counsel to speak to Dr. S, these proceedings briefly recessed. In particular, I asked counsel if she could ascertain how long it would take Dr. S to provide the Tribunal with some written medical confirmation that he was incapacitated or disabled to such an extent he could not participate in these proceedings. Counsel returned and indicated she could now advise that Dr. S was still in Chicago, had an "anxiety attack yesterday" (the day before), and could perhaps provide medical substantiation that he was unable to participate in these proceedings by the end of

the week. Counsel renewed her request that the proceeding be adjourned because of Dr. S[redacted]'s mental health "issues".

[7] Again, perhaps not surprisingly, the University maintained its strong objection to any adjournment of the proceedings. The University asserted that Dr. S[redacted]'s pattern of conduct was clear and reiterated its position (that it had been repeatedly asserting over the past year) that this was no more than an escalating tactic by Dr. S[redacted] to prevent these charges from ever being heard.

[8] The panel recessed to consider the submissions. The panel unanimously determined that, in all of these circumstances, we should not exercise our discretion to grant any adjournment.

[9] First, notwithstanding counsel's attempt to conflate mental health "issues" with an actual disability or incapacity to participate in the proceedings, we see these as separate and different. We neither doubt (nor are surprised) that these proceedings might engender in Dr. S[redacted] anxiety, stress or some degree of depression – one might argue that is a normal or appropriate reaction to the difficult situation Dr. S[redacted] finds himself in. That these proceedings have raised "mental health issues" for Dr. S[redacted] has been a repeated refrain from Dr. S[redacted], his counsel or representatives. However, every time the Tribunal has granted an indulgence or an adjournment to Dr. S[redacted] to medically substantiate that he is actually disabled or incapacitated to such an extent that he is unable to participate in these proceedings, he has failed to adequately or satisfactorily do so (see the discussion in prior decisions dated May 4, June 13, September 1, October 19 and December 16, 2016 – where, contrary to what Dr. S[redacted] was providing the Tribunal, the University obtained a clear and unequivocal medical opinion to the effect that Dr. S[redacted]'s material provided to the Tribunal

was "insufficient to conclude that he is psychiatrically incapable of participating in the proceedings"). This was, yet again, another example – at a hearing not only scheduled months before, but with the active agreement and participation of both Dr. S[redacted] and his counsel.

[10] Moreover, at the Divisional Court hearing unsuccessfully seeking to stay this proceeding (effectively the same result that the requested adjournment would now achieve) only days before, not only was an affidavit sworn contemporaneously by Dr. S[redacted] filed, but no issue of Dr. S[redacted]'s health (or ability to give instructions) was raised. In fact, that he suffered an anxiety attack on the previous day (apparently after the Divisional Court announced that his application for a stay was being denied) raised the not unreasonable inference, as the University argued, whether Dr. S[redacted] ever intended at all to travel from Chicago to Toronto, as he had initially asserted he would, and which was one of the reasons the hearing was scheduled the way it was.

[11] Equally, not only were we not advised (notwithstanding our explicit questions) that Dr. S[redacted] was either hospitalized or under immediate medical supervision, but the fact that no medical corroboration could be obtained for almost five days, again as the University argued, leads to the not unreasonable inference that he was neither under immediate medical supervision nor suffering from any acute crisis. Waiting until the end of the week for some medical corroboration (the form or contents of which we were never assured of) would also lead to the cancelling of at least three scheduled days of hearing, and with the coming of summer vacations and the many parties involved, virtually assured that the hearings would likely not resume and continue at least well into the Fall. Moreover, these hearings were clearly set (and known to all parties and Dr. S[redacted]) as peremptory.

[12] In the end, absent any (let alone clear and compelling) medical evidence (and in reviewing the history of the prior proceedings and interlocutory decisions, Dr. S[redacted] could not possibly say he was unaware of both the need for such medical evidence or the required contents of such medical evidence), in all of the circumstances, we were not prepared to exercise our discretion to grant an adjournment. After we orally announced our decision not to adjourn (with these written reasons to follow), counsel for Dr. S[redacted] withdrew.

The Charges and the Evidence

[13] There is no dispute that under the *Code*, the Tribunal's *Rules of Procedure* and the *Statutory Powers Procedure Act*, the Tribunal could still proceed in the absence of Dr. S[redacted]. It has done so frequently in other cases and has done so even in these proceedings with Dr. S[redacted] (see decision dated December 16, 2016). The University urged that we proceed in Dr. S[redacted]'s absence. We did so – as we indicated we were most likely to do, earlier in the morning, to counsel for Dr. S[redacted] before she withdrew.

[14] The charges against Dr. S[redacted] are:

> 1. In 1996, you knowingly represented the ideas of another, or the expressions of the ideas of another as your own work in the thesis titled "The Effects of Sport Participation on the Academic and Career Aspirations of Black Male Student Athletes in Toronto High Schools" ("Thesis"), which you submitted in conformity with the requirements for the degree of Doctor of Education, contrary to section B.I.1(d) of the Code.
>
> 2. In the alternative, by submitting the Thesis, you knowingly engaged in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not otherwise described in the Code in order to obtain

academic credit or other academic advantage of any kind, contrary to section B.I.3(b) of the Code.

Particulars

3. At all material times you were a student registered in the School of Graduate Studies, at the University of Toronto.

4. In 1996, you submitted the Thesis in partial completion of the requirements for the Degree of Doctor of Education.

5. You submitted the Thesis:

(a) to obtain academic credit;

(b) knowing that it contained verbatim or nearly verbatim text from other sources, which you did not place in quotation marks or properly attribute to the original source of the text;

(c) knowing that it contained ideas that were not your own and which you did not properly attribute to the source of the ideas;

(d) knowing that it contained ideas expressed in words that were not your own and which you did not properly attribute to the source of the ideas;

(e) knowing that you had not included the source of some of the verbatim or nearly verbatim text in your bibliography; and

(f) with the intention that the University of Toronto rely on the Thesis as containing your own ideas that were expressed in your own words when evaluating the work.

The *Code* explicitly provides:

> "Wherever in this Code an offence is described as depending on 'knowing', the offence shall likewise be deemed to have been committed if the person ought reasonably to have known."

[15] The University called one witness, Professor Luc De Nil, the Vice-Dean of Students of the University's School of Graduate Studies, and who served as the Dean's Designate who conducted the investigation in accordance with the procedures of the *Code* that led to the charges filed against Dr. S[redacted]. Not only as the Vice-Dean (where he had processed approximately 140 cases of academic misconduct of which 80-85% involved allegations of plagiarism), but having himself supervised approximately ten doctoral students since joining the University, Professor De Nil testified that he would expect a doctoral student (having already earned both a Bachelor's and Master's degree as Dr. S[redacted] had) to be familiar with and fully understand the concepts and rules with respect to plagiarism and the proper attribution of sources. Professor De Nil testified that plagiarism is destructive of the academic integrity that lies at the heart of the University, particularly in a graduate school. Academic integrity means acknowledging the work before you so that your work can be evaluated for its original thinking. If a student does not properly acknowledge sources, such evaluation becomes virtually impossible allowing a student to claim others' or prior work as the student's original contribution.

[16] Professor De Nil referred us to both the Calendar for the University's School of Graduate Studies for 1992-1993 (when Dr. S[redacted] was first accepted for the Ed.D. program) and 1995-1996 (when Dr. S[redacted] both defended and submitted his doctoral thesis and the Ed.D. was conferred upon him) to show how the Education faculty and the Ed.D. were explicitly governed by the *Code*. Professor De Nil briefly reviewed the investigation leading to the charges, the notice to Dr. S[redacted], the request for Dr. S[redacted] to consent to submitting his thesis to two on-line databases (Turnitin.com and Ithenticate.com) that permit rapid comparison of submitted works to prior published academic work (which Dr. S[redacted] did), his meeting (and the notes of that meeting) with Dr. S[redacted] as the Dean's representative when Dr. S[redacted] admitted that he had committed the offence of plagiarism, and the decision to file these charges against Dr. S[redacted] under the *Code*.

[17] Professor De Nil then identified for the panel both Dr. S[redacted]'s thesis, with those portions taken verbatim (or virtually verbatim) from secondary sources without attribution, highlighted, and the secondary sources with the portions taken by Dr. S[redacted] without attribution also highlighted. There were 67 examples – far too numerous to list and describe in this decision but which we attach in a chart prepared by the University, attached as Appendix "C". They range from examples that are several sentences long, to some that are paragraphs long, to some that are pages long – the longest being approximately 9 pages.

[18] Even though verbatim, or virtually verbatim, it was also clear that they had been carefully reviewed and altered (or "tailored" as the University put it) to better fit into Dr. S[redacted]'s thesis – as opposed to just thoughtlessly or carelessly inserted into Dr. S[redacted]'s thesis without attribution. This manifested itself in several ways. First, American spellings of words had often been replaced with their Canadian equivalents (e.g., "honour" for "honor", "travelled" for "traveled"). Second, punctuation and capitalization were frequently changed in

Dr. S[redacted]'s thesis from the original to what presumably Dr. S[redacted] considered more appropriate. Third, clearly American references were frequently replaced with more Canadian or generic descriptions (e.g., "African-American" by "Black"). Fourth, when the secondary source had a footnote in it, the style of the footnote in the secondary source had been changed to match the style of footnote that Dr. S[redacted] was using in his thesis. Fifth, even though the secondary source was reproduced verbatim or virtually verbatim without attribution, Dr. S[redacted] would occasionally add a few words, not to indicate that it was from a secondary source, but to incorporate the unattributed words into his narrative (e.g., "In my experience"). Moreover, not only were virtually all of these 67 examples not attributed at all (as opposed to merely being incorrectly attributed), but many of the secondary sources were not even listed at all in the bibliography to Dr. S[redacted]s thesis.

[19] Professor De Nil was of the view that the extent of the plagiarism could not have been inadvertent or accidental, and that a doctoral student would be expected to know not only the necessity of, but how to properly attribute these sources. Simply put, if this had come to the attention of the University beforehand, Dr. S[redacted]'s Ed.D. would never have been conferred.

University's Submissions

[20] In light of all of the evidence, which it characterized as overwhelming, the University asserted that it had clearly discharged the onus on it to establish, on clear and convincing evidence, that Dr. S[redacted] had violated section B.I.1(d) of the *Code*. Clearly, Dr. S[redacted]'s thesis was an "academic work" within the meaning of the *Code* and clearly plagiarism had been committed. Plagiarism as established by the jurisprudence of the Discipline Appeals Board did not necessarily require an element of theft (i.e. any malicious intent) – see *University of Toronto v. O. K.*, (Case 718, February 2016) at para. 22.

[21] Equally, there could be no dispute that the Tribunal had jurisdiction over alleged misconduct by Dr. S[redacted] even though he had long ago graduated. The *Code* explicitly provided in B.i.4:

> "A graduate of the University may be charged with any of the above offences committed knowingly while he or she was an active student, when, in the opinion of the Provost, the offence, if detected, would have resulted in a sanction sufficiently severe that the degree would not have been granted at the time that it was."

Since the Provost had elected to proceed with these charges against Dr. S[redacted], there could be no question of her opinion. The Tribunal regularly, if not frequently, exercised jurisdiction over graduates, often in cases of plagiarism (See *University of Toronto and S.M.* (Case 736, February 19, 2015); *University of Toronto and S.G.* (Case 588, July 28, 2011); and *University of Toronto and J.D.* (Case 456, February 26, 2007).

[22] The University said that in the circumstances, it was impossible to conclude that Dr. S[redacted] could not have known that he was committing plagiarism. He has extensive academic experience, having had to complete both his B.A. and M.A. even before becoming a candidate for Ed.D. The applicability and requirements of the *Code* (and with respect to plagiarism) were explicitly listed in the Calendar and the OISE Bulletin, putting Dr. S[redacted]on notice. The sheer volume of the examples demonstrated that Dr. S[redacted] ought to have known he was committing plagiarism. But the University urged the Tribunal to go further. Although it would be more than sufficient to conclude that Dr. S[redacted] ought to have known, which is enough under the *Code*, the University argued the Tribunal should conclude that Dr. S[redacted] knowingly committed plagiarism in view of not only the sheer volume of the examples, but also the evidence of how he clearly "tailored" the unattributed portions of his thesis to "mask" his plagiarism and the various different methods that he used to do this.

Decision

[23] The panel recessed to consider the University's submissions. The panel unanimously concluded that the University had established that Dr. S[redacted] had violated Section B.I.1(d) of the *Code*.

[24] The panel unanimously accepted the University's position – not only that Dr. S[redacted] ought to have reasonably known he was committing plagiarism but that he knowingly did so. Not only was there no doubt that plagiarism was committed – Dr. S[redacted] had admitted as much in his meeting with Professor De Nil as the Dean's Designate – but on the evidence, it was impossible to conclude not only that Dr. S[redacted] ought to have reasonably known he was committing plagiarism, but that he knowingly did so. Even if carelessness or negligence, or no intention to mislead could somehow constitute a defense (and in our view it could not), that could not be credibly asserted by Dr. S[redacted], given not only the sheer magnitude of the lack of attribution (67 examples, some running to pages and pages), but the many ways that the non-attributed sources were very repeatedly, clearly altered and changed in the vain attempt to hide their real source – someone else's ideas and someone else's work, frequently, if not always, American. In the end, the Tribunal agreed with the University – the evidence was overwhelming and not even close.

[25] After the Tribunal announced its decision, the University, as it said it would, withdrew the second charge of academic misconduct against Dr. S[redacted]

Sanction

[26] The University sought the following sanctions:

(a) a final grade of zero in the course RSH888Y;

(b) a recommendation that Dr. S[redacted]s Ed.D. degree be cancelled and recalled;

(c) a recommendation to the President of the University that he recommend to the Governing Council that Dr. S[redacted] be expelled from the University, which should be permanently noted on his academic transcript;

(d) the case be reported to the Provost to publish notice of the decision of the Tribunal and the sanction with the name of the student withheld.

[27] The University submitted that this misconduct warranted the highest possible sanctions permitted under the *Code*. Dr. S[redacted]s degree could not be permitted to remain outstanding. The plagiarism used to obtain it was repugnant to the entire purpose of the *Code* – to ensure real academic achievement was rewarded and not obtained by the work of others. The purposes of sanctions as enunciated in the now seminal decision of *University of Toronto and Mr. C.* (Case 1976/77-3; November 5, 1976) were reviewed.

[28] The University argued there were no extenuating circumstances here. Dr. S[redacted] did not attend and his counsel withdrew before any were advanced or established before the Tribunal. Dr. S[redacted] was not entitled to keep a degree he had not legitimately earned. The University submitted that many of the other factors listed in *Mr. C* did not apply here, but the really important criterion was general deterrence both because of the very serious nature of the offence and the detriment to the University – the message or signal that needed to be sent to the community about the integrity of degrees conferred by the University. Not only was revocation of a degree the common, if not regular, penalty when plagiarism was used to obtain the degree, and the degree had already been conferred (see *University of Toronto and*

Mr. R. (Case 1996/7-02); *University of Toronto and Dr. U.* (Case 1980/81-19); *University of Toronto and S.M.* (Case 736, February 19, 2015); *University of Toronto and S.G.* (Case 588, July 28, 2011); *University of Toronto and J.D.* (Case 456, February 26, 2007), but here, the plagiarism was especially egregious, not just because of the extent of it, but because it also involved a doctoral thesis. In view of this, the University also urged us to recommend to the President of the University that he recommend that Dr. S[redacted] be expelled from the University, among the highest sanctions the Tribunal can impose, and referred us to the recent decision in *University of Toronto and Ö.G.* (Case 587, April 14, 2010) where that was done.

[29] Again, the panel recessed to consider the submissions of the University. Essentially, the panel agrees with and accepts the submissions of the University. Short of purchasing an essay from an essay service, it is difficult to envisage plagiarism more blatant or extensive than this – not only in its sheer volume but the extent to which unattributed portions were clearly "tailored" to fit into the narrative of Dr. S[redacted]s thesis without disclosing something (e.g., American references, spelling, different styles of footnotes, etc.) that might "tip" the reader that these portions were from unattributed American sources. Other than admitting his plagiarism at the meeting with the Dean's Designate, since these charges were laid, Dr. S[redacted] has done virtually nothing but oppose them and, in the University's view, deliberately delay them. Although it is certainly Dr. S[redacted]s right (and Dr. S[redacted]is fully entitled) to make the University establish its case of academic misconduct against him, there is nothing before us that demonstrates either any real remorse or an appreciation of the gravity of this misconduct on the part of Dr. S[redacted] that persuades us to mitigate the usual and regular sanctions the Tribunal imposes on this type of plagiarism.

[30] Accordingly, this panel unanimously recommends that Dr. S[redacted] be given a final grade of zero in the course RSH888Y, recommends that Dr. S[redacted]'s Ed.D. degree be cancelled and recalled, that this be permanently noted on Dr. S[redacted]'s academic transcript, that the University remove Dr. S[redacted]'s thesis from any library, wherever it may be located, and that the decision be published with the name of Dr. S[redacted] withheld. Due to the egregiousness of Dr. S[redacted]'s academic misconduct, the majority of the Tribunal recommended that the President of the University recommend to Governing Council that Dr. S[redacted] be expelled. On this last sanction, the Co-Chair dissented, viewing expulsion of a student who completed his studies and received the impugned degree more than 20 years ago as unnecessary and therefore excessive. The majority of Tribunal members recommend the former student, Dr. S[redacted], be formally expelled from the University of Toronto which prohibits him from any further registration at the University. The majority of the Tribunal believes that expulsion is the appropriate sanction due to the nature and extent of the academic offence. Expulsion makes it clear that any future academic engagement of Dr. S[redacted] at the University of Toronto shall be prohibited.

Dated at Toronto, this 10th day of July, 2017

Mr. Bernard Fishbein, Chair

Professor Ann Tourangeau

Ms. Susan Mazzatto

[30] Accordingly, this panel unanimously recommends that Dr. S[redacted] be given a final grade of zero in the course RSH888Y, recommends that Dr. S[redacted]s Ed.D. degree be cancelled and recalled, that this be permanently noted on Dr. S[redacted]'s academic transcript, that the University remove Dr. S[redacted]'s thesis from any library, wherever it may be located, and that the decision be published with the name of Dr. S[redacted] withheld. Due to the egregiousness of Dr. S[redacted]s academic misconduct, the majority of the Tribunal recommended that the President of the University recommend to Governing Council that Dr. S[redacted] be expelled. On this last sanction, the Co-Chair dissented, viewing expulsion of a student who completed his studies and received the impugned degree more than 20 years ago as unnecessary and therefore excessive. The majority of Tribunal members recommend the former student, Dr. S[redacted], be formally expelled from the University of Toronto which prohibits him from any further registration at the University. The majority of the Tribunal believes that expulsion is the appropriate sanction due to the nature and extent of the academic offence. Expulsion makes it clear that any future academic engagement of Dr. S[redacted] at the University of Toronto shall be prohibited.

Dated at Toronto, this 7th day of July, 2017

_____
Mr. Bernard Fishbein, Chair

Ann Tourangeau
_____
Professor Ann Tourangeau

_____
Ms. Susan Mazzatto

[30] Accordingly, this panel unanimously recommends that Dr. S[redacted] be given a final grade of zero in the course RSH888Y, recommends that Dr. S[redacted]'s Ed.D. degree be cancelled and recalled, that this be permanently noted on Dr. S[redacted]s academic transcript, that the University remove Dr. S[redacted]s thesis from any library, wherever it may be located, and that the decision be published with the name of Dr. S[redacted] withheld. Due to the egregiousness of Dr. S[redacted]'s academic misconduct, the majority of the Tribunal recommended that the President of the University recommend to Governing Council that Dr. S[redacted] be expelled. On this last sanction, the Co-Chair dissented, viewing expulsion of a student who completed his studies and received the impugned degree more than 20 years ago as unnecessary and therefore excessive. The majority of Tribunal members recommend the former student, Dr. S[redacted] be formally expelled from the University of Toronto which prohibits him from any further registration at the University. The majority of the Tribunal believes that expulsion is the appropriate sanction due to the nature and extent of the academic offence. Expulsion makes it clear that any future academic engagement of Dr. S[redacted] at the University of Toronto shall be prohibited.

Dated at Toronto, this 6TH day of July, 2017

_____
Mr. Bernard Fishbein, Chair

_____
Professor Ann Tourangeau

Susan Mazza
Ms. Susan Mazzatto

APPENDIX A

UNIVERSITY OF TORONTO

UNIVERSITY TRIBUNAL

July 14, 2014

Dear Counsel,

I have now had an opportunity to review in more detail the materials provided last week, including Mr Zarnett's factum.

In light of the allegations in the motion materials and the nature of the evidence that may need to be considered, I am withdrawing as chair of this hearing.

The matter will not proceed tomorrow evening, and will need to be rescheduled.

Yours very truly,

Paul Schabas

Simcoe Hall, 27 King's College Circle, Room 106, Toronto ON M5S 1A1 Canada
Tel: +1 416 978-6576 • Fax: +1 416 978-8182 • governing.council@utoronto.ca • www.governingcouncil.utoronto.ca

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER of charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto Code of Behaviour on Academic Matters, 1995,

AND IN THE MATTER OF the University of Toronto Act, 1971, S.O. 1971, c. 56 as am. S.O. 1978, c. 88

B E T W E E N:

UNIVERSITY OF TORONTO

- AND –

C[redacted] S[redacted]

CASE MANAGEMENT DIRECTION

Appearances	Selwyn A. Pieters -	Counsel for C[redacted] S[redacted]
	Benjamin Zarnett -	Assistant Discipline Counsel University of Toronto
	Robert Centa -	Assistant Discipline Counsel University of Toronto
	Christopher Lang Sinéad Cutt -	Governing Council University of Toronto

A Case Management Conference by telephone was held July 25, 2014. The following Directions are hereby issued:

1. Counsel for the parties are agreed that the Chair can hear and determine the Provost's Motion for Directions and that a full panel need not be convened for the hearing of that motion.

2. Counsel are agreed that the Provost's Motion for Directions may be considered and decided by the Chair based upon the written materials, without the need to convene a hearing for oral argument.

3. Counsel for the Provost will file a Reply by August 1, 2014.

4. Counsel for Mr. S[redacted] reserves the right to file a Sur-Reply, if required arising out of the Provost's Reply. If Mr. S[redacted] wishes to file a Sur-Reply, he will advise in writing and will advise of the date by which the Sur-Reply will be filed.

5. After receipt of the Provost's Reply and Mr. S[redacted]'s Sur-Reply, if any, the Chair will consider and determine the Provost's Motion for Directions and will issue a Decision and Reasons in writing.

6. The date of August 21, 2014 is being held by the University for the purposes of addressing any questions that the Chair may have with respect to the Motion for Directions.

7. Following release of the Decision on the Motion for Directions, a further case conference will be convened to address issues arising from the Decision, if any, and next steps.

F. Paul Morrison
Chair
July 25, 2014

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto Code of Behaviour on Academic Matters, 1995,

AND IN THE MATTER OF the University of Toronto Act, 1971, S.O. 1971, c. 56 as am. S.O. 1978, c. 88

BETWEEN:

UNIVERSITY OF TORONTO

-AND-

C[redacted]S[redacted]

MOTION DECISION

For the Student:

Mr. Selwyn Pieters, Lawyer

For the University of Toronto:

Mr. Benjamin Zarnett, Assistant Discipline Counsel, Goodmans LLP
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Rosenberg Rothstein LLP

1. This motion brought by the Provost of the University of Toronto (the "University") arises with respect to pending charges filed by the Provost against the Respondent, [redacted], under the University's *Code of Behaviour on Academic Matters* (the "Code"). The Provost alleges that, in 1996, Dr. [redacted] knowingly represented the ideas or expressions of ideas of another as his own in the thesis he submitted for his degree of Doctor of Education. The charges were filed in March 2013, following an investigation commenced in January 2013.

2. In response to the pending charges, Dr. [redacted] has brought a motion for:

    1. An order that Robert Centa and Paliare Roland Rosenberg Rothstein LLP be removed as counsel for the University and as prosecutor of the pending charges; and

    2. An order that the matter as against Dr. [redacted] be stayed as an abuse of process.

3. In support of his motion, Dr. [redacted] alleges (and it is not denied) that he had retained Mr. Ian Roland and the firm of Paliare Roland Rosenberg Rothstein LLP as his counsel in respect of his employment and the termination of his employment as Director of the Toronto District School Board. In response, Mr. Roland and the Paliare Roland firm state, *inter alia*, that Dr. [redacted] waived any conflict of interest and consented to having Mr. Centa and the Paliare Roland firm act as counsel to the University in the prosecution of the charges against him. Further, Mr. Roland and the Paliare Roland firm assert that Mr. Roland's retainer by Dr. [redacted] had terminated prior to the retainer of Mr. Centa and the firm by the University in connection with the pending charges against Dr. [redacted].

4. Further in support of his motion, Dr. [redacted] alleges that Mr. Johnathan Shime, who he retained in or about early April 2013, to represent him in defending the charges by the University, and who continued to represent Dr. [redacted] until he withdrew from the retainer on or about February 10, 2014, failed properly to represent him in the defence of the University's pending charges, and that he was influenced by his relationship with Mr. Centa, such that Mr. Shime, himself, may have been in a conflict of interest in this case.

5. Accordingly, Dr. [redacted] brings his motion seeking the Orders synopsized above.

6. For purposes of Dr. [redacted]'s motion, the Provost has brought a motion seeking the following Directions:

    A. Orders relating to the Roland File

    1. An order requiring Dr. [redacted] to obtain the legal file that is currently held by Ian J. Roland of the law firm Paliare Roland Rosenberg Rothstein LLP ("PRRR") in respect of Dr. [redacted]'s retainer of Mr. Roland (the "Roland File")

    2. An order requiring Dr. [redacted] to produce copies of all documents contained in the Roland File over which he does not assert a claim of solicitor-client privilege that are arguably relevant to the matters raised by

Dr. S[redacted] in the S[redacted] Motion, including, but not limited to documents relating to:

(a) the timing and purpose of Dr. S[redacted]'s retainer of Mr. Roland, including the duration of the retainer and its termination;

(b) whether or not the issue of alleged plagiarism in Dr. S[redacted]'s dissertation at the University of Toronto (the "University") was discussed with Mr. Roland or the Toronto District School Board ("TDSB"); and

(c) all communications between Dr. S[redacted] and Mr. Roland regarding Dr. S[redacted]'s decision to waive any potential conflict of interest in Robert A. Centa and PRRR acting for the University.

3. If Dr. S[redacted] wishes to assert a claim of solicitor-client communication privilege over any of the contents of the Roland File, an order requiring Dr. S[redacted] to:

(a) Provide a list of any documents in the Roland File that identifies the materials that are alleged to be covered by solicitor-client privilege to the extent that this is possible without compromising the claimed privilege; and

(b) Provide a brief written statement of his position as to the general basis for the claim of solicitor-client privilege.

B. Orders relating to the Shime File

4. An order requiring Dr. S[redacted] to obtain and review his legal file that was or is currently held by Jonathan Shime of the law firm Cooper, Sandler, Shime & Bergman LLP in respect of Dr. S[redacted]'s retainer of Mr. Shime (the "Shime File").

5. An order requiring Dr. S[redacted] to produce copies of all documents contained in the Shime File over which he does not assert a claim of solicitor-client privilege and that are arguably relevant to the matters raised by Dr. S[redacted] in the S[redacted] Motion, including, but not limited to documents relating to:

(a) The timing of his first contact with Mr. Shime and his retainer of Mr. Shime;

(b) The scheduling or timing of the potential hearing in this matter, including any requests for delays in the scheduling of the hearing;

(c) PRRR's alleged conflict of interest, including whether or not to raise the alleged conflict of interest, any considerations strategic or otherwise about doing so, and any instructions sought and received;

(d) Mr. Shime's relationship with PRRR or its lawyers and/or with the Faculty of Law at the University; and

(e) The consent that Dr. S[redacted] provided to the University respecting the submission of his dissertation to online databases.

6. If Dr. S[redacted] wishes to assert a claim of solicitor-client communication privilege over any of the contents of the Shime File, an order requiring Dr. S[redacted] to:

(a) Provide a list of any documents in the Shime File that identifies the materials that are alleged to be covered by solicitor-client privilege to the extent that this is possible without compromising the claimed privilege; and

(b) Provide a brief written statement of his position as to the general basis for the claim of solicitor-client privilege.

7. The Provost's motion also seeks an order as to the timing of the production of documents, if any, ordered pursuant to the Directions summarized above, as well as an order fixing the next case conference to be held to determine next steps in the proceeding.

8. I have fully reviewed the Motion Record of Dr. S[redacted] and the Motion Record of the Provost, including Affidavits and Exhibits contained therein. I am cognizant that the evidence in the Motion Records is pertinent to the ultimate motion brought by Dr. S[redacted] seeking disqualification of the Paliare Roland firm and a stay of this matter as an abuse of process. Accordingly, I intend to refer to the evidence only briefly, and only insofar as is necessary to determine the Provost's Motion for Directions.

9. The Provost's Motion is founded on the apparently reasonable premise that the Roland File and the Shime File may contain documents relevant to the issues raised by Dr. S[redacted]'s motion to disqualify the Paliare Roland firm and to stay the proceedings as an abuse of process. In his facta on the Provost's motion, Dr. S[redacted] does not deny or, indeed, call into question the assertion that the files may contain relevant documents. Rather, in his facta Dr. S[redacted] submits that the contents of both files are privileged and that any privilege has not been waived by Dr. S[redacted], either expressly or by reason of his motion.

10. The Provost's Motion is carefully tailored to identify and protect any solicitor-client privilege that may attach to documents in the two files. It does not request that privileged documents be produced. It proposes a process for the identification of privilege attaching to any otherwise relevant documents, and envisions that there will be a process to address and determine issues of privilege if they arise.

11. The Provost relies, by analogy, upon the *Procedural Protocol re Allegations of Incompetence of Trial Counsel in Criminal Cases* (the "Protocol") of the Court of Appeal for Ontario. Although the application of the Protocol is not expressly agreed to by Dr. S[redacted] for purposes of this motion, I note that its application was suggested by Dr. S[redacted]'s counsel, Mr. Pieters, in an email to Mr. Shime dated March 19, 2014. The

terms of the Order requested by the Provost are analogously similar to those which would apply under the Protocol and, in my view, the analogy is apt.

12. The touchstone of the Provost's Motion is the likelihood that the Roland File and the Shime File contain documents relevant to Dr. S[redacted]'s pending motions. I agree. Issues of privilege, if asserted by Dr. S[redacted], can be appropriately addressed and determined and such a process is contemplated by the Provost's Motion.

13. Accordingly, I grant the Order sought by the Provost on the terms set out in paragraph 6 of these Reasons. I ask counsel for the parties to confer and, if possible, reach agreement on the timetable for the process envisioned by this Order, together with any further steps that may be necessary to fulfill the terms of the Order. If the parties cannot reach agreement, I am prepared to hear submissions on and determine any points of difference.

14. I should add in closing that, as reflected in my Case Management Direction dated July 25, 2014, the parties agreed that, as Chair, I could hear and determine the Provost's Motion without the necessity to convene a full panel and that the Motion could be determined based upon the parties' written submissions.

15. I am grateful to counsel for their assistance.

September 8, 2014

F. Paul Morrison

DOCS 13716968

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto Code of Behaviour on Academic Matters, 1995,

AND IN THE MATTER OF the University of Toronto Act, 1971, S.O. 1971, c. 56 as am. S.O. 1978, c. 88

BETWEEN:

UNIVERSITY OF TORONTO

-AND-

C[redacted] S[redacted]

CASE MANAGEMENT DIRECTION

Date: August 25, 2015

Panel:
Mr. Paul Morrison, Lawyer, Chair

Appearances:
Mr. Robert Centa, Lawyer for the University, Paliare Roland Barristers
Ms. Lauren Pearce, Articling Student, Paliare Roland Barristers
Mr. Benjamin Zarnett, Lawyer for the University, Goodmans LLP
Mr. Ryan Cookson, Lawyer for the University, Goodmans LLP
Mr. Selwyn Pieters, Lawyer for Dr. C[redacted] S[redacted]
Mr. Brian Clark, Lawyer in Training, Selwyn Pieters Barrister and Solicitor

In Attendance:
Dr. C[redacted] S[redacted], former Student
Mr. Anu Koshal, Lawyer assisting the Chair Mr. Paul Morrison, McCarthy Tétrault
Ms. Louise Brown, Reporter, Toronto Star, Observer
Ms. Althea Blackburn-Evans, Director, Media Relations, University of Toronto
Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances, Tribunal Secretary

[1] At the instance of the Provost, a Case Management Conference, in person, was held August 25, 2015. This Case Management Conference ("CMC") was as contemplated in paragraph 7 of my Case Management Direction dated July 25, 2014 and pursuant to paragraph 13 of my Motion Decision dated September 8, 2014 (the "Motion Decision").

[2] For purposes of the CMC, the Provost filed a two-volume Case Conference Brief and each of the Provost and Dr. S[redacted] filed Written Submissions and a Book of Authorities.

[3] It is apparent from the materials filed that subsequent to my Motion Decision, Dr. S[redacted] delivered a document consisting of four Schedules entitled "Re: Order of Paul F. Morrison dated September 8, 2014 re directions on Roland and Shime Files" (the "Schedules"). This document consisted of four Schedules. Schedule A and Schedule C list documents from the files of the Paliare Roland firm and from the files of Jonathan Shime, respectively, that Dr. S[redacted] does not object to producing. There is no issue between the parties as to these Schedules.

[4] Schedule B and Schedule D list documents from the Paliare Roland files and from the Shime files, respectively, over which "Dr. S[redacted] asserts and maintains solicitor/client privilege". It is with respect to these documents that the Provost seeks directions pursuant to my Motion Decision.

[5] Dr. S[redacted] takes the position that the documents in Schedule B and Schedule D are privileged and maintain their privileged character notwithstanding Dr. S[redacted]'s Disqualification Motion. The Provost takes the position that all of the documents in Schedules B and D either are not privileged at all, or have lost their privileged character by reason of the issues raised by Dr. S[redacted]'s Disqualification Motion.

[6] Pursuant to my Motion Decision, I must determine whether the documents in Schedule B and Schedule D are privileged as claimed by Dr. S[redacted], or are not privileged as claimed by the Provost. The description of the documents in those Schedules is not sufficient to allow me to make that decision. I therefore make the following Direction. The terms of this Direction were the subject of submissions by counsel for both parties during the CMC, and the dates in this Direction are those suggested by counsel for Dr. S[redacted] and for the Provost, respectively.

[7] My Direction is as follows:

1. Dr. S[redacted] through his counsel, is to file a more fulsome description of each of the documents listed in Schedule B and Schedule D. The description of each document is to be sufficient to enable the Provost to make submissions with respect to the issues of privilege that are raised with respect to each such document, and to enable me, as Chair, to decide those issues.

2. Dr. S[redacted], through his counsel, is to deliver Written Submissions with respect to his position on the issues of privilege raised with respect to the documents in Schedule B and Schedule D. Those issues are apparent from the Provost's Written Submissions on this CMC, dated August 18, 2015 and are focussed on whether privilege over such documents has been lost or waived by reason of the allegations made by Dr. S[redacted] on the Disqualification Motion.

3. The document called for by paragraph 1 above, and the Written Submissions called for by paragraph 2 above, are to be delivered by no later than October 19, 2015.

4. The Provost, through her counsel, is to deliver a written statement of her position with respect to each of the documents in Schedule B and Schedule D, as they will be more fully described by the document to be delivered on behalf of Dr. S[redacted] pursuant to paragraph 1 above, together with written submissions as to the basis of the Provost's position that the documents in question are not privileged or have lost their privileged character.

5. The written statement and submissions on behalf of the Provost are to be delivered by October 31, 2015.

6. A Reply on behalf of Dr. S[redacted] to the Written Submissions of the Provost is to be delivered by November 6, 2015.

7. Included in the submissions on behalf of both Dr. S[redacted] and the Provost should be submissions on whether, if the description of the documents in question is insufficient to allow the issues of privilege to be determined, I, as Chair, am

entitled to and ought to review any such documents myself in order to determine the issues of privilege that arise.

[8] Following receipt of all of the materials and submissions discussed above, it is contemplated that I will release a Decision upon the issues of privilege that are raised with respect to the documents in Schedule B and Schedule D and directing production of any such documents that I may determine are not privileged or have lost their privileged character. Thereafter, it is likely that a further case conference will be necessary in order to address next steps for purposes of determination of the Disqualification Motion brought by Dr. S[redacted] and other matters.

[9] I am grateful to counsel for their assistance.

August 27, 2015

F. Paul Morrison
Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto Code of Behaviour on Academic Matters, 1995,

AND IN THE MATTER OF the University of Toronto Act, 1971, S.O. 1971, c. 56 as am. S.O. 1978, c. 88

BETWEEN:

UNIVERSITY OF TORONTO

-AND-

C[redacted] S[redacted]

DECISION and REASONS

1. As set out below, I have decided to withdraw as Chair of the Panel in this case. This is to record that Decision and, briefly the Reasons.

2. In an e-mail to Christopher Lang, Director, Appeals Discipline & Faculty Grievances, University of Toronto (the "Director") dated October 19, 2015, Dr. S[redacted] advises that he is aware that McCarthy Tétrault, of which I am a partner, represents the Ontario College of Teachers, which is prosecuting Dr. Spence. As a result, Dr. S[redacted] has raised whether I am biased and, inferentially, whether I ought not to preside over this case as Chair. He has not brought a motion.

3. Dr. S[redacted] is currently not represented by counsel. His previous counsel, Mr. Pieters, advised that he was withdrawing as counsel by letter dated October 5, 2015.

4. Since Dr. S[redacted] raised the question of bias, I have given the matter very careful consideration. The following are the circumstances:

   (a) I have been presiding over this case as Chair since July, 2014. I have presided over case management conferences, both by phone and in person, and have determined motions brought forward by the parties.

   (b) I first became aware that McCarthy Tétrault is acting for the Ontario College of Teachers in its prosecution of Dr. S[redacted] in August, 2015. Although I now understand that our firm was retained by the College of Teachers in or about February, 2015, I was previously unaware of that retainer.

(c) Our firm has erected a confidentiality screen. Except for having read the Notice of Hearing, I have no knowledge of the College of Teachers case whatsoever. Nor do I know when Dr. S[redacted] first became aware that McCarthy Tétrault was representing the College of Teachers. As noted above, he raised the issue for the first time by e-mail to the Director dated October 19, 2015.

5. I am familiar with the applicable law with respect to bias. I have no hesitation in recording that I see no basis for any suggestion either of actual bias or of a reasonable apprehension of bias in my role as Chair of the Panel arising out of the circumstances recited above, or at all.

6. Notwithstanding this conclusion, I feel it is best that I withdraw as Chair. I am satisfied that there is no foundation for any suggestion of bias. However, in the interests of transparency and that justice not only be done, but be seen to be done, I hereby withdraw as Chair of the Panel in this matter.

November 11, 2015

F. Paul Morrison

DOCS 15007787

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

ADJOURNMENT DECISION

[1] This is a decision with respect to the request made by Dr. C[redacted] S[redacted] ("S[redacted]") to adjourn a Case Conference scheduled for April 29, 2016 – a date not only agreed to but actually suggested by S[redacted] – over the objections of the University of Toronto ("the University"). For the reasons that follow, I determined to grant S[redacted]'s request for the adjournment of the Case Conference (and the parties have already been notified), but only on conditions that I outline below.

Background

[2] Unfortunately, it is difficult to explain the context in which this has all arisen without detailing, even if in a very summary way, the background of these proceedings and the tortured route they have taken to arrive at this point.

[3] The University filed Charges against S[redacted] pursuant to the University's *Code of Behaviour on Academic Matters, 1995* (the "*Code*") in or about March 2013. The Charges allege that in 1996, S[redacted] knowingly represented the expressions of ideas of another as

his own in the thesis he submitted for his degree of Doctor of Education. The Charges arose after the very public termination of S[redacted]'s employment as Director of Education of the Toronto District School Board ("TDSB") in connection with other incidents of alleged plagiarism.

[4] During the course of these proceedings, S[redacted] has been represented by various counsel, the last of whom advised that he was no longer representing S[redacted], in the Fall of 2015. Since that time, and currently, S[redacted] is unrepresented by counsel although he has expressed, on a number of occasions, his intention to retain further counsel. He has not yet done so.

[5] To prosecute these Charges, the University retained, as it customarily does, the law firm of Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland") as its Discipline Counsel and, in particular, Robert Centa ("Centa"), a member of Paliare Roland. While represented by his immediately preceding counsel (and not his original counsel), S[redacted] brought a motion on March 17, 2014 (approximately a year after the Charges were filed by the University) to disqualify Centa and Paliare Roland from acting as Discipline Counsel in these proceedings ("the Disqualification Motion") and also sought to stay the proceedings on the basis of a purported abuse of process. The University (retaining other counsel) opposed the Disqualification Motion and the relief sought, in part on the grounds that, to the extent that S[redacted] relies on a prior retainer of Paliare Roland by him (to represent him in connection with his earlier termination of employment by the TDSB), such a conflict was waived by S[redacted] prior to the University retaining Centa and Paliare Roland – primarily because S[redacted] was represented by prior independent counsel (counsel prior to the counsel who brought the Disqualification Motion) for almost a year during which he did not raise any conflict on the part of Paliare Roland and during which time he had full knowledge of the facts that form the basis of the Disqualification Motion.

[6] To further complicate this tortured history, a number of prior Chairs of the Tribunal have recused themselves, either voluntarily or at the suggestion of S[redacted] or his counsel. After the Disqualification Motion, the University had brought a motion before the immediately prior Chair seeking disclosure of material from S[redacted] that the University thought necessary for the resolution of the Disqualification Motion. In a decision dated September 8, 2014, the immediately prior Chair granted the University's motion and ordered

S[redacted] to produce documents ("the Production Order"). To deal with the possibility that the Production Order could involve the production of documents for which privilege could be claimed (the basis, *inter alia*, upon which S[redacted] had opposed the Production Order), the Production Order provided that S[redacted] should provide a written statement setting out the basis for any claim of privilege with respect to any documents for which such a claim was made.

[7] Notwithstanding that Production Order, S[redacted] did not comply. As a result, at the initiation of the University, the immediately prior Chair issued another Case Management Direction dated August 27, 2015 wherein S[redacted] was directed, *inter alia*, to provide a proper description of the documents over which he claimed privilege and written submissions to support that claim, by no later than October 19, 2015 ("the Case Management Direction"). Again, S[redacted] has not yet complied and the only event that has transpired is that S[redacted]'s most recent lawyer advised that he was no longer representing S[redacted].

[8] There was communication between the University and S[redacted] about compliance with the Production Order and the Case Management Direction of August 27, 2015. On or about October 19, 2015 (the date on which S[redacted]'s materials were due under the Case Management Direction), S[redacted] advised that he still intended to pursue the Disqualification Motion but "given the status of [his] legal counsel", needed an extension of unspecified length to fulfill his obligations under the Case Management Direction.

[9] With the recusal of the former Chair, I assumed carriage of these proceedings in January 2016. At my direction, the Tribunal wrote to S[redacted] asking him to advise the name of his counsel so that scheduling of these matters could be discussed. S[redacted] responded that he was out of the country until early February and "should have a response to your question then". Notwithstanding this assurance, no response was received from S[redacted].

[10] Again, at my direction, on February 3, 2016 the Tribunal wrote to the parties and advised S[redacted] that he should advise the Tribunal, no later than February 10, 2016, of his availability so that scheduling could proceed. The letter further specifically directed S[redacted], regardless of whether he had retained legal counsel or not, to provide his availability in March, April and May 2016 so that the matter could proceed "preferably but not necessarily

on a date convenient for everyone". The University, for its part, offered a number of dates upon which it would be available. The University wished to have a Case Conference scheduled in order to deal with the production (which had still not been complied with) and to determine the steps how both the Disqualification Motion and the abuse of process motion would be dealt with.

[11] S[redacted] responded on February 10, 2016 stating that he had not yet retained a lawyer but still wished to pursue the Disqualification Motion and indicated his only available dates were April 28, 29 and May 19 and 20, 2016. Although these were beyond the dates initially offered by the University, the University did agree to April 29, 2016, one of the dates suggested by S[redacted]. The Tribunal, in confirming this date, further advised S[redacted] as follows:

> Dr. S[redacted] is reminded of the previous decisions of the Tribunal and both longstanding Orders made against him – the outstanding Production Order and the order that should he wish to claim privilege with respect to any such documents ordered to be produced he is to prepare a list describing such documents and the basis of such claim. Although that appears not to have been complied with yet, it should be by this hearing date.

[12] Again, and with the hearing date for the Case Conference rapidly approaching, S[redacted] had not complied. On April 18, 2016, S[redacted] wrote to the Tribunal, copying the University:

> It remains my intent to continue with the Disqualification Motion. I have been unable to retain legal counsel at this time. Furthermore, I am navigating 2 personal issues and therefore request a 6-8 month adjournment.

[13] At my direction, the Tribunal requested their comments and submissions with respect to S[redacted]'s request.

[14] S[redacted] subsequently also provided a medical note dated April 14, 2016 signed by Dr. Dean Joseph Zizzo ("the Doctor Note"), and copied to the University which indicated:

> C[redacted] is my patient. He has been unable to work for medical reasons.
>
> He is under a great deal of stress and he needs to disengage for a period of time to gett [sic] his professional activities in order.
>
> He will follow up with me as appropriate.

I have received submissions from both the University and S[redacted] which I have carefully

reviewed.

[15] S[redacted] did not forward his submissions to the University (notwithstanding repeated prior directions by the Tribunal for S[redacted] to do so) It included some attachments which S[redacted] described as "deeply personal" and requested that they be shared only with myself as Chair (as opposed to the Doctor Note which S[redacted] acknowledged was provided to the University). S[redacted]'s submission asked that I exercise my discretion to adjourn the proceedings, otherwise S[redacted] alleged that he would be denied a reasonable opportunity to present his case, a fair process and the "right to be heard". He averted to the devastation that "has unravelled in my life" since his resignation from the TDSB. He referred to the onset of post-traumatic stress disorder, a loss of job and continuing unemployment, a "marriage seperation" [sic], "financial hardship ([that he was] working with Trustees to avoid bankruptcy)", the loss of his matrimonial home to foreclosure, and that the present situation had gone "beyond his coping ability". The enclosed documents (which S[redacted] did not wish to be shared) were an unsigned draft separation agreement dated September 2015 between S[redacted] and his spouse, a lawyer's letter dated October 29, 2015 with respect to S[redacted] no longer having any valid interest in what was apparently his former residence and, as mentioned earlier, the Doctor Note. What is significant is none of S[redacted]'s submission averts to any specific time when his life would "be in order" (either financially, in terms of his health, or otherwise) and at which time these proceedings could commence again.

Decision

[16] As I indicated earlier, in the circumstances, I have determined to grant the adjournment. Notwithstanding the University was not provided with a copy of S[redacted]'s submission (again, notwithstanding repeated prior directions by the Tribunal to S[redacted] to do so), I do not think anyone could dispute that S[redacted]'s life is in chaos and there have been serious adverse consequences that have flowed from the termination of his employment with the TDSB (which was a very public and well-known event) and led to the commencement of these proceedings by the University. Moreover, there is no immediate urgency to these proceedings – we are talking about events allegedly committed with respect to a University degree conferred approximately 20 years ago and Charges which, although filed more than three years ago, have not progressed very far In the

circumstances, a brief adjournment, even on the scanty evidence provided by S[redacted], will, in my view, cause no serious prejudice to anyone or any irreparable harm to anyone.

[17] Having said that, there is much merit in the University's position that, in essence, S[redacted] seeks an "indefinite stay of these proceedings". That, at least at this point in time, is not being granted. Simply put, with the advent of the Case Conference only days away, even in the absence of further comments by the University which I am prepared to assume would have been negative and continued to oppose the adjournment, there simply would not have been sufficient time for S[redacted], in my view, to repair the deficiencies in the evidence that he presented for the adjournment. Accordingly, in my view, in the circumstances, it was better to err on the side of a brief adjournment.

[18] I wish to make something perfectly clear. I have not accepted as necessarily true the contents of S[redacted]'s submissions because, *inter alia*, they were not provided to the University – other than for the limited purpose of granting this brief adjournment on the possibility they are true (which could entitle S[redacted] to an adjournment) and to give S[redacted] a realistic opportunity to properly establish those facts. Those facts cannot be relied on as having been established for any other purpose in these proceedings (for example, in deciding further requests or adjournments) by this adjournment decision or agreed upon unless the University agrees – which cannot happen unless S[redacted] provides copies (of this submission or any future one) to the University – and which S[redacted] is once again directed to do.

[19] Having said that, the Doctor Note that S[redacted] has provided is inadequate. If only to list the deficiencies that the University has already pointed out, it:

(a) provides no information about the timing or extent of Dr. Zizzo's treating relationship with Dr. S[redacted];

(b) provides no medical diagnosis, no information about any treatment Dr. Zizzo has provided, and no prognosis. It does not say what "the period of time" would be for Dr. S[redacted] to "get his professional activities in order" or even define the latter term. It does not say what Dr. S[redacted] was doing, or the relationship of stress to it;

(c) contains no information to suggest Dr. Zizzo was told that this note would be used at the University Tribunal or for what purpose;

(d) provides no opinion of Dr. S[redacted]'s inability to participate in the Case Conference, or in the further proceedings in this matter, provides no information as to what accommodations might alleviate any concerns if there were any.

More strikingly, notwithstanding S[redacted]'s reference to post-traumatic stress disorder or his depression and "hopelessness" in his submissions, these are in no way averted to, let alone substantiated, by the Doctor Note. However, that does not necessarily mean that they cannot be, or would not be. I simply do not know. But, for this adjournment to be for anything other than a brief period of time, S[redacted] will have to provide a better doctor's note curing these serious deficiencies. Again, in the interest of prudence and caution, and the rapidly diminishing time, it seemed better to err on the side of the adjournment and that is why it has been granted.

[20] S[redacted] is directed to provide a better and sufficient doctor's note no later than **May 24, 2016** with a copy to the University. Aside from curing the other deficiencies, that doctor's note should indicate when, in the doctor's view, these hearings can commence again. The University will have **one week** from May 24, 2016 to comment on the doctor's note and S[redacted] will have **a further week** in which to reply.

[21] Again, notwithstanding that there may not be immediate urgency in these proceedings, they cannot be held in the state of paralysis that they have been, whether that has been S[redacted]'s deliberate intention or not. It is S[redacted] who has made the Disqualification Motion. It is S[redacted] who has failed to comply with the Production Order. It is S[redacted] who has not yet retained counsel. All of this notwithstanding frequent indulgences and extensions granted to S[redacted]. Simple non-compliance by S[redacted] with all these directions or just ignoring them cannot indefinitely prevent these proceedings from continuing. I caution S[redacted] that neither the *Code* nor any rule of law necessarily requires S[redacted] be represented by counsel for these proceedings (regardless of how preferable that may be for everyone, not just S[redacted]). I further caution S[redacted] that the *Code* explicitly envisages that the Tribunal may proceed in his absence provided he has proper notice.

[22] Accordingly, subject to what may result from a new doctor's note, the Tribunal is directed to schedule this matter for the Case Conference the University seeks **within three months** of the date of this decision. If S[redacted] and the University are unable to quickly agree on a date, it will be determined at the convenience of the Tribunal. That hearing will be peremptory. Again, subject to whatever may arise out of the doctor's note or completely unforeseen circumstances, no further adjournments or indulgences (unless agreed to by the University) will be extended to S[redacted]. At that time, this Case Conference will proceed and determine how the balance of these proceedings will be dealt with.

[23] Lastly, although this may be obvious, S[redacted] would appear to be unable to rely on any further delay occasioned by this adjournment or any adjournment at S[redacted]'s request with respect to his abuse of process motion or argument about which I make no other comment.

Dated at Toronto, this 4th day of MAY, 2016

Mr. Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N:

UNIVERSITY OF TORONTO

-AND -

C[redacted] S[redacted]

INTERIM DECISION

[1] In a decision dated May 4, 2016, I granted the request made by Dr. C[redacted] S[redacted] ("S[redacted]") to adjourn a Case Conference in these proceedings scheduled for April 29, 2016 despite the objections of the University of Toronto ("the University") to doing so. That adjournment was explicitly only for a brief period of time and was granted on a conditional basis, namely, that S[redacted] provide a better and sufficient doctor's note no later than May 24, 2016, with a copy to the University, otherwise the Case Conference would be rescheduled. In addition to curing the deficiencies of the previous doctor's notes that S[redacted] provided (as enumerated in the previous decision), the better doctor's note was supposed to indicate when, in the doctor's view, these hearings can commence again.

[2] I do not wish to, again, review the tortured background of these proceedings outlined at paragraphs 2 to 15 of the previous decision. It is sufficient to say that the proceedings arise out of serious charges with respect to S[redacted]'s PhD thesis in 1996, filed against S[redacted] pursuant to the University's *Code of Behaviour on Academic Matters, 1995* (the "*Code*") in or about March 2013, over three years ago. They have not proceeded very far at all, other than S[redacted]'s challenge and motion to disqualify the University's Discipline Counsel, Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland"), which the University opposes, and which has not yet been dealt with, and the production order that has been made against S[redacted] with respect to documents arising out of that challenge and which has not yet been completely complied with. The University seeks to proceed with the expeditious processing of these charges and certainly the determination of these preliminary matters.

[3] The deficiencies of the terse previous doctor's notes were set forth in the previous decision, dated May 4, 2016:

> "[19] Having said that, the Doctor Note that S[redacted] has provided is inadequate. If only to list the deficiencies that the University has already pointed out, it:
>
> (a) provides no information about the timing or extent of Dr. Zizzo's treating relationship with Dr. S[redacted];
>
> (b) provides no medical diagnosis, no information about any treatment Dr. Zizzo has provided, and no prognosis. It does not say what "the period of time" would be for Dr. S[redacted] to "get his professional activities in order" or even define the latter term. It does not say what Dr. S[redacted] was doing, or the relationship of stress to it;
>
> (c) contains no information to suggest Dr. Zizzo was told that this note would be used at the University Tribunal or for what purpose;
>
> (d) provides no opinion of Dr. S[redacted]'s inability to participate in the Case Conference, or in the further proceedings in

> this matter, provides no information as to what accommodations might alleviate any concerns if there were any.

More strikingly, notwithstanding S[redacted]'s reference to post-traumatic stress disorder or his depression and "hopelessness" in his submissions, these are in no way averted to, let alone substantiated, by the Doctor's Note. However, that does not necessarily mean that they cannot be, or would not be. I simply do not know. But, for this adjournment to be for anything other than a brief period of time, S[redacted] will have to provide a better doctor's note curing these serious deficiencies."

[4] Since the prior decision, S[redacted] has provided two further doctor's notes. The first is dated May 16, 2016, again from Dr. Dean Joseph Zizzo, who appears to be a general practitioner, which states:

> C[redacted] S[redacted] has been under my care since 2004. Since resigning from the Toronto District School Board his mental health and well being have suffered greatly. The magnitude of the stress and humiliation experienced has produced a catastrophic degree of despair and sense of esteem that hopelessness associated with the loss of self esteem has triggered a continued state of despair.
>
> Along with shame and humiliation, the threat of imminent disciplinary action, relationship conflict and financial hardship are ongoing triggers for suicidal thoughts.
>
> **Due to C[redacted]'s current state of precarious mental health I will arrange some mental health support to develop a diagnosis and decide on a plan to go forward.**
>
> [emphasis added]

[5] A second doctor's note dated May 30, 2016 from Dr. Zizzo also provided:

> C[redacted] S[redacted] has been under my care for many years.
>
> Due to C[redacted]'s current state of precarious mental health I advise that he should not participate in any disciplinary hearings/proceedings at this time.

> A psychiatric assessment is pending. Over the next couple of months he will undergo this psychiatric assessment and I will continue to offer mental health support and treatment in the interim.

[6] The prior decision also required S[redacted] to provide dates on which he would be available for a rescheduled Case Conference (as well as giving him an opportunity to respond to any submissions by the University). The only other correspondence received from S[redacted] was an E-mail on June 7, 2016 (in response to a reminder from the Tribunal of his opportunity to respond to the University's submissions and need to provide dates he would be available) that merely stated:

> "I have provided 3 doctor notes that clearly state my precarious mental health. I have no more submissions at this time.
>
> On the advice of my doctor I am not able to participate in these proceedings at this time and therefore unable to provide any dates."

[7] Perhaps not surprisingly, notwithstanding the notes provided by S[redacted], the University continues to press that these proceedings continue and the Case Conference be scheduled.

[8] Neither unfairly, nor inaccurately, the University argues:

> "11. Neither the Second Doctor Note nor the Third Doctor Note appear to provide a medical diagnosis for Dr. S[redacted], any specific information about the treatment he is undergoing, or a prognosis. Although the Second Doctor Note refers to a "continued state of despair" and "a current state of precarious mental health", no actual medical diagnosis is given, nor treatment described. **To the contrary, the Second Doctor Note suggests that there has been no medical diagnosis and that Dr. S[redacted] is not currently undergoing treatment, as Dr. Zizzo states that he will attempt to arrange some mental health support to "develop a diagnosis" and "decide on a plan to go forward".** ...
>
> 12. Similarly, the Third Doctor Note states that Dr. S[redacted] should not participate in these proceedings due to his "precarious state of mental health", but goes on to state that "[a] psychiatric assessment is pending" and will be completed "over the next couple of months". **As it appears Dr. S[redacted] has not undergone the psychiatric assessment one would expect to be necessary to support a diagnosis of a state of mental health which precludes participating in a proceeding, a proper basis for this conclusory statement in the Third Doctor Note is lacking.**

13. The Second Doctor Note and Third Doctor Note **also fail to indicate when, in the doctor's view, these hearings can commence again. ... In the absence of such information, Dr. S[redacted]'s request for a further adjournment based on the Second Doctor Note and Third Doctor Note remains a request for an indefinite stay of these proceedings.**

14. To the extent either of the doctor notes submitted by Dr. S[redacted] attribute his state of despair or state of mental health to the aftermath of his resignation from the Toronto District School Board ("TDSB") or the threat of disciplinary action, those circumstances have existed for years. Dr. S[redacted] resigned from the TDSB in January 2013 and these proceedings were commenced in March 2013. Since that time, Dr. S[redacted] has, among other things, (i) retained and instructed two different counsel; (ii) challenged two past Chairs of the Tribunal; (iii) brought a motion to disqualify Paliare Roland Rosenberg Rothstein LLP as discipline counsel; (iii) responded to a motion for directions brought by the Provost; (iv) provided (albeit inadequate) production of documents flowing from the orders of the Chair; (v) attended at least one case conference in-person along with his counsel in respect of the above-noted matters. **There is no explanation in either the Second Doctor Note or the Third Doctor Note as to why this participation was possible, but none is now possible in relation to a case conference to address his own violations of orders of this Tribunal about how his own motion is to go forward, exacerbating a delay in the resolution of the very proceedings said to cause Dr. S[redacted] stress.**

15. Moreover, the Second Doctor Note and Third Doctor Note do not explain how Dr. S[redacted] was able, in February of this year, to give an interview to the *Toronto Star* in support of a new book he had written[5] nor conduct the activities described in the interview – writing a screenplay and attempting to sell it, authoring a book and arranging for its commercial publication and promotion – yet is unable to participate in this proceeding.[6]"

[emphasis added]

[9] It is difficult to quarrel with any of the assertions made by the University, particularly in the absence of any rebuttal from S[redacted]. In these circumstances, S[redacted] has not, notwithstanding numerous invitations to do so, established a credible basis to yet again adjourn these hearings – and to say nothing of "to when" since despite how long it has been since these proceedings have commenced, or how long S[redacted]'s symptoms may have presented themselves, there still appears to be no psychiatric assessment yet, let alone any treatment, even assuming it is required. As I observed in paragraph 21 of my previous decision:

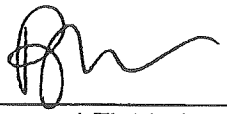
> "[21] Again, notwithstanding that there may not be immediate urgency in these proceedings, they cannot be held in the state of paralysis that they have been, whether that has been S[redacted]'s deliberate intention or not. It is S[redacted] who has made the Disqualification Motion. It is S[redacted] who has failed to comply with the Production Order. It is S[redacted] who has not yet retained counsel. All of this notwithstanding frequent indulgences and extensions granted to S[redacted]. Simple non-compliance by S[redacted] with all these directions or just ignoring them cannot indefinitely prevent these proceedings from continuing. I caution S[redacted] that neither the *Code* nor any rule of law necessarily requires S[redacted] be represented by counsel for these proceedings (regardless of how preferable that may be for everyone, not just S[redacted]). I further caution S[redacted] that the *Code* explicitly envisages that the Tribunal may proceed in his absence provided he has proper notice."

[10] In these circumstances, given the University's insistence that these proceedings continue, and given S[redacted]'s repeated failure to provide a compelling or justifiable basis to indefinitely adjourn (other than his disinclination to ever deal with these serious charges and his no doubt unhappy circumstances) contrary to the wishes of the University, I feel I have little choice but to schedule this Case Conference for **Monday, August 29, 2016 at 4:00pm.**.

[11] I note that this is only a Case Conference and not the actual hearing of the Charges themselves. The Case Conference is only to deal with the further production that S[redacted] has failed to make, notwithstanding the previous orders of the Tribunal, and how to determine a procedure to deal with S[redacted]'s disqualification motion of Paliare Roland that S[redacted] appears to be determined to pursue (which, of course, is his right).

[12] I do not wish to appear to be any harsher than these circumstances already compel. If S[redacted] can produce a doctor's note that actually justifies and substantiates the need for the adjournment that he seeks, with the reasonable prospect that they would recommence at a reasonable time in the future (as opposed to being permanently or indefinitely put off unilaterally by S[redacted], as now appears to be the case), S[redacted]'s adjournment request can be reconsidered yet again prior to that hearing date of August 29, 2016 – and of course there is always the possibility of S[redacted] retaining counsel to deal with at least these preliminary issues, which he has repeatedly asserted he wishes to do since the withdrawal of his last counsel approximately 9-10 months ago.

Dated at Toronto, this 13th day of June, 2016



Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C [redacted] S [redacted]

INTERIM DECISION

Date: August 29, 2016

Panel:
Mr. Bernard Fishbein, Lawyer, Chair

Appearances:
Mr. Benjamin Zarnett, Assistant Discipline Counsel, Goodmans LLP
Mr. Ryan Cookson, Counsel, Goodmans LLP
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Krista Osbourne, Administrative Assistant, Office of Appeals, Discipline and Faculty Grievances
Mr. Sean Lourim, Office of the Governing Council

Not in Attendance:
Dr. C [redacted] S [redacted], former Student

[1] Further to my interim decisions of May 4, 2016 (which had adjourned a Case Conference for April 29, 2016) and June 13, 2016, this Case Conference was scheduled for August 29, 2016 at 4:00 p.m. It was at the University's request to deal with Dr. S [redacted]'s continuing failure to make the productions to the University previously directed in order to

deal with Dr. S[redacted]'s preliminary motion to have University Discipline Counsel removed and these proceedings stayed for abuse of process (and ultimately how to deal with Dr. S[redacted]'s main preliminary motion as well). There is no need to go further into the background which is set out more fully in both those interim decisions. Notice of this Case Conference was given to Dr. S[redacted].

[2] Dr. S[redacted] wrote to me at the Tribunal on August 22, 2016. Although he did not explicitly ask for the Case Conference to be yet again adjourned, it was clear he did not wish the conference to proceed due to the "precarious" state of his health. The letter adverted to a psychiatric appointment scheduled on September 13, 2016 (barely more than two weeks away) after which Dr. S[redacted] indicated that he would "provide a psychiatric assessment shortly thereafter".

[3] The August 29, 2016 Case Conference was scheduled to commence at 4:00 p.m. I waited until after 4:15 p.m. Perhaps not surprisingly, Dr. S[redacted] was not present – nor did he attend at any time during the course of the Case Conference.

[4] I am fully aware of my authority both under the Tribunal's Rules of Practice and Procedure and the *Statutory Powers Procedure Act* to proceed in the absence of Dr. S[redacted] provided he had notice of this Case Conference – of which there can be no dispute in light of Dr. S[redacted]'s letter to me of August 22, 2016. I myself have done so a number of times in other Tribunal proceedings.

[5] In the circumstances, I asked the University how it wished to proceed. The University indicated it wished to proceed notwithstanding Dr. S[redacted]'s absence (and in accordance with their previously served written submissions, have all of Dr. S[redacted]'s preliminary motions dismissed in view of his failure to comply with the previous production directions). The University, quite accurately, noted that the consequences of failure to comply and the options open to him to avoid those consequences had been clearly pointed out to Dr. S[redacted] in my previous interim decisions. This was not the first or second request for adjournment Dr. S[redacted] had been granted (and he had still failed to provide a satisfactory or sufficient doctor's note) and the record of past indulgences granted to Dr. S[redacted] (not just in my interim decisions but in the decisions of prior Chairs of the Tribunal and by University Counsel beforehand) had not only failed to induce Dr. S[redacted]s

compliance, but could justify no confidence that yet another indulgence would produce any different result from Dr. S[redacted].

[6] I have carefully considered the University's submissions. Although I too have no great confidence that a further adjournment will necessarily produce a proper and satisfactory psychiatric assessment (notwithstanding Dr. S[redacted]'s assurances) or any compliance with the long outstanding production directions, I have decided that in these circumstances, the balance, if only barely, weighs in favour of yet again adjourning this Case Conference. Simply put, for charges filed over three years ago (with respect to incidents now twenty years ago) with the serious repercussions that these Charges could have, it is difficult not to delay for a psychiatric appointment only two weeks away. In these circumstances, I am of the view it is wiser to err on the side of a very brief adjournment.

[7] I wish to make clear to Dr. S[redacted] that barring completely unforeseeable circumstances, he has likely exhausted the patience of the Tribunal for any further adjournments. He is directed to provide his psychiatrist with a copy of this (and the other interim) decisions and request that the psychiatric assessment be provided no later than September 30, 2016. To the extent that Dr. S[redacted] may rely on this psychiatric assessment to justify any further delay in these proceedings, he is directed to immediately deliver it to the Tribunal and the University and its counsel, together with any request by him for further delay of the proceedings. But for concern under the *Freedom of Information and Protection of Privacy Acts* raised by the University, that disclosing Charges under the Code, or the nature and information disclosed in these proceedings, might be disclosing personal information to third parties, without the consent of Dr. S[redacted], I would have made the directions to the psychiatrist directly myself.

[8] Again, this last indulgence is granted only because Dr. S[redacted]'s psychiatric appointment is only two weeks away. To prevent this from amounting (or arguably continuing to amount) to an endless attempt by Dr. S[redacted] to ensure that these Charges under the Code brought by the University are never dealt with, this adjournment is for a very brief period – only to **October 5, 2016 at 4:00 p.m.** – time sufficient for Dr. S[redacted] to attend his psychiatric appointment and obtain the psychiatric assessment. That hearing will be peremptory. Short of a proper and ample psychiatrist assessment saying Dr. S[redacted] is unable to attend or continue with these proceedings, the hearing of this Case Conference

will take place on October 5, 2016, at 4:00 p.m. in the Governing Council Boardroom (Room 209), Simcoe Hall, at which time, even in Dr. S[redacted]'s absence, the Tribunal may very well consider and find favour with all of the University's submissions including its position that Dr. S[redacted]'s preliminary motion be deemed abandoned in view of his longstanding refusal to make the production already directed of him for some lengthy period of time.

Dated at Toronto, this 1st day of September, 2016

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C [redacted] S [redacted]

INTERIM DECISION

Hearing Date: October 5, 2016

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Benjamin Zarnett, Assistant Discipline Counsel, Goodmans LLP
Mr. Ryan Cookson, Counsel, Goodmans LLP
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Tracey Gameiro, Associate Director, Office of Appeals, Discipline and Faculty Grievances
Mr. Sean Lourim, Office of the Governing Council
Ms. Althea Blackburn-Evans, Director, Media Relations

Not in Attendance:
Dr. C [redacted] S [redacted], the Student

[1] In yet another interim decision dated September 1, 2016, I rescheduled this Case Conference for October 5, 2016. The long tortured history of these proceedings has been adequately outlined in that decision and the prior interim decisions of May 4 and June 13,

2016. In this last decision, I gave fairly explicit instructions about what Dr. S[redacted] was to do, and indicated that Dr. S[redacted] had "likely exhausted the patience of the Tribunal for any further adjournments" and this hearing was, again, being scheduled as peremptory. Notwithstanding all of this, on October 2, 2016, Dr. S[redacted] sent the following e-mail to the Tribunal:

> Dear Mr. Chair
>
> I have been diagnosed with "Major Depressive Disorder" a full confidential report is available from my family doctor. I will make arrangements to provide you with the assessment and the accompanying note advising me not to participate in these proceedings.
>
> Given my precarious mental health I am doing the best that I can to meet your deadlines. Your continued patience and understanding are appreciated.

No copy was provided to the University.

[2] As a result, at my direction, the Tribunal e-mailed Dr. S[redacted] on October 3rd:

> The Tribunal acknowledges receipt of your e-mail of October 2, on the eve of your scheduled hearing of October 5, as directed by the decisions of the Chair attached. Your letter has been forwarded to the Chair and in accordance with both the Decision and his most recent directions to the Tribunal--as any notion of natural justice would require. Your e-mail does not comply with the fairly explicit directions of the Decisions. You should understand that as things presently stand--and unless directed otherwise by the Tribunal, the hearing for October 5 will proceed as scheduled including the motion of the University filed last week. If you are seeking an adjournment of this hearing the Chair advises that your e-mail and the accompanying letter is neither explicit, adequate or sufficient--for all the reasons made clear in the decision and the prior interim decisions.

[3] Early in the morning of October 5th (at 12:22 a.m.), Dr. S[redacted] again e-mailed the Tribunal:

> Dear Mr Lang
>
> Please pass these confidential documents onto the Chair.
> I am drowning in depression and doing my best to respond to this invasive scrutiny of the most intimate and private details of my mental health.
> I have attached the confidential psyc assessment for the Chair.
> I am unable to participate in these proceedings.
>
> Respectfully,

No copy was provided to the University.

[4] The Tribunal hearing proceeded as scheduled at 4:00 p.m. on October 5th. Not surprisingly, after waiting until 4:15 p.m. in the vain hope that Dr. S[redacted] might attend, he did not and the hearing commenced.

[5] The University's position was that I not take into account any of these last submissions or documents that Dr. S[redacted] had provided. Not only were they not in compliance with any of the directions of the previous decisions, but they had deprived the University both an opportunity to review them and respond and to possibly assist the Tribunal in its deliberations.

[6] There is much to be said for the University's position, but in the end I have decided to have regard to Dr. S[redacted]'s late and last-minute submissions. Albeit late, he has provided a lengthy psychiatric report. Although it does not clearly answer many of the questions raised (and can fairly be said to perhaps raise more questions than it answers), it does raise some questions about Dr. S[redacted]'s health and whether he is able to participate in these proceedings or not. I am not a psychiatrist – and neither wish to disregard what may be significant evidence available to me nor attribute more weight to medical terms and opinions than they warrant.

[7] Notwithstanding Dr. S[redacted]'s characterizing his submissions and medical reports as confidential and to be disclosed only to me, after receiving appropriate assurances from the University, they were provided with a copy of the psychiatrist's report. Not only had the previous interim decisions directed Dr. S[redacted] to provide the University with copies of the documents or reports he intended to rely on, but in my view, the basic tenets of natural justice demanded it – Dr. S[redacted] could not be entitled to take a position to delay these proceedings contrary to the wishes and the position of the University based and relying on evidence he was not prepared to share with them. The University assured me that Dr. S[redacted]'s medical information would be used only for the purpose of these proceedings and no other, would be shared only with those instructing counsel with respect to these proceedings, and experts or professional advisors retained by the University to review and comment on them. In the event the University received a request from anyone else to provide a copy, it would not do so without notice to Dr. S[redacted] and an opportunity to him to make submissions on such a request.

[8] The University wished me to go further and instruct the Tribunal (and Dr. S[redacted]) that, should he again forward documents to my attention without also providing a copy to

the University, such documents be returned to Dr. S[redacted] by the Tribunal without being forwarded to me. I do not think I need go that far. Rather, I advise Dr. S[redacted] that, except in the most extraordinary circumstances or some very compelling explanation provided by Dr. S[redacted], any documents he forwards to the Tribunal without providing a copy to the University will virtually always automatically and simultaneously be forwarded to the University when they are provided to me, or returned to Dr. S[redacted]. To a large degree, it is his choice.

[9] Not surprisingly, having just received the psychiatrist's report, the University wished to consider its position and whether the University required more information from the psychiatrist or whether the University wished to have the report reviewed by its own experts. To the extent the University wishes Dr. S[redacted]'s doctors to provide the University with more relevant information, I am directing that Dr. S[redacted] consent to the doctors doing so, subject to any submission he may make to me about any alleged inappropriateness about the University's further questions. I am directing that the Tribunal provide a copy of this interim decision to Dr. S[redacted]'s doctors. To the extent Dr. S[redacted] refuses to cooperate, he is warned, that may dramatically affect any weight to be given to his medical evidence that he refuses to allow to be appropriately questioned.

[10] In order for the University to properly consider its position in response to these latest submissions and medical report of Dr. S[redacted], the University has until **November 11, 2016** to file with the Tribunal any submissions it wishes to make including any other medical reports (with copies to Dr. S[redacted]). If Dr. S[redacted] wishes to make any submissions in response, he is to do so, with copies to the University, by **November 21, 2016**.

[11] This hearing is adjourned until **December 1, 2016 at 4:00 p.m.**, at which time the Tribunal will determine whether to proceed further and deal with the University's motion with respect to Dr. S[redacted]'s earlier motion to remove University Discipline Counsel and/or to dismiss these proceedings as an alleged "abuse of process", and for directions how to proceed with the merits of the University's charges of academic misconduct against Dr. S[redacted]. Yet again, I have erred on the side of Dr. S[redacted]'s health – but Dr. S[redacted] is specifically warned that, short of compelling medical reasons, his non-cooperation, and continued ignoring or flaunting of the Tribunal's procedural directions will not be permitted to result in a *de facto* indefinite stay of these charges against him.

Dated at Toronto, this 19th day of October, 2016

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013, **AND IN THE MATTER OF** the University of Toronto *Code of Behaviour on Academic Matters, 1995,*

AND IN THE MATTER OF the *University of Toronto Act,* 1971, S.O. 1971 c. 56 as amended S.O. 1978, c. 88.

BETWEEN:

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

INTERIM DECISION

Hearing Date: December 1, 2016

MEMBERS OF THE PANEL:
Mr. Bernard Fishbein, Chair

APPEARANCES:
Mr. Benjamin Zarnett, Assistant Discipline Counsel, Goodmans LLP
Mr. Ryan Cookson, Counsel, Goodmans LLP
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Emily Home, Student-at-Law, Paliare Roland Barristers

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Tracey Gameiro, Associate Director, Office of Appeals, Discipline and Faculty Grievances
Mr. Sean Lourim, Technology Assistant, Office of the Governing Council

Not in Attendance:
Dr. C[redacted] S[redacted], the Student

[1] The long saga of these proceedings against Dr. C[redacted] S[redacted] has been set out in many of my previous decisions, and in particular the decision of May 4, 2016 (which the University of Toronto (the "University") refers to as my "first adjournment decision") and in particular at paragraphs 2 to 15. I will not set that background out again here.

Do we proceed?

[2] In my decision of October 19, 2016 which the University refers to as my "fourth adjournment decision" I, again, out of an abundance of caution, adjourned this Case Conference to December 1, 2016 in order to provide the University an opportunity to respond to the letter and psychiatric report that Dr. S[redacted] had filed on the eve of the last Pre-Hearing Conference on October 5, 2016, (which again were well after the deadline that had been set for filing of materials in the previous decision).

[3] The University did so, including obtaining and filing the report of Dr. Lisa Ramshaw, a forensic psychiatrist whom the University had provided all of the previous documents, including the previous medical notes filed by Dr. S[redacted]. The University did so in compliance with directions I had set in the fourth adjournment decision, namely, filed it by November 11, 2016 and served a copy on Dr. S[redacted]. That fourth adjournment decision also provided Dr. S[redacted] an opportunity to make any submissions in response by November 21, 2016 (with copies to the University).

[4] Again, the Tribunal received on the eve of this Case Conference, well after that deadline further correspondence on behalf of Dr. S[redacted]. This correspondence was from The Daisy Group and stated:

> We are long-time advisors to Dr. C[redacted] S[redacted], OCT. We are also his friends and are primarily writing to you in that capacity.

> As per the attached, a letter from Dr. Zizzo that was faxed to Dr. Lang's office several weeks ago, Dr. S[redacted] will not be in attendance on December 1, 2016.
>
> ...
>
> As you are perhaps aware, Dr. S[redacted] has been diagnosed by several medical professionals to be in the grip of deep depression – **before, during and after his time as the Director of the Toronto District School Board.**
>
> It was this impairment, this medically-diagnosed deep depression, that persuaded **Dr. S[redacted]'s doctors to insist that he stay away from the U of T's process.**
>
> We are concerned that such a process may violate the principles of natural justice. We are concerned that it denied Dr. S[redacted] the opportunity to be heard in a way that did not worsen his mental and emotional state.
>
> [emphasis added]

[5] Accompanying this letter from The Daisy Group was another letter from Dr. Dean J. Zizzo dated October 31, 2016. The relevant portions of that note provided:

> Mr. S[redacted] was in to see me today regarding his depression and to review his recent phychiatric assessment. As you know he has been diagnosed by Dr. Jehaan Illyas with Major Depressive Disorder. Dr. Illyas has provided very specific treatment instructions but did not initiate treatment.
>
> I have started him on the suggested medications and am pursuing his other recommendation with my mental health counsellor. The cost of counselling and medications are an issue for him.
>
> Unfortunately, there are some waiting lists for some of these recommendations and the treatment requires a period of time to be effective.
>
> I **would suggest** that Mr. S[redacted] not participate in the disciplinary hearing during this early treatment phase as **it will possibly complicate his recovery.**

> I remain under the direction of the psychiatrist and will re-refer Mr. S[redacted] back to psychiatry if we require further treatment recommendations or guidance.
>
> [emphasis added]

[6] For the record, contrary to what was suggested in this recent correspondence The Daisy Group, Dr. Zizzo's letter (albeit dated October 31, 2016) was not received by the Tribunal ("Mr. Lang's office") until the very same time that the letter from The Daisy Group arrived, namely on the eve of this Case Conference.

[7] Again, as has been the unfortunate pattern in all of these prior case conferences, the conference was scheduled to commence at 4:00 p.m., Dr. S[redacted] was not in attendance (as the letter from The Daisy Group had indicated he would not be). Notwithstanding that, the Tribunal waited until 4:15 p.m. in the vain hope that Dr. S[redacted] might attend. He did not. The hearing commenced at 4:15 p.m.

[8] The University once again opposed any further extensions or adjournments being granted to Dr. S[redacted] and requested that the matter proceed. For the reasons that follow, I have accepted the University's submissions this time.

[9] First, it is important to remember what we are actually dealing with here. It is not the merits of the charges of academic misconduct made against Dr. S[redacted] under the University's Code of Behaviour on Academic Matters, which are still to be determined. Rather, is it the University's motion for a case conference on how to deal with Dr. S[redacted]'s motion made more than two years ago to remove Paliare Roland, and in particular, Mr. Centa, the University's Discipline Counsel, because of an alleged conflict of interest or an alleged abuse of process ("the disqualification motion") because of Dr. S[redacted]'s previous representation by Mr. Roland, another Paliare Roland lawyer. Dr. S[redacted]'s

disqualification motion has not proceeded, primarily, if not exclusively, due to Dr. S[redacted]'s continuing refusal, or failure, to make the production previously ordered by the Tribunal of relevant documents to deal with the disqualification motion (or at least outline the basis on which any privilege was claimed with respect to them). This case conference sought by the University for such directions has been adjourned at least four times by me (over the objections of the University) in an attempt to accommodate Dr. S[redacted] and hopefully obtain more definitive or specific information about his state of health or his implied inability to participate in or continue with these proceedings.

[10] Underlying all of this, are the charges of academic misconduct that were filed on March 15, 2013, more than three and a half years ago. Although it is true they relate to academic misconduct that occurred in the 1990s, this does not necessarily mean that there is absolutely no urgency to them. The subject of the charges are whether Dr. S[redacted] engaged in academic misconduct (in particular, plagiarism) in obtaining his PhD from the University. The issue is whether Dr. S[redacted]'s PhD was legitimately obtained or not. As the University points out, Dr. S[redacted] continues to trade upon, or hold himself out as having received that PhD legitimately. As the University argues, the issue of the University's credibility in issuing post-graduate degrees is in question. Moreover, it is not only a question of just Dr. S[redacted]'s graduate degree. The legitimacy of any degree from the University is called into question for all those who are working towards or currently hold one. If Dr. S[redacted]'s graduate degree was legitimately obtained, then it is time for any cloud to be removed.

[11] The attempts to move these hearings ahead have been derailed to a large extent by Dr. S[redacted] himself. A year after the charges were laid and after changing counsel, it is Dr. S[redacted] who brought the disqualification motion with respect to the University's counsel. Although I do not in any way begrudge Dr. S[redacted]'s entitlement to bring such a motion, when the University sought production in connection with that motion, Dr. S[redacted] again resisted such

production and failed to cooperate. Although, again I do not begrudge Dr. S[redacted]'s entitlement in any way to resist production, hearings were held by the Tribunal and production ordered. Dr. S[redacted] has failed to comply with those production orders not withstanding numerous requests, numerous indulgences, and further directions by the Tribunal. Hence the University seeking a case conference for further direction on how to proceed.

[12] Now, Dr. S[redacted] professes illness that precludes him from participating in these proceedings. Again, no one begrudges that a legitimate illness that precluded Dr. S[redacted]'s participation could inevitably and justifiably lead to a delay in these proceedings. However, the University disputes that such illness exists and Dr. S[redacted] has been given numerous adjournment opportunities to adequately substantiate medically that he is unable to participate in these proceedings. He has consistently failed to do so.

[13] Merely by way of example, the last letter from The Daisy Group asserts that "Dr. S[redacted]'s doctors **insist** he stay away from the U of T's process." That is simply not correct. No doctor has clearly "insisted" that Dr. S[redacted] "stay away from the U of T's process". The lengthy psychiatric assessment that Dr. S[redacted] provided from Dr. Illyas on the eve of the previous scheduled Case Conference, nowhere explicitly stated that Dr. S[redacted] was unable to participate in these proceedings. Moreover, that Daisy Group letter now suggests for the first time that the deep depression that Dr. S[redacted] suffers from was "before, during and after his time as Director of The Toronto District School Board" – well before these proceedings were commenced (or even contemplated), let alone well before Dr. S[redacted] first raised his health as an issue in these proceedings (which was also well after these proceedings had commenced and progressed, to the extent they have progressed). The last letter from Dr. Zizzo states that Dr. Zizzo "would **suggest** that Mr. S[redacted] not participate in the disciplinary hearing" and without at all attempting to be overly semantic, a suggestion is a far cry from insistence.

[14] Were that not more than enough, the University has now taken all of Dr. S[redacted]'s medical reports that he has provided to date including the lengthy psychiatric assessment of Dr. Illyas (with the exception of the last letter from Dr. Zizzo dated October 31, 2016) and presented them for review to a forensic psychiatrist, Dr. Ramshaw, whose credentials appear unimpeachable (and the University provided the Tribunal with her lengthy curriculum vitae). Dr. Ramshaw has provided a report that is unequivocal – the material is "insufficient to conclude that he is psychiatrically incapable of participating in the proceedings". Dr. Ramshaw's report presents several reasons for reaching that conclusion, which are all compelling and persuasive. In particular, leaving aside that Dr. S[redacted]'s reports appear to be based on Dr. S[redacted]'s own self-reporting, which is at best subjective, there is no dispute that throughout this time Dr. S[redacted] continues to travel to and from work in Chicago. Quite compellingly, Dr. Ramshaw raises this as a "disconnect" with any medical assessment that Dr. S[redacted] is unable to participate in these proceedings.

[15] Dr. Ramshaw's report together with the University's materials were provided to Dr. S[redacted]. They were provided to Dr. S[redacted] weeks before this hearing of December 1, 2016. There has been no response from Dr. S[redacted] or his doctors, and, in particular, to the clear report of Dr. Ramshaw. The only response has been the letter from The Daisy Group which includes the letter from Dr. Zizzo dated October 31, 2016. However, none of this even raises Dr. Ramshaw's report, let alone rebuts or answers the concerns raised by Dr. Ramshaw.

[16] In the circumstances, I am no longer prepared to continue adjourning this Case Conference over the objections of the University as I have repeatedly done in the past. I orally indicated that I would proceed at the hearing on December 1, 2016.

What next?

[17] The University urged me therefore to now just dismiss (or treat as abandoned) the disqualification motion both because Dr. S[redacted] had failed to appear and because he had repeatedly refused to make the production required to deal with the disqualification motion. Both the Code and the Tribunal's jurisprudence provide ample authority to proceed in the absence of one of the parties having notice of these proceedings and there is no question of notice to Dr. S[redacted]. I was not prepared to do that just yet – solely on the basis of Dr. S[redacted]'s non-attendance. Rather, I indicated to the University that on the facts not in dispute (or as advanced by Dr. S[redacted]) I also wished to hear the University's submissions as to why Dr. S[redacted]'s disqualification motion should fail. I indicated to the extent necessary, I was prepared to draw adverse inferences concerning any documents that were referred to that Dr. S[redacted] had failed to produce in accordance with the previous direction of the Tribunal. In the end, that was largely unnecessary, as the University essentially relied on Dr. S[redacted]'s own motion brief, his own affidavit and the exhibits attached to his affidavit. After a brief adjournment, the University made its submissions. Accordingly, even if I were not already disposed to dismiss the disqualification motion as abandoned solely on the basis of Dr. S[redacted]'s failure to attend or failure to make out a case why he could not attend, I would do so on the merits for the reasons that follow.

[18] As the University pointed out to me, the law with respect to disqualifying conflicts of interest distinguishes between the duties owed to former clients and the duties owed to current clients. See *R. v. Neil* [2002] 3 S.C.R. 631 (a case that was included in the authorities from Dr. S[redacted]'s motion record on the disqualification motion). The duty to former clients is largely concerned with confidential information and the duty to current clients deals with the duty of loyalty in respect of whether or not there is a risk of disclosure of confidential information. In any event, the conflict may be waived by informed consent, expressed or implied.

[19] For current clients, there is what has been described as a "bright line test":

> "The bright line is provided by the general rule that a lawyer may not represent one client's interest and directly adverse to the immediate concerns of another current client – *even if the two mandates are unrelated* – unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer reasonably believes that he or she is able to represent each client without affecting the other"

See *Neil, supra* at paragraph 29.

[20] With respect to former clients, conflict of interest is specifically addressed in Rule 2.04 of the Rules of Professional Conduct of the Law Society of Upper Canada. In particular, Rule 2.04(4) prohibits "a lawyer acting for a client in a matter from subsequently acting against that client ... save as provided by sub-Rule 2.04(5)" (and even then "if the lawyer has obtained from the other retainer relevant confidential information"). Those prescribed conditions in Rule 2.04(5) include the former client consenting to the "lawyer's partner or associate acting" or the law firm establishes the "adequacy and timing of the measures taken to ensure no disclosure of the former client's confidential information" occurred to the new lawyer acting.

[21] In the circumstances here, the University says clearly that with respect to Paliare Roland, at its highest, Dr. S[redacted] stands in the position of a former client. Again this can be gleaned just from the materials that Dr. S[redacted] filed in the motion record in support of his disqualification motion. I might also point out that not only is this information that Dr. S[redacted] in his own motion placed before the Tribunal, but any further information from Mr. Roland (which the Tribunal had earlier ordered been disclosed) is not only material that Dr. S[redacted] refused to disclose allegedly claiming that it was privileged, but then also refused to outline the basis or nature of such privilege, even though directed to do so by the Tribunal.

[22] In any event, Mr. Roland in an email dated March 7, 2014, to Mr. Pieters, Dr. S[redacted]'s then (and second) counsel, clearly took the position that his former representation of Dr. S[redacted]:

> "...was in respect of his employment and the termination of his employment as Director of the Toronto District School Board. **My representation of C[redacted] was unrelated to the University of Toronto.** My email, sent out below, was sent to C[redacted] after I read the newspaper report earlier the same day which indicated that there were allegations concerning C[redacted] that involved the University after I spoke to C[redacted]. **By this time my work for C[redacted] had concluded.**
>
> C[redacted] acknowledged receipt of the email, below. C[redacted] had not raised or discussed this issue with me from January 11, 2013, to the present.
>
> I have had no involvement whatsoever in the proceedings between your client and the University."
>
> [emphasis added]

[23] The earlier email that Mr. Roland referenced was an email of January 11, 2013, which Mr. Roland had sent Dr. S[redacted], almost 14 months earlier. It is worth reproducing in its entirety:

> "This email follows upon our conversation few minutes ago. I have informed you that our firm acts for the University of Toronto in respect of academic misconduct. This is work that member of my firm have done for many years. In light of today's reported news concerning alleged plagiarism by you in an OISE PhD thesis, I have informed you that, as you are our client, our firm can not act for the University on such matters, without your consent.
>
> I have also informed you that I will not personal [sic] act on or have any involvements in such matters. **As you know, I have neither information from you nor any acknowledge of these matters as a result of our solicitor/client relationship.**
>
> **On this basis you advised me that you consent that our firm act for the University of Toronto in respect of any matter involving your student academic activities at the University. Our firm shall institute a "Chinese wall" that isolates me from any**

> **knowledge or involvement with the matters between you and the University of Toronto.**
>
> **I also told you that I would provide you with the name of a lawyer who is experienced and generally well regarded in the representation of students at the University against whom allegation are brought of academic misconduct, including plagiarism. You confirmed that you would like me to forward the lawyer's name and contact information to you. It is attached."**
>
> [emphasis added]

[24] The attached information was contact information for Mr. Jonathan Shime, whom the record indicates that Dr. S[redacted] retained to represent him with respect to the University's charges for almost a year until Mr. Shime resigned and was replaced by Mr. Pieters (and who subsequently initiated the disqualification motion on Dr. S[redacted]s behalf).

[25] Whatever the test for informed consent is, and it requiring full disclosure, there can be no dispute on the basis of this email at least, that full disclosure was made by Mr. Roland of all of the relevant details.

[26] In fact, among the documents that Dr. S[redacted] refused to produce (or specify the basis upon which he asserted privilege over them) is communication between Dr. S[redacted] and Mr. Shime on January 11, 2013, the very same day as Mr. Roland's email to Dr. S[redacted] explaining Mr. Roland and his law firm's position and forwarding the name of Mr. Shime. Again, as the record clearly indicates Mr. Shime continued to represent Mr. Roland for some time with respect to these matters until ultimately resigning in February 2014 (a year later) and ultimately being replaced by Mr. Pieters. It seems more than fair to conclude that not only was full disclosure made to Dr. S[redacted] by Mr. Roland, but Dr. S[redacted] had every opportunity to consult with independent legal counsel, namely, Mr. Shime, about it.

[27] Although I think that is already clear, in the event that there were any doubt, it is removed by Mr. Shime's email of February 14, 2014 to Dr. S[redacted] wherein Mr. Shime terminated his representation of Dr. S[redacted]. Again, this was one of the few documents that Dr. S[redacted] did produce and again is contained in Dr. S[redacted]'s materials in support of the disqualification motion. It is not necessary to quote this email of February 10, 2014 from Mr. Shime to Dr. S[redacted] in its entirety, but to point out this discussion between Mr. Shime and Dr. S[redacted]:

> "...you noted that Mr. Roland had acted for you in relation to TDSB and that now that Mr. Centa, of the same firm was prosecuting the case at U of T. I understand you signed a waiver in relation to any conflict. [Such waiver has never been produced and it appears that was not the case notwithstanding Mr. Shime's apparent understanding and belief] You also noted that Mr. Roland and Mr. Centa independently recommended me to you to assist you.
>
> I understand completely why this was of a concern to you. If I were in your shoes I would be asking the same questions. **This is something you and I had discussed on several occasions, and it was a serious enough concern that I consulted with one of my partners about the issue. Ultimately, our advice had been not to raise the conflict** because I was of the view that we were better off with Mr. Centa as a prosecutor because I know him well and believe him to be a very fair and decent-minded lawyer and prosecutor. We could not be assured of the same if he was replaced. Given how fairly Mr. Centa has dealt with the matter to date, I feel that my advice to you was the correct advice.
>
> ....In my view, you should have a lawyer who will raise any issue, including this one if you so desire. I would hate for you to come to the end of the process and feel that your lawyer had not done everything possible to advance your case. You deserve to have a fair process and a lawyer who will make every argument you feel is necessary to ensure a fair process.
>
> Accordingly, while I would love to assist you with this matter through to the end I think you should find other counsel, for your own state of mind and level of comfort."
>
> [emphasis added]

[28] Again, whatever the wisdom of the advice that Dr. S[redacted] sought and accepted from Mr. Shime, and whatever Dr. S[redacted] subsequently (more than a

year later) thought of that advice, it is clear that not only did Dr. S [redacted] have an opportunity to obtain independent legal advice, but actually did so and was content to rely on that advice and acted upon it for the better part of over a year.

[29] The only answer to any of this that Dr. S [redacted] raised is that Mr. Shime was either incompetent or himself too close to Mr. Centa and therefore in a conflict of interest himself – an allegation which pretty much was only baldly made. However, any documents from Mr. Shime's file that could somehow substantiate or corroborate this were essentially what Dr. S [redacted] failed to produce. In the circumstances, the University wishes me to draw an adverse inference that no documents exist or that any documents that did, would not support such an allegation.

SUMMARY and CONCLUSION

[30] Accordingly, I accept the University's submissions, that even if I was not prepared to find Dr. S [redacted]'s disqualification motion abandoned by virtue of his repeated failure to attend and, if not pursue it, at least make arrangements on how it should be processed (to say nothing of his failure to produce the documents relevant to the disqualification motion as the Tribunal had previously directed him to do – or even outline the basis on which Dr. S [redacted] claimed privilege with respect to the documents in order to exclude them from production, again as the Tribunal had previously directed him to do), even on the record advanced by Dr. S [redacted], there is no conflict of interest on the part of University discipline counsel, Paliare Roland, and in particular Mr. Centa, the partner of Mr. Roland, Dr. S [redacted]'s former counsel, because:

(a) the matter which Dr. S [redacted] had Mr. Roland represent him had concluded before the University sought to retain Mr. Centa with respect to the academic misconduct charges against Dr. S [redacted] – making Dr. S [redacted] at best a former client.

(b) The matter in which Mr. Roland (and Paliare Roland) represented Dr. S[redacted] was a completely separate and unrelated matter (the termination of his employment by the TDSB) to the academic misconduct alleged to be committed by Dr. S[redacted] decades earlier for which the University retained Mr. Centa (and Paliare Roland), and Mr. Roland could not have any confidential information about this (nor did Dr. S[redacted] specifically allege that he had).

(c) In any event, Paliare Roland imposed a "Chinese Wall" between Mr. Roland and Mr. Centa, to ensure no involvement of Mr. Roland with Mr. Centa's representing the University against Dr. S[redacted] (and there is no suggestion by Dr. S[redacted] or anyone that this measure was ineffective or compromised).

(d) Full disclosure was made to Dr. S[redacted] by Mr. Roland on January 11, 2013, and Dr. S[redacted] was immediately in contact with independent counsel (Mr. Shime), whom he either contemporaneously or subsequently retained, and with whom he discussed this conflict issue and from whom he received advice which be accepted and relied upon for over a year, until his representation by that counsel ended, and the conflict issue was later raised and, the disqualification motion was made by his subsequent counsel. Certainly to that point of time (well over a year) it is more than fair to say that Dr. S[redacted] had waived or consented to any possible conflict – and certainly acted in a manner to convey that consent or waiver. The suggestion that this could be adequately explained either by Mr. Shime's incompetence or his own conflict *vis a vis* Mr. Centa, other than being baldly alleged is simply not supported by any particulars or alleged facts.

[31] In these circumstances, whether because it had effectively been abandoned by Dr. S[redacted], or because on the merits there is either no conflict of

interest, or if there was, it has effectively either been waived or consented to by Dr. S[redacted], the disqualification motion is dismissed. I should note that from time to time the disqualification motion also alluded to (almost in a passing manner, and certainly not as its main thrust) "an abuse of process" element – although this was never really elaborated or particularized by Dr. S[redacted] other than perhaps in connection with (and it is by no means clear) another argument raised by Dr. S[redacted] about timeliness. In these circumstances, either by nature of it being abandoned for all of the foregoing reasons or no basis for an "abuse of process" really ever having been clearly, fully or adequately set forth, it is also dismissed.

[32] As a result, the charges of academic misconduct against Dr. S[redacted] may be scheduled before the Tribunal to be determined on their merits on February 16, 2017. A full formal notice will be issued by the Tribunal. I caution Dr. S[redacted] once again that he risks the Tribunal proceeding in his absence should he not attend. In the circumstances of this case, notwithstanding the unclear nature of the relationship between Dr. S[redacted] and The Daisy Group with respect to those particular proceedings, and without any objection by the University, I direct the Tribunal to provide a copy of this decision to The Daisy Group as well as Dr. S[redacted], given that the Daisy Group appears to already be in possession of confidential information pertaining to Dr. S[redacted] (and particularly the medical reports) either from Dr. S[redacted] or with his consent.

Dated at Toronto, this 16 day of December, 2016

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C [redacted] S [redacted]

CASE MANAGEMENT INTERIM DECISION

Hearing Date: February 13, 2017

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S [redacted] (former student)

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Tracey Gameiro, Associate Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Emily Home, Articling Student, Paliare Roland Barristers

Not in Attendance:
Dr. C [redacted] S [redacted], former Student

[1] This is a decision with respect to a request for an adjournment of a hearing of charges under the University of Toronto's (the "University") *Code of Behaviour on Academic Matters, 1995*, as amended (the "Code"), against Dr. C[redacted] S[redacted] ("S[redacted]") now scheduled for February 16, 2017. A conference call to deal with the request was held on February 13, 2017.

[2] Unfortunately, there is a long and tortured history to these charges that has been previously set out in some detail in decisions dated May 4, June 13, September 1, October 19 and December 16, 2016.

[3] In the last decision dated December 16th, the preliminary motion of S[redacted] that University's counsel be disqualified was dismissed. It was dismissed after a lengthy series of adjournments that had been granted to S[redacted], over the objections of the University, of case conferences to deal with (or how to deal with) the disqualification motion brought by S[redacted] and which was necessary to rule on in order that the charges could proceed to be heard on their merits. As a result, the academic misconduct charges against S[redacted] were finally scheduled to be heard on their merits before the Tribunal on February 16, 2017. The charges had initially been filed in March 2013 and they related to S[redacted]'s PhD dissertation in 1996. Without going into great detail, processing the charges had been delayed by many factors including the recusal of a number of Co-Chairs, the challenge of S[redacted] to have University counsel removed or disqualified, the change of solicitors by S[redacted] and a number of indulgences granted to S[redacted] to retain new counsel, the failure of S[redacted] to produce documents relevant to his disqualification motion as directed earlier by the Tribunal, the failure of S[redacted] to provide explanations for the basis on which he claimed privilege for those documents he refused to produce (again, directed by the Tribunal), and then the asserted medical incapacity of S[redacted] to continue with these proceedings. Again,

there had been numerous contested adjournments before the hearing was finally scheduled to hear the merits of the charges on February 16, 2017.

[4] On February 6, 2017, Ms. Carol Shirtliff-Hinds advised the Tribunal that she was newly-retained counsel for S[redacted]. S[redacted] had been without counsel since the resignation of his second counsel in September 2015. S[redacted] had asserted twice in early 2016 that, in response to enquiries from the Tribunal, he still intended to retain counsel. However, S[redacted] failed to do so throughout the contested adjournments and proceedings during 2016, and during which S[redacted] was both unrepresented and failed to attend. In view of her late retainer, new counsel for S[redacted] requested an adjournment. That adjournment, in the circumstances, was opposed by the University.

[5] Again, a case conference was held by telephone on February 13, 2017. After hearing the submissions from both counsel for S[redacted] and the University, with a great degree of reluctance, I have once again agreed to an adjournment. The matter is now rescheduled for **April 18, 2017** at 5:45 p.m. (which date has been agreed to by all counsel). As well, a further case conference is scheduled for **February 28, 2017** at 3:30 p.m. (again, a date and time agreed to by all counsel) to ascertain how much is still in dispute on the merits.

[6] These are my brief reasons for granting the adjournment. Both parties have referred me to the decisions in *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 2009 Carswell Ont 3420 and *Linartez v. Canada (Minister of Citizenship and Immigration)*, 1995 Carswell Ont 1546, [1995] A.C.F. n° 498, [1995] F.C.J. No. 498, which I have reviewed. It is fair to say that these cases, as likely all cases of contested adjournments, turn on their facts – as does this one. Although there are similarities to the facts of these cases, there are also differences.

[7] There is no doubt that this case has been unnecessarily delayed at great length. However, even the University concedes that one hundred percent of that delay cannot be placed at the feet of S[redacted] – although certainly an overwhelming proportion of it has been the result of his non-cooperation. Although the conduct of S[redacted] has been far less than exemplary, and certainly not worthy of compliment or condonation, in the end there is still a balance that must be struck between the public interests and the University's interests in having this proceeding resolved, and in the interests of S[redacted] in having natural justice accorded him. In the end, the adjournment is relatively brief – even if longer than the University wished. It is only eight weeks. There is no dispute that the file in this matter is lengthy and convoluted. Counsel for S[redacted] advised me in the event of an adjournment, she would be compelled to withdraw, being unable to effectively represent S[redacted] at a hearing only three days away. Moreover, although I certainly recognize the University's and the public's concerns over of the integrity of the degrees conferred by the University and people being able to hold themselves out as having legitimately received the University degrees (to say nothing of the concern of those other degree holders legitimately conferred), the charges still relate to a degree conferred more than 20 years ago and these proceedings have already consumed the better part of 4 years. It is difficult to say that the University will be substantially prejudiced by a further 8-week delay, as unpalatable as it may be. The consequences to S[redacted] may be extremely severe and, even if extremely belatedly and with not much explanation of his delay, he has finally sought counsel, which will not only be beneficial to him but of assistance to the processing of these charges and certainly the light in which their outcome will be viewed. If only barely, I have decided to exercise my discretion to grant this adjournment. But as was stressed to counsel, the hearing on April 18 will be regarded as peremptory regardless of whether S[redacted] has counsel or not (recognizing that I have already said this about previous hearings even if it inadvertently was omitted from the December 16th decision). Barring completely unforeseen

or unpredictable circumstances, the hearing will proceed on the merits on that day. Counsel for S[redacted] has repeatedly assured me that she will be able to proceed in the merits on that day and has advised me that as she is representing S[redacted] *pro bono*, no issue of S[redacted]'s ability to afford a lawyer will be raised as it has been in the past.

[8] Counsel for S[redacted] has also given me such assurances that she will confer with University counsel so that issues in dispute may be reduced, failing which they may be addressed at the case conference scheduled for February 28, 2017.

Dated at Toronto, this 15th day of February, 2017

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

CASE MANAGEMENT INTERIM DECISION

Case Conference: February 28, 2017

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S[redacted] (former Student)

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances
Ms. Krista Osbourne, Administrative Clerk and Hearing Secretary, Office of Appeals, Discipline and Faculty Grievances
Ms. Emily Home, Articling Student, Paliare Roland Barristers

Not in Attendance:
Dr. C[redacted] S[redacted], former Student

[1] In the last decision, it was agreed that a case conference by means of telephone would be conducted on February 28, 2017 to deal with whatever issues could be dealt with prior to the hearing now scheduled for April 18, 2017. This is the decision and the directions resulting from the case conference.

1. The University will provide its responses to the questions posed by counsel for Dr. S[redacted] in her earlier email of February 21, 2017 by March 3, 2017.

2. Counsel for Dr. S[redacted] advises that at present, she plans to bring at least three applications prior to the Tribunal commencing its hearing into the merits of the charges against Dr. S[redacted]. It was agreed that these applications would be filed in writing together with a supporting factum no later than **March 17, 2017**. Equally, counsel for Dr. S[redacted] will advise the University and the Tribunal no later than March 17, 2017 of any witnesses or additional evidence she proposes to call for the hearing.

[2] In view of these applications that counsel for Dr. S[redacted] advises she will bring, and in the hope of completing the hearing of these charges on the scheduled day of **April 18, 2017**, the hearing will now commence at **2:30 p.m.**

[3] In the event that any other interlocutory disputes arise prior to the hearing, either party may request the Tribunal to convene another case conference to deal with those disputes.

Dated at Toronto, this 1st day of March, 2017

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S O 1971, c 56 as amended S O 1978, c 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

CASE MANAGEMENT DECISION

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S[redacted] (former student)

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances ("ADFG)
Ms. Tracey Gameiro, Associate Director, ADFG
Ms. Emily Home, Articling Student, Paliare Roland Barristers

Not in Attendance:
Dr. C[redacted] S[redacted], former Student

A Proceedings Management Conference was held by telephone on March 28, 2017 with respect to the University's charges against Dr. S[redacted].

1. Since the last proceedings management conference call, which scheduled the hearing on the merits of these charges for April 18, 2017, Dr. S[redacted] has filed three motions:

(a) That the Co-Chair recuse himself because of a reasonable apprehension of bias;

(b) That the University's Discipline Counsel be disqualified because of a conflict of interest; and

(c) That these proceeding be stayed because they are an abuse of process

2 Since counsel for Dr. S[redacted] had suggested she might be bringing these motions in the last conference call, the motions were filed with a supporting factum and authorities as I had directed in the earlier conference call In response, the University gave notice of motions of its own:

(a) That the latter two motions of Dr. S[redacted], namely the disqualification motion of University's Discipline Counsel and the abuse of process motion, themselves be dismissed, as an abuse of process in view of the earlier decisions dealing with these very same questions; and

(b) That the recusal motion be heard by me alone without the panel.

3 The University wished its motions to be dealt with and heard as soon as possible so as not to imperil the already scheduled "merits" hearing date of April 18, 2017 Dr S[redacted] wished the motions to be dealt with on the already scheduled hearing date largely due to the busy schedule of counsel

4. First, the University will file its Response on the recusal motion, and all of its material (factum, authorities etc) in support of its motions with the Tribunal and counsel for Dr. S[redacted] no later than **4:00 p.m. tomorrow, March 29, 2017**.

5 Second a hearing will be held at the University on **April 6, 2017 at 6:00p.m.**, which date was ultimately acceptable to all counsel. Dr. S[redacted]'s recusal motion will be dealt with first. In the event, I am able to determine that recusal motion and accept it, then I will recuse myself and the proceedings will halt until the Tribunal is able to find another Co-Chair. If I dismiss it

(including the possibility that I will rule orally with written reasons to follow at a later date), then that evening, argument will be made on the University's motion to strike the other two motions of Dr S[redacted] (not the merits of Dr. S[redacted]'s motions). Again, I will attempt to issue a decision on those motions prior to the April 18, hearing date (again with the possibility than it may only be a "bottom line" decision with full written reasons to follow). How the hearing proceeds on April 18, whether it proceeds on the merits of the charges, or whether one or both of Dr. S[redacted]'s motions proceed to be argued on their merits, will obviously depend on my decision The University advises that if Dr S[redacted] is allowed to proceed with his disqualification of Discipline Counsel on the basis of conflict of interest, the University will insist on compliance with the production orders it had previously obtained with respect to that motion that Dr. S[redacted] had never fulfilled, but which became irrelevant when the disqualification motion itself was previously dismissed Counsel for Dr. S[redacted] disagrees that those production orders are applicable, but that question can be dealt with later, if necessary.

6 Third, counsel for Dr. S[redacted], will consult with Dr. S[redacted] to see if he is available for the April 6 evening hearing (or is content to participate by Skype which is available or content for what is essentially a legal argument, to proceed in his absence) and advise the Tribunal by **no later than noon tomorrow, March 29, 2017**. If there is an issue as a result with the April 6, 2017 hearing, there will a further proceedings management conference call tomorrow, March 29, 2017 at 3:00 p m. to deal with it.

7 Lastly, as the Student Panel Member (Ms. Sue Mazzatto) and Faculty Panel Member (Professor Ann Tourangeau) that have been assigned to these charges have been assigned for a number of years, and have frequently been required to prepare for hearings that for many reasons did not proceed, which has involved reading voluminous material (including for the April 18 hearing), the parties are agreed , subject to the confirmation of Dr. S[redacted] through his counsel, **by no later than noon on March 29th**, 2017, that the panel members may be seized regardless of how the April 18 hearing proceeds.

8. In the event that any other issues arise prior to the hearing, either party may request the Tribunal to convene another case conference to deal with those disputes

Dated at Toronto, this 23rd day of March, 2017

Bernard Fishbein, Chair

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,
AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

CASE MANAGEMENT DECISION

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S[redacted] (former student)

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances ("ADFG)
Ms. Tracey Gameiro, Associate Director, ADFG
Ms. Emily Home, Articling Student, Paliare Roland Barristers

Not in Attendance:
Dr. C[redacted] S[redacted], former Student

A Proceedings Management Conference was held by telephone on March 29, 2017.

1. Following the decision in the Proceedings Management conference call yesterday, March 28, 2017, counsel for Dr. S[redacted] wrote to the Tribunal this morning, March 29, 2017, advising:

Dear Chair Fishbein (thru the Tribunal committee) and Mr. Centa,

Further to the case management conference call held yesterday, I advised during the conference call that I needed to speak to Dr. S[redacted] to determine whether he was available for the April 6, 2016 [sic] date tentatively scheduled in advance of the hearing date of April 18, 2016 [sic]. Dr. S[redacted] as previously advised is available for the hearing date of April 18, 2016 [sic]. Dr. S[redacted] is not however available for the date scheduled yesterday of April 6, 2016 [sic] owing to the short notice period. Dr. S[redacted] wishes to be personally present for his case in this matter as is his right. I am therefore not in a position to proceed on April 6, 2016 [sic] in Dr. S[redacted]'s absence in light of his instructions to me. I have also canvassed additional availability of Dr. S[redacted] in advance of the April 18, 2017 date and unfortunately he has no availability given the short time period and the fact that he does not work in Canada.

In light of these events, we had discussed yesterday having another case management conference this afternoon at 3pm. I am available to do so as I also advised yesterday. It is my understanding from the conference call yesterday that Mr. Centa is also available. I await further instructions from the Tribunal.

2. Counsel for Dr. S[redacted] acknowledged during the telephone call that the references to "2016" were in error and should have been "2017."

3. The University almost immediately responded taking the position that:

> [...] the hearing must proceed on April 6 or any earlier convenient date. Since Dr. S[redacted] could participate by Skype, that there is no need for live evidence from Dr. S[redacted] at the hearing, that an evening hearing should not interfere with normal work hours, this hearing should proceed on April 6.

4. A telephone conference call was held between counsel and the Co-Chair on March 29, 2017 where counsel were given full opportunity to make submissions, respond to submissions of the other, and answer any of my questions. Very reluctantly, I am denying the University's request to continue with, and therefore cancelling, the April 6 hearing, as Dr. S[redacted] has urged. The hearing will continue on April 18, as previously scheduled and agreed to by the parties.

5. Notwithstanding how much has already been written (by me and other Co-Chairs) in this matter already, I think I should, at least briefly, give reasons for this decision, so it is not misinterpreted in future cases or by the parties.

6. First I am not persuaded that the notice of the April 6th hearing was not reasonable as Dr. S[redacted] argued. Leaving aside how long these proceedings have been ongoing, the April 6th

hearing was set to deal with motions that Dr. S[redacted] has brought (or issues or countermotions arising from these motions) after the Case Management Hearing decision of February 13, 2017 which established the hearing date of April 18th, to finally deal with the merits of the allegations that the University brings against Dr. S[redacted], and which sought to impose conditions (apparently unsuccessfully) to ensure the hearing proceeded on the merits on that day. Those motions appear to have been served by Dr. S[redacted] on the University on or about March 17, 2017 (more than a month later). Within days the University brought its motions to strike Dr. S[redacted]'s motions. Since the likely and reasonably foreseeable effect of possible success by Dr. S[redacted]'s motions on at least his motion that I recuse myself as Chair, because of an alleged reasonable apprehension of bias, would be that the proceeding could go no further on April 18 while the Tribunal sought yet another Co-Chair to deal with this matter, it is neither surprising nor unreasonable that the University would seek to have its motions determined before April 18th. Courtesies were justifiably extended to counsel for Dr. S[redacted] so that she could participate in the Proceedings Management Conference on March 28th, to deal with the logistics and scheduling of the University's motions. In these circumstances I do not regard notice on March 28 of an interlocutory hearing on April 6th (more than a week) to be unreasonable. Nor do I think that Dr. S[redacted]'s argument that the notice is unreasonable because he now resides in Chicago any more persuasive. Leaving aside that these are interlocutory motions initiated by motions brought by Dr. S[redacted] himself, in an already short time frame, the choice of residence, particularly dealing with students who have already graduated, cannot be a determinative factor, particularly with an institution such as the University which draws many students from many places far away from Toronto - and much further than Chicago.

7. Second, I am not convinced either that there is a fundamental lack of fairness or that there is significant prejudice to Dr. S[redacted] if the hearing proceeded on April 6, 2017 in Toronto with Dr. S[redacted] participating by way of Skype, as both the University and the Tribunal offered, to which Dr. S[redacted] has objected and refused to consent. There is no doubt that the Tribunal's

Rules of Procedure envisage both written and electronic hearings (in full or in part) in place of oral hearings (see Rules 16, 17, 47 and 48 for example) and the Tribunal has held such hearings in the past. I understand and appreciate that the outcome of and possible consequences of these charges are of great importance to Dr. S[redacted]. However, I do not see any significant prejudice to Dr. S[redacted] to proceeding in this fashion. Again these are interlocutory motions. The charges will not be determined in these motions. Certainly Dr. S[redacted] has not objected to any of the earlier proceedings management conference calls taking place with only the participation of his counsel. No evidence will be called. The motions will be argued from the record. Counsel for Dr. S[redacted] suggested that proceeding in this fashion would impair Dr. S[redacted]'s solicitor client privileges in that he would not be able to communicate and instruct counsel during such hearing. However, the University and the Tribunal offered that either an open private telephone line could be maintained between counsel and Dr. S[redacted], or Dr. S[redacted] could send counsel e-mails and if necessary the proceedings could be paused, if counsel needed to consult with Dr. S[redacted] privately or more extensively. I do not see how this would be significantly more prejudicial than Dr. S[redacted] sitting beside counsel and writing notes (the analogy that counsel suggested Dr. S[redacted] would be deprived of) or counsel also asking for a brief pause to consult with Dr. S[redacted] in those circumstances. Counsel also stated she was not instructed to proceed in such a hearing. When asked if that meant she would or could no longer represent Dr. S[redacted] if the Tribunal ruled in favour of the University's position, counsel merely advised that she would have to consult with Dr. S[redacted] when and if that happened.

8. Having said all of this, I, again, have simply decided to extend the benefit of any limited doubt I may have about any conceivable unfairness to Dr. S[redacted], in favour of Dr. S[redacted] — primarily because considering the unique circumstances of this case and the length of time that has already elapsed since the laying of these charges by the University, the likely delay in proceeding in this fashion does not seem to me to significantly prolong the proceedings and

unduly exacerbate whatever prejudice the University has already suffered. Having said that, in order to move this matter forward as expeditiously as possible on April 18, I direct the following:

(a) Dr. S[redacted]'s motion that I recuse myself will be argued first—as best as I can I will attempt to deliver an oral "bottom line" decision then with full written reasons to follow. Any material (or authorities) that Dr. S[redacted] intends to rely in opposition to the University's materials (which I previously directed the University to file by March 29, 2017) either with respect to Dr. S[redacted]'s recusal motion or the other motions of the University must be filed with the Tribunal and the University no later than April 10, 2017. I do not anticipate this recusal motion to require at the very most, one hour, in total to be heard in its entirety and counsel should govern their oral submissions accordingly.

(b) In the event I am not persuaded to recuse myself, I will then hear the arguments on the University's motions to strike Dr. S[redacted]'s motions - again as best I can I will attempt to deliver an oral "bottom line" decision then with full written reasons to follow. Again, I do not anticipate the University's motions to require, at most, one hour in total to be heard in their entirety and counsel should govern their oral submissions accordingly.

(c) In the event I am not persuaded to strike Dr. S[redacted]'s motions, in the time remaining I will hear submissions about whether Dr. S[redacted] should now comply with the production orders previously made against him in the event that Dr. S[redacted]'s motion to disqualify University Discipline Counsel is still outstanding, and/or the arguments of the parties on Dr. S[redacted]'s motion to dismiss the charges by the University because of abuse of process.

(d) In any event, the University and Dr. S[redacted] are to have prepared and exchanged and filed with the Tribunal, no later than April 13th, a complete witness list of witnesses they intend to call for the hearing of the charges on their merits (including

the arrangements they will make to call them), assuming the charges survive any or all of Dr. S[redacted]'s motions.

(e) In any event the University and Dr. S[redacted] should agree between themselves on enough dates they will make and be available (failing which be prepared on April 18th) in order to schedule at least 2-3 more days for hearing (that are available to the panel) within the following 3 months to deal with the merits of the charges, again assuming the charges survive any or all of Dr. S[redacted]'s motions. and

(f) In any event, perhaps not surprisingly, I am advised that there have been media inquiries about these proceedings. In the event the media attends on April 18, as they have attended once before in the past, and/or any future hearing dates, and any party objects to their presence, that party is to advise the other party and the Tribunal in writing no later than April 10 and be prepared to make full submissions in support of any such objection on April 18, 2017.

9. Lastly, I note for the record that the parties confirmed to me their agreement that the panel assigned to this hearing, Ms. Sue Mazzatto (Student Panel Member) and Professor Ann Tourangeau (Faculty Panel Member) is seized, subject of course to Dr. S[redacted]'s motion that I recuse myself. In the event that any other issues arise prior to the hearing, either party may request the Tribunal to convene another case conference call.

Dated at Toronto, this 30th day of March, 2017

Bernard Fishbein, Chair

Lauren Pearce

From: Christopher Lang <christopher.lang@utoronto.ca>
Sent: Thursday, April 13, 2017 5:53 PM
To: [redacted]
Cc: [redacted]
Subject: [redacted]

Dear Ms. Shirtliff-Hinds and Mr. Centa.

In view of the shortage of time until the scheduled hearing and the intervening long holiday weekend, this is being sent by e-mail, and on behalf of the Chair. Chris

"On April 11, 2017, the University requested yet another case management conference with respect to the charges under the Code against Dr. S[redacted], now scheduled for hearing on April 18, 2017. As a result a conference was quickly arranged for the afternoon of April 12, 2017. Although the parties initially agreed that no written decisions or reasons were necessary for the directions issued in the conference, Dr. S[redacted] has subsequently requested a written decision. This is that decision.

The first dispute between the University and Dr. S[redacted] concerned how far we would actually proceed on April 18, 2017. In the previous case management conferences, I had determined that we would first hear Dr. S[redacted]'s motion that I recuse myself. Obviously if Dr. S[redacted] was successful on this motion (which the University opposed) then the hearing could proceed no further as the Tribunal would have to find a new Co-Chair to continue. If Dr. S[redacted] was unsuccessful, I had previously determined that we would then hear the University's motions to strike Dr. S[redacted]'s two preliminary motions, that University discipline counsel be disqualified because of an alleged conflict of interest, and, in any event, the charges be dismissed because of an alleged abuse of process. Depending on the success of the University's motions to strike and what postion the University took if it was unsuccessful (already a dispute had crystallized about previously ordered production in the event the motion to disqualify was allowed to proceed), we would then hear Dr. S[redacted]'s preliminary motions to the extent they survived and it was possible to proceed. The dispute that now had emerged between the parties was what, if anything else, should then happen on April 17, if time permitted. In particular, if the recusal motion was denied, and the University was successful in striking both of Dr. S[redacted]'s preliminary motions, would the hearing into the merits of the charges against Dr. S[redacted] commence. Dr. S[redacted] took the position that nothing further should happen on April 18—the hearing should not commence on the merits of the charges. In the view of Dr. S[redacted], that was clearly what I had directed in the last case management, and in particular

paragraph 8 (e)—that only the preliminary motions would be dealt with. The University disagreed.

I ruled that, obviously depending on the outcome of the University's motions to strike and the position the University took about proceeding further with Dr. S[redacted]'s preliminary dispute (by this time another dispute besides the previous production order had arisen as outlined later) and the outcome of Dr. S[redacted]'s preliminary motions (to the extent they survived), if time permitted, we would proceed with the hearing on the merits. As the onus is on the University, as is customary before the Tribunal it would proceed with the calling of evidence first and we would see how far we could get. I advised the parties that although this might be arguably remote (the University would have to achieve success in both opposing the recusal motion and striking both of Dr. S[redacted]'s preliminary motions and within sufficient time on the 18th), it was a distinct possibility. I did so for the following reasons.

Leaving aside that I did not intend the result that Dr. S[redacted] argues is "clear" from the last case conference decision, I do not think it is a fair reading of the decision, and is at best taken out of context particularly in the history of these proceedings. The University's position, not surprisingly since these charges are now a number of years old, has always been that these charges cannot be delayed any further and must be finally determined. All of the case management hearings have been disputes about what the University has characterized as no more than further attempts at delay by Dr. S[redacted]. The University pressed for a hearing date as soon as possible and wished dates earlier than the April 18th ultimately pressed upon it to accommodate Dr. S[redacted]'s counsel. The University pressed for a hearing date of its motions to strike Dr. S[redacted]'s preliminary motions prior to April 18 (over the opposition of Dr. S[redacted]) and after it was originally scheduled, opposed its cancellation when Dr. S[redacted] was unavailable to actually attend. More importantly both parties agreed to start the hearing at 2:30 pm instead of its originally scheduled start time of 5:45 pm. "in the hope of completing the hearing of these charges" (See case management decision dated March 1st ,2017). The Tribunal often schedules its hearings to commence in the evenings and will often sit late into the evening to conclude them. The parties clearly recognized and agreed that in this case that would not be sufficient time. In fact, I asked counsel for Dr. S[redacted], since I had already indicated in the last case management decision that I expected that the argument of both Dr. S[redacted]'s recusal motion and the University's motions to strike, in their entirety, to take no more than an hour each for the full argument of both sides, that if the University met with success throughout (so that the recusal motion was rejected and both Dr. S[redacted]'s preliminary motions struck), should we then simply stop and go home at sometime between 4:30 and 5:30 pm? In my view, she had no adequate response how that would be a wise use of resources and so hard to obtain hearing time in this case and, in particular, when originally scheduled, it clearly would continue much later.

The second dispute that now crystallized was in the event that the University's motion to strike the second of Dr. S[redacted]'s preliminary motions, that the charges must be dismissed as an abuse of process, did not succeed how would that motion proceed. In particular in support of this preliminary motion, Dr. S[redacted] had made several

assertions of fact to establish prejudice to him, with which the University disagreed. In other words, to the extent that Dr. S[redacted] wished to rely on those facts to establish prejudice, there would need to be evidence of those facts. Dr. S[redacted] wished there to be a separate evidentiary hearing (separate from the evidentiary hearing that would be required for the University to establish the facts constituting the violations of the Code) to establish those facts for his preliminary motion—a sort of "voir dire". The University opposed this and took the position that one evidentiary hearing (both for the merits of the charges and any evidence Dr. S[redacted] wished to call to establish prejudice), in the circumstances of this case, would be the most expeditious way of proceeding.

I ruled, in the circumstances of this case, that there would only be a single evidentiary hearing. If there were facts that Dr. S[redacted] wishes to positively assert (that the University does not accept or agree with) to establish prejudice in a preliminary motion that he has chosen to make, as opposed to arguing that at the conclusion any evidence on the merits, I would not yet further delay the outcome of these proceedings by bifurcating the calling of evidence in this fashion. This is not a criminal case and Dr. S[redacted] has no constitutional protection against self incrimination—nor did I hear or understand him to make such an argument. Dr. S[redacted] argues that the onus is on the University to establish breaches of the Code and by proceeding in this fashion, he is being compelled to testify. In my view, if Dr. S[redacted] chooses to testify, that is the result of his own choice to assert positive facts (which the University is not compelled to agree to). When I asked counsel specifically what prejudice Dr. S[redacted] suffers by proceeding in this fashion, she posited that he would be deprived of an opportunity to make a "non suit" motion at the end of the University's case—that is, the University had failed to make out its case of a violation of the Code, the onus of which was on the University. Again, this is not a criminal case. As I pointed out to counsel, in a civil proceeding, since there is a likelihood (and without actually deciding this point now) that the party making a "non suit" motion will first be put to his/her election whether to call any evidence, it was not clear to me how Dr. S[redacted] was necessarily prejudiced. In the long and complex history of this case (which I think there is no need to outline again here), as the Tribunal is the master of its own procedure, in order to bring these long outstanding proceedings to a conclusion in the near future, I declined to proceed as Dr. S[redacted] urged.

Lastly I note that both parties apparently pressed me to determine these questions now. In other words neither party explicitly or specifically objected to my proceeding to answer these questions before the motion that I recuse myself is heard or determined. Again, I have issued these brief reasons in the time remaining to me (there is an intervening long holiday weekend) before the hearing on April 18."

Christopher Lang, B.A., LL.B., LL.M. (ADR)
Director, Appeals, Discipline and Faculty Grievances
University of Toronto
(416) 946-7663

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

INTERIM DECISION

Hearing Date: April 18, 2017

Members of the Panel:
Mr. Bernard Fishbein, Chair

Appearances:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S[redacted] (former student)

In Attendance:
Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances ("ADFG")
Ms. Tracey Gameiro, Associate Director, ADFG
Ms. Krista Osbourne, Administrative Clerk and Hearing Secretary, ADFG
Ms. Sheree Drummond, Secretary of the Governing Council
Mr. Anwar Kazimi, Deputy Secretary of the Governing Council
Mr. David Walders, Assistant Secretary of Governing Council
Mr. Sean Lourim, Technology Assistant, Office of the Governing Council
Ms. Emily Home, Articling Student, Paliare Roland Barristers
Ms. Sue Mazzatto, Student Panel Member
Professor Ann Tourangeau, Faculty Panel Member
Dr. C[redacted] S[redacted], former Student
Ms. Althea Blackburn-Evans, Director, Media Relations, University of Toronto

[1] This is the decision of the recent hearing held on April 18, 2017 arising from charges of academic dishonesty filed by the Provost of the University of Toronto ("the University") against the respondent, Dr. C[redacted] S[redacted] ("Dr. S[redacted]") under the University's *Code of Behaviour on Academic Matters, 1995* ("the *Code*"). Those charges were filed in March 2013 following an investigation commenced in January 2013. There has been a long complicated history with respect to the processing of these charges involving approximately a dozen prior directions or decisions. That history has been laid out in the previous decisions which there is no need to repeat yet again here. See, for example, my decision dated May 4, 2016 at paras. 2-15 which recounted the background, at least until that point in time. Moreover, I understand that Dr. S[redacted] has now asserted some urgency in my releasing this decision so I do not wish to either protract the length of this decision or the time to release it.

[2] The hearing on April 18, 2017 dealt with:

(a) Dr. S[redacted]'s motion that I recuse myself from further hearing this matter because of a reasonable apprehension of bias ("the recusal motion");

(b) The University's motions to strike or dismiss Dr. S[redacted]'s other two preliminary motions:

(i) that the University's Discipline Counsel be disqualified because of an alleged conflict of interest ("the disqualification motion"); and

(ii) that these proceedings be stayed because they are an abuse of process ("the abuse of process motion").

[3] As I had said in the earlier decisions (which was agreed to by everyone), I undertook to deliver, as best I could, an oral "bottom line" decision with respect to those two motions on April 18th so that the hearing could continue to proceed as best as it could (or another Co-Chair found) on the next scheduled dates. On April 18th, after hearing the submissions of the parties, I dismissed the recusal motion and after hearing further submissions of the parties, I granted the University's motion that the disqualification motion be dismissed, but dismissed the University's motion with respect to the abuse of process motion, allowing it to proceed on certain conditions.

[4] These are my reasons for those decisions. Again, as I understand Dr. S[redacted] has been pressing for the release of this decision, I have tried to make it as brief as possible. I should also note that during the course of the hearing, observers attended. No one objected to their presence or insisted that the hearing be closed.

(A) The recusal motion

[5] There is no dispute between the parties about the law – that an unbiased appearance is an essential component to procedural fairness. Equally, there is no dispute between the parties as to the test. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator. See *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners and Public Utilities)*, [1992] 1

S.C.R. 623 and *R. v. R.D.S.*, [1997] 3 S.C.R. 484, which Dr. S[redacted] repeatedly referred me to. In particular, it is worthwhile quoting the headnote of *R. v. R.D.S.* which summarizes, in my view, the law quite accurately and succinctly:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

[6] As well, Dr. S[redacted] also placed great reliance on this quote also found in the headnote of *R. v. R.D.S.*:

> "A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision."

I will have more to say about that later.

[7] Dr. S[redacted], in great detail, reviewed all of the previous interim decisions that I have written. Dr. S[redacted] objected to many of the "turns of phrases" or particular wording I utilized in describing either positions being advanced or the circumstances. In particular, Dr. S[redacted] objected to my describing the history or background of these proceedings as "tortured", which occurred a number of times. Some of Dr. S[redacted]'s criticisms appear to me to be trifling (e.g., a reference in my decision dated May 4, 2016 at para. 6 to "a number of prior Chairs of the Tribunal have recused themselves" when it was only two, and a description in para. 5 of the basis of one of Dr. S[redacted]'s earlier motions as a "purported" abuse of process), but to be fair to Dr. S[redacted]'s argument, he conceded that no individual example was determinative but that the conclusion for reasonable

apprehension of bias was cumulative on the basis of all of the examples. Some of the indicia of a reasonable apprehension of bias that Dr. S[redacted] pointed to seemed to be my rejection of the conclusions that Dr. S[redacted] asserted – for example my rejection of the "medical evidence" that he provided, that he was incapable of continuing with the hearing when there were a number of doctors' letters provided, or my description of the evidence as "scanty". However, again, to be fair, Dr. S[redacted] conceded that an incorrect conclusion or faulty decision making on my part was not demonstrative of a reasonable apprehension of bias – rather, it was faulty decision making which could be the subject of an appeal.

[8] The University strongly opposed Dr. S[redacted]'s motion and urged that I do not recuse myself. In the University's submission, Dr. S[redacted]'s motion was frivolous and there was no reasonable apprehension of bias whatsoever. In fact, the University could not help but observe that in virtually all of decisions complained of (with the exception of one), I had ruled against the University's position and in favour of Dr. S[redacted].

Decision

[9] As I observed at the hearing, it is extremely awkward for an adjudicator to sit in judgment of himself/herself because one of the parties has alleged a reasonable apprehension of bias on the part of the adjudicator. There is a natural predisposition to "throw up one's hands" and walk away, if only on the basis of when one's integrity is being questioned, it is arguably best to exit the stage and let someone else take over. Notwithstanding an initial inclination, I have resisted that urge here.

[10] I have done so for a number of reasons. First, as no one disputed (see the quote from *R. v. R.D.S.*, *supra*), the test is a high one and the onus is on the person making the allegation. More importantly, the apprehension must be what an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude. As the University very strongly urged, I do not think that applicable here at all. I appreciate that Dr. S[redacted] argued that there was no specific example which alone conclusively demonstrated this reasonable apprehension of bias, but it was the cumulative impact of all of the examples of language in my decisions that he pointed to.

Even conceding such "a death by a thousand cuts" possible, still, there must be something to make out the allegation.

[11] Here, the use of language (and Dr. S did not argue about particularly anything substantive I have said, but only the words I have used to say it), in my view, is not undue. At no time did Dr. S persuasively say that any of the language was inaccurate in any significant, way. At no time did Dr. S say any of the language was wrong. Rather, it was argued that the language was harsh and would somehow disclose a predisposition that my mind was closed – I had already decided the issues against Dr. S. I do not believe that to be the case (even if that arguably appears to be a self-serving conclusion).

[12] For example, Dr. S repeatedly objected to my use of the term of the word "tortured" or "tortuous" to describe the history of these proceedings. I am the third Co-Chair of the Tribunal to deal with these charges. Dr. S is now represented by his third lawyer. The University, after having retained separate counsel to deal with the original disqualification motion, is now back to its original (and preferred choice) Discipline Counsel. There have been approximately a dozen prior case management directions or interim decisions. I have authored approximately ten of them. All were contested, or at least Dr. S did not attend a great number of them. The charges themselves were laid in March 2013 which is more than 4 years ago at the time of writing this. The charges relate to incidents of approximately 15 years before. I think a description of "tortuous" neither inaccurate nor unfair – and not so inflammatory or injudicious as to disclose a reasonable apprehension of bias.

[13] The University cited, only by way of recent example, a dozen cases in just the last number of years where the Ontario Court of Appeal itself had used "tortured history" or similar words to describe proceedings.

[14] Regardless of whether with the benefit of hindsight I might have used more temperate language, I do not believe that the inferences or implications that Dr. S seeks to draw from the language are either warranted or justified and would be reached by an informed person viewing the matter realistically and practically and having thought

the matter through. Merely by way of example, I do not believe that the language, certainly not explicitly, and moreover not even implicitly, could warrant an interpretation that I laid the blame for the length and complexity of these proceedings solely at the feet of Dr. S[redacted] For example, it was the University that vigorously contested Dr. S[redacted]'s disqualification motion of Discipline Counsel, even retaining highly regarded counsel to contest such motion when simply conceding the motion without prejudice and continuing with such highly regarded counsel (already familiar and briefed with respect to the charges) could have allowed these charges to proceed to a hearing on the merits, if not already, certainly much more quickly – something I observed to the University and something the University conceded during this hearing.

[15] More importantly, in all but one of the situations, it was Dr. S[redacted] who was successful at the hearings over the vigorous and strong opposition of the University, which in my view strongly indicates no bias against Dr. S[redacted]. In fact, even after all the decisions which Dr. S[redacted] alleges demonstrate reasonable apprehension of my bias, when Dr. S[redacted]'s current counsel was retained, and after I had rejected Dr. S[redacted]'s position (with written reasons) that his motions required a separate independent hearing which not be prior to the already scheduled hearing date of April 18th (but in lieu of it), and after Dr. S[redacted] indicated he was unable to attend at that separate earlier hearing date, and again notwithstanding the vigorous opposition of the University, I nevertheless issued a further decision cancelling the earlier hearing date postponing these motions until the April 18th hearing date when Dr. S[redacted] could attend. Moreover, and in any event, Dr. S[redacted] conceded that wrong or incorrect conclusions are not the equivalent of bias (even were I to concede any of my conclusions heretofore to be wrong or incorrect) and Dr. S[redacted] still retains his full appeal rights with respect to any of those conclusions or decisions he alleges were wrong or incorrect.

[16] Again, notwithstanding virtually all of the rulings were in Dr. S[redacted]'s favour, Dr. S[redacted] repeatedly relied on the reference previously referred to from *R. v. R.D.S.*, *supra*, that:

> "The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct."

[17] However, as the University argued, the facts of *R. v. R.D.S.* and the context of that quote are completely different than here. In particular, in *R. v. R.D.S.*, the improper remarks made by the judge were general remarks about the police and their credibility. The accused however, was acquitted. The Crown successfully appealed, and the conviction was restored. The accused then successfully appealed and the Supreme Court of Canada allowed that appeal. As a result, notwithstanding the tenor of those remarks by the trial judge, the acquittal was restored. Moreover, the impugned remarks in *R. v. R.D.S.* were generalized comments about police in general in criminal prosecutions. There were no such generalized remarks here or any particular remarks about Dr. S[redacted], *per se*, that were made, let alone attacked.

[18] In the end, in the circumstances here, I found very persuasive the recent decision of the Ontario Court of Appeal in *Miracle v. Maracle III*, 2017 ONCA 195, that the University pointed me to at paras. 6 and 7:

> "[6] We further note that, when this appeal was listed for hearing last week, counsel for the appellant made similar allegations of bias against a differently constituted panel. That panel ruled that, while there was no substance to those allegations, the case would be adjourned to a different panel. The repetition of the same complaint today reveals a pattern of conduct on the part of counsel that cannot be condoned. **Unfounded claims of bias and repeated requests for adjournments cause delay and impose added cost to other litigants and the court system. Judges have a duty to sit and hear cases to ensure proper and expeditious justice. They must not be dissuaded from fulfilling that duty by groundless allegations of bias.**
>
> [7] ...
>
> > It is important that justice be administered impartially. A judge must give careful consideration to any claim that he should disqualify himself on account of bias or a reasonable apprehension of bias. In my view, a judge is best advised to remove himself if there is any air of reality to a bias claim. **That said, judges do the administration of justice a disservice by simply yielding to entirely unreasonable and unsubstantiated recusal demands. Litigants are not entitled to pick their judge. They are not entitled to effectively eliminate judges randomly assigned to their case by raising specious partiality claims against those**

> **judges. To step aside in the face of a specious bias claim is to give credence to a most objectionable tactic."**
>
> [emphasis added]

[19] I do not say that Dr. S[redacted] is an inveterate maker of allegations of bias, but I cannot help but observe that I am the third Co-Chair assigned to hear these charges (and regardless, as Dr. S[redacted] argued, whether why the first Co-Chair decided to recuse himself is not clear on the record – whether it was the result of any allegations made by Dr. S[redacted]). Again, these are charges that were laid more than 4 years ago and have still not yet proceeded to a hearing on their merits – again, not necessarily attributing all of that delay to Dr. S[redacted].

[20] For all of these reasons, I did not recuse myself and dismissed Dr. S[redacted]'s recusal motion.

(B) The University's motions to strike Dr. S[redacted]'s preliminary motions

[21] The University argued that both of Dr. S[redacted]'s motions, the disqualification motion and the abuse of process motion, should be dismissed either on the basis of issue estoppel and/or abuse of process. As the University pointed out, this is the second time these motions have been brought by Dr. S[redacted] on the very same grounds. Both were raised by Dr. S[redacted]'s second counsel in 2014, more than a year after the charges were initially filed. The University reviewed both the grounds for the motions and the relief sought to demonstrate that in fact they were essentially the same. Both motions were dismissed by me on their merits, the University contended, in my decision of December 2016. Although Dr. S[redacted] failed to attend that hearing, he had every opportunity to do so (in fact, several opportunities as I repeatedly granted postponements of the hearing over the strong objections of the University). Simply put, according to the University (in the words of Mr. Justice Binnie), Dr. S[redacted] "is not entitled to a "second bite at the cherry".

[22] The University argued that it is uncontroversial that a determination in an interlocutory proceeding is binding on the parties at least for the duration of those proceedings. It was not open for a tribunal to review its own decision in the same

proceedings otherwise the proceedings would never end. I was referred to *Ward v. Dana G. Colson Management Ltd.*, 1994 Carswell Ont 496 at paras. 12 and 15:

> [12] ... A decision in an interlocutory application is binding on the parties, at least with respect to other proceedings in the same action. I agree with the submission that the general principle is that it is not open for the court, in a case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed within the appropriate time-frames. This principle is not affected by the fact that the first decision was pronounced in the course of the same action. See *David Diamond v. The Weston Realty Company*, 1924 CanLII 2 (SCC), [1924] S.C.R. 308.
>
> [15] I consider, as well, that the comments of Lord Diplock, made in the *Fidelitas* case, at p. 642, to be of further relevance in my determination of this issue:
>
> > Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment ...

[23] The University argued that to allow in effect the preliminary motions to proceed afresh a second time was a misuse the procedure, disrespectful of the process, wasteful of resources, potentially promoted inconsistent decision making, and ultimately bring the administration of justice into disrepute. This was equally true and applicable whether involving the doctrine of issue estoppel or abuse of process (as elaborated, allowed and applied by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. See also *Mod-Aire Homes Ltd. V. Fernicola*, 2005 CanLII 19845; aff'd 2006 Carswell Ont 1741 (CA).

[24] Dr. S[redacted], notwithstanding he elected to provide no written response to the University's materials, pointed me to the Supreme Court of Canada decisions in *Danyluk v. Ainsworth Technologies*, [2001] 2 S.C.R. 460 and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125. Although the Supreme Court did recognize issue estoppel could be applied, it set out three preconditions for it to be established:

> (1) that the same question had been decided in earlier proceedings;
>
> (2) that the earlier judicial decision was final; and
>
> (3) that the parties to that decision or their privies are the same in both the proceedings.

More importantly, in the submission of Dr. S[redacted], even if all these preconditions were established, there still remained an "inherent jurisdiction" to refuse or decline invoking *res judicata* or issue estoppel on the basis of fairness.

[25] As the headnote in *Danyluk, supra* succinctly puts it:

> "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case."

If this approach was in doubt at all, it was confirmed yet again by the Supreme Court of Canada in *Penner, supra*. Again, quoting from the headnote of *Penner*:

> "The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach."

[26] Dr. S[redacted] conceded that all of the elements of issue estoppel have been met with one exception. With respect to the abuse of process motion, Dr. S[redacted] argued that the first element, namely, that the same question had been decided in the earlier proceedings has not been met. Dr. S[redacted] argued that the only reference to the abuse of process motion at all in my earlier decision of December 16, 2016 is found in para. 31 where I stated:

> "... I should note that from time to time the disqualification motion also alluded to (almost in a passing manner, and certainly not as its main thrust) "an abuse of process" element – although this was never really elaborated or particularized by Dr. S[redacted] other than perhaps in connection with (and it is by no means clear) another argument raised by Dr. S[redacted] about timeliness. In these circumstances, either by nature of it being abandoned for all of the foregoing reasons or no basis for an "abuse of process" really ever having been clearly, fully or adequately set forth, it is also dismissed."

[27] In any event, Dr. S[redacted] pointed to and emphasized the overriding discretion that the Supreme Court of Canada explicitly stated, to refuse to apply issue estoppel even when the elements were made out, or as counsel put it: "fairness trumps finality". Dr. S[redacted] argued that fairness demanded that I exercise this residual discretion to allow his preliminary motions to be argued because he had been previously unrepresented (or unrepresented at the time the motions were dismissed in December 2016 – if not when they were first raised). Dr. S[redacted] had found himself in a situation where his life was "falling apart" and he had provided some doctors' notes and a psychiatric assessment that at least alluded to (even if I previously found they did not establish) his not being well enough to defend himself. The result is that it would be unfair for these motions not to be fully argued by counsel on behalf of Dr. S[redacted] and I ought to, as an exercise of this residual discretion, allow that to occur.

[28] The University countered that both *Penner* and *Danyluk* were inapplicable here. Both involved the application of issue estoppel to a determination of a previous tribunal to a subsequent tribunal or court hearing. Neither addressed the situation here of a party seeking to re-litigate something already determined in the very same proceeding.

[29] The University also rejected the assertion that my decision had not clearly dealt with the abuse of process motion. The University pointed out that in the notice of motion and factum raising this question filed by Dr. S[redacted]'s previous counsel (well before I became involved in these proceedings), the question was clearly raised and therefore my decision disposed of it on the merits.

[30] Lastly, the University argued there was no real unfairness that required any residual discretion to be exercised in favour of Dr. S[redacted]. He had failed to establish, notwithstanding my numerous decisions to extend him another chance (over the objection of the University), that he was not well enough to attend. Neither the doctors' reports nor the psychiatric reports that he had produced (almost unwillingly and hesitantly) had established that. In the University's characterization, they were merely ways for Dr. S[redacted] to evade the consequences of his non-attendance.

Decision

[31] I need not decide here, and have not, any of the arguments raised in the factum, or alluded to, with respect to the actual merits of Dr. S[redacted]'s preliminary motions (i.e., whether to disqualify the University's Discipline Counsel for conflict of interest or whether to dismiss these charges as an abuse of process because of the inappropriate extraordinary delay). Rather, I need only decide at this point whether to grant the University's motion to strike these two preliminary motions by Dr. S[redacted] – whether to allow them to be argued on the merits.

(i) The disqualification motion

[32] Dr. S[redacted] conceded that the three elements necessary to establish issue estoppel have been made out with respect to this issue. However, Dr. S[redacted] argued that I ought to exercise my residual jurisdiction to allow this preliminary motion to proceed out of fairness to him.

[33] I am prepared to accept, for the purposes of dealing with the motions, notwithstanding the arguments of the University, that this residual jurisdiction, as alluded to in *Danyluk* and *Penner*, applies here notwithstanding the distinction the University made that what is being attacked is a determination in the same proceeding. Having said that, as I ruled orally at the hearing, I was not persuaded that discretion ought to be exercised in favour of Dr. S[redacted]. The very factors that Dr. S[redacted] asserted as the basis of exercising my discretion, or why fairness to him dictated allowing the motions to proceed, were the very same factors addressed previously in determining whether the proceeding ought not to have continued, namely, that he was unrepresented, that his life was in disarray, and that he was medically unable to participate. Notwithstanding numerous opportunities afforded Dr. S[redacted] to establish the latter (including the adjournments granted over the opposition of the University), namely, he was medically unable to proceed, Dr. S[redacted] did not do so (notwithstanding his attempts to characterize it otherwise). I have explained that in the previous decisions. Essentially, I see this as the University characterized it – no more than a collateral attack on the earlier decisions which ultimately, after allowing numerous adjournments, allowed the University (as it

insisted it should be allowed) to proceed with this hearing. Although I understand that Dr. S[redacted] would like to have that issue now argued by counsel, that it will not be, is a result of his own actions or a situation of, in my view, his own making. I am not convinced that it is so unfair that I ought to exercise my residual discretion and allow a matter previously determined in some detail in my December 16, 2016 decision to be reargued.

(ii) The abuse of process motion

[34] As I ruled at the hearing, I am not as convinced with respect to this motion. Dr. S[redacted] argued that even apart the discretion, the first element of issue estoppel has not been made out, namely that the same question has been decided in earlier proceedings. There is no dispute by the University that, to the extent that the abuse of process issue occupied any time at all, or was discussed at all, in the previous hearings, it was very little. That is reflected in the decision of December 2016. That is true even if, as the University points out, the issue was clearly raised by Dr. S[redacted]'s previous counsel in the original motion (and the factum). In my view, this is readily demonstrated by the fact that the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, upon which the abuse of process motion is virtually entirely based, both as originally presented by Dr. S[redacted]'s former counsel and as presented by Dr. S[redacted]'s present counsel, was not adverted to at all, either in argument at the hearing or in the decision of December 16, 2016.

[35] To the extent that I have some doubt as to whether that question was decided in the earlier proceedings (let alone fully argued or considered), for that reason alone I would exercise the residual jurisdiction provided for in *Danyluk* and *Penner* in favour of Dr. S[redacted] and, out of fairness to Dr. S[redacted], allow his motion to proceed.

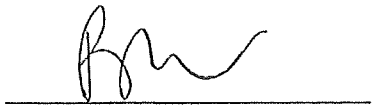
[36] In one of the earlier hearings and reflected in that decision, the University made clear that it rejected and denied the notion that, in any event, Dr. S[redacted] had suffered any prejudice as a result of delay. As a result, I determined that the question of any prejudice to Dr. S[redacted] would have to be a question of evidence. To the extent that Dr. S[redacted] wished to present such evidence to establish that prejudice, I already ruled that I would not allow these proceedings to be bifurcated (and yet again further lengthened

and delayed) in order to have a separate evidentiary hearing on this motion apart from any hearing of the evidence with respect to the merits of the charges (as Dr. S[redacted] urged upon me). I see no need to revisit that determination nor was it particularly argued in front of me in this hearing. Since I have already determined that would unduly prolong any hearing of these charges and I was not prepared to do so, but to give the benefit of any possible doubt or fairness to Dr. S[redacted], I ruled that I would allow the motion for abuse of process to proceed as part of the hearing on the merits of the charges of misconduct against Dr. S[redacted] under the *Code*.

[37] Again, I wish to make clear that I am not suggesting that the abuse of process motion is likely to be successful (or unsuccessful) or that the burden of making out such abuse of process is on anyone other than Dr. S[redacted], nor that it is not necessarily a high burden (as stated in *R. v. R.D.S., supra)*, but in the interest of fairness and justice, I have determined that I will allow that motion to be more fully argued by both parties in the course of the hearing on the merits of the charges, after whatever relevant evidence is presented by either party.

[38] In order for these charges to be finally determined, which in my view serves everyone's interest, the parties agreed to further hearings on **June 20, 21, 22 and 26, 2017** at various times and locations which have been set out by further notice of hearing from the Tribunal. Again, in order to release this decision as soon as possible, I have kept my comments to a minimum.

Dated at Toronto, this 17th day of May, 2017



Bernard Fishbein, Chair

Case No.: 709

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on March 12, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

B E T W E E N :

UNIVERSITY OF TORONTO

- and -

C[redacted] S[redacted]

INTERIM DECISION

Teleconference Date: June 1, 2017

Members of the Panel:
Mr. Bernard Fishbein, Chair

In Attendance:
Mr. Robert Centa, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Tina Lie, Assistant Discipline Co-Counsel, Paliare Roland Barristers
Ms. Carol Shirtliff-Hinds, Shirtliff-Hinds Law Office, Counsel for Dr. S[redacted] (former student)
Mr. Vincent Rocheleau, Articling Student, Shirtliff-Hinds Law Office
Ms. Tracey Gameiro, Associate Director, Office of Appeals, Discipline and Faculty Grievances ("ADFG")

Not In Attendance:
Dr. C[redacted] S[redacted], former Student

[1] These proceedings relate to charges under the University of Toronto ("the University") *Code of Behaviour on Academic Matters, 1995* (the "*Code*") brought by the Provost of the University against Dr. C[redacted] S[redacted] ("Dr. S[redacted]"). The charges were initially filed on March 12, 2013 and since then have had a long and complicated procedural history, which has been summarized previously in the many prior case management interlocutory decisions.

[2] In the most recent decision, dated May 17, 2017, I rejected Dr. S[redacted]'s motions that:

(a) I recuse myself for a reasonable apprehension of bias; and

(b) also denied Dr. S[redacted]'s request that he be permitted to argue for the disqualification of the University's Discipline Counsel for an alleged conflict of interest notwithstanding my earlier decision, dated April 18, 2017, dismissing that disqualification motion.

At the hearing of these motions – I had made three oral rulings with written reasons to follow – and after much discussion, to accommodate the schedule of all of the parties, hearing dates to proceed with the merits of the charges (and one other preliminary motion of Dr. S[redacted] that I ruled could still proceed) were agreed for June 20, 21, 22 and 26, 2017.

[3] Dr. S[redacted] has now filed a judicial review application of my decision and seeks an adjournment of the scheduled hearing dates. The University opposes such adjournment. At a telephone conference on June 1, 2017 to deal with this adjournment request, after hearing all of the submissions of the parties, I orally declined to grant any adjournment, with reasons to follow. These are those reasons.

[4] Dr. S[redacted] says his judicial review application goes to my jurisdiction which I have now lost (I was provided a copy of Dr. S[redacted]'s judicial review factum by the University as part of its materials in opposition to the adjournment – Dr. S[redacted] elected to file no materials). Dr. S[redacted] refers me to *Ontario (Commissioner, Provincial Police) v. MacDonald*, [2008] O.J. No. 5053, where a stay was granted pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, prohibiting an adjudicator in a police discipline matter from proceeding further while the Divisional Court determined a judicial review application of the adjudicator's refusal to recuse himself for a reasonable apprehension of bias. In particular, Dr. S[redacted] refers me to para. 14:

> In my view, the applicant will suffer irreparable harm if the stay is not granted. As noted by the court in *RJR MacDonald, supra*, at para. 59, "'Irreparable' refers to the nature of the harm rather than its magnitude." In the case of a denial of natural

> justice or bias, it is difficult to see how it could be cured. **A tribunal loses jurisdiction when a reasonable apprehension of bias arises. To force a litigant to continue to appear before such a tribunal would constitute irreparable harm. Anything the tribunal did to attempt to cure the appearance of bias would be suspect.**
>
> [emphasis added]

[5] Dr. S[redacted] says the same reasoning is applicable here. Dr. S[redacted] says that it would now be unfair to compel him to proceed before me since a cloud has now arisen over my continuing by virtue of his judicial review application questioning my bias. Dr. S[redacted] says furthermore that continuing to proceed would not be the most economical use of judicial or administrative resources since those proceedings would be a nullity and a waste of time should he be successful in his judicial review application. The University disagrees. In anticipation of the University's objections (laid out in the University's factum), Dr. S[redacted] says that he is seeking an adjournment which I have full discretion to grant pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("*SPPA*") and, notwithstanding Dr. S[redacted]'s own reliance on *MacDonald*, *supra*, I ought to disregard all of the authorities the University relies on because they are cases dealing with stays or prematurity – they are distinguishable and inapplicable because those issues are not before me (but will be before the Divisional Court) and I ought not to conflate that judicial review law with the simple question before me – whether to exercise my jurisdiction to grant an adjournment.

[6] The University strongly disagrees and objects to any further adjournments or delay of the hearing of these charges. Again, the University characterizes Dr. S[redacted]s request as yet another attempt by him to delay these charges from ever being heard and determined on the merits.

[7] The University does not disagree that I have the jurisdiction under the *SPPA* to adjourn, but that I should not exercise that discretion to do so. The University says that a stay of an impugned interim decision is not automatic upon the filing of an application for judicial review under the *SPPA* (as opposed to an appeal under section 25 of the *SPPA*). Not only would such a stay be contrary to the statute, but Dr. S[redacted] has done nothing to expedite his judicial review application. He has not filed his application on an urgent basis as contemplated by section 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, C. J.1, and notwithstanding that the imminent hearing dates later in June were known to him, he has not

sought a stay of my earlier decision from the Divisional Court (as was the case in *Macdonald*). I am told that a Divisional Court hearing would not be until October at the earliest – some four months away – although Dr. S[redacted] suggests that is due to the availability of University counsel and Dr. S[redacted] could be available in September.

[8] Moreover, the University argues, if only as something to take into account in how I exercise my discretion, the law is clear the Divisional Court does not condone the fragmenting of administrative proceedings by way of judicial review. It requires the complete record of concluded administrative proceedings (including the full reasons of the adjudicator), otherwise it will regard the judicial review application as premature, other than in exceptional circumstances. See for example the decision in *The Law Society of Upper Canada and Isaac*, 2016 ONLSTH 195 (and all the cases cited therein) where an adjournment of the balance of proceedings because of an application for judicial review had already been commenced was refused. Moreover, the mere allegation of "reasonable apprehension of bias" does not constitute the kind of exceptional circumstances to warrant departing from this manner of proceeding – see *Air Canada v. Lorenz*, [2000] 1 FCR 494; 1999 CanLII 9373 (FC) where Evans J. (as he then was) wrote at para. 39:

> [39] **Nonetheless, I find no authority for the proposition that an allegation of bias *ipso facto* constitutes "exceptional circumstances" justifying judicial review before the tribunal has rendered its final decision.** With respect, I cannot agree with the proposition advanced by my colleague Muldoon J. in *Con-Way Central Express Inc. v. Armstrong et al.* (1997), 1997 CanLII 5872 (FC), 153 F.T.R. 161 (F.C.T.D.), at page 163 that the fact that an application for judicial review raises "a question of jurisdiction" brings it within the "special circumstances" category.
>
> [emphasis added]

[9] Moreover, even before a decision of a judicial review application is necessary, the University points out that Dr. S[redacted] has an internal full and unfettered right of appeal (on both a question of law or mixed fact of law with the possibility of even introducing new evidence) under the *Code* to the Discipline Appeals Board. There, Dr. S[redacted] can raise the issue of bias (or any other issue) again.

[10] Lastly, the University argues that the *MacDonald* decision ought not be followed. In the University's submission, the strong dissent of Swinton J. is more persuasive, and the majority result in *MacDonald* has been distinguished. In *Xanthoudakis v. Ontario Securities*

Commission, [2009] O.J. No. 1873; 2009 Carswell Ont 2888; 252 O.A.C. 180, Karakatsanis J. (as she then was) wrote at paras. 28-29:

> [28] The appellants rely upon the case of *Ontario (Commissioner, Provincial Police) v. MacDonald*, [2008] O.J. No. 5053 at para. 14 (Div.Ct.), decided days after the decision by Ferrier J. on the previous motion to stay. The Commissioner in that case sought a stay of disciplinary proceedings against police officers pending determination of an application for judicial review following the adjudicator's refusal to recuse himself. The decision of the motions judge refusing to grant a stay was appealed to a full panel of the Divisional Court. The majority decision stated:
>
> > In my view, the applicant will suffer irreparable harm if the stay is not granted. As noted by the court in *RJR MacDonald, supra*, at para. 59, "'Irreparable' refers to the nature of the harm rather than its magnitude." In the case of a denial of natural justice or bias, it is difficult to see how it could be cured. A tribunal loses jurisdiction when a reasonable apprehension of bias arises. To force a litigant to continue to appear before such a tribunal would constitute irreparable harm. Anything the tribunal did to attempt to cure the appearance of bias would be suspect.
>
> [29] **I do not agree that this court's decision in *Ontario (Commissioner, Provincial Police) v. MacDonald* stands for the proposition that an allegation of reasonable apprehension of bias that may deprive the tribunal of jurisdiction will automatically satisfy the requirement of irreparable harm. In that case the allegations of bias were based upon the conduct of the adjudicator, and the court found that the Commissioner would suffer irreparable harm if he was forced, by reason of a stay not being granted, to appear before a tribunal where there was a reasonable apprehension of bias. The language of the paragraph quoted suggests that the court was relying on the factual circumstances of that particular case. In addition, the application before the Divisional Court was already scheduled to be heard within a month's time. The court held (at para. 16) that its conclusion to grant a stay in that case might be different if there were a longer period of delay for the hearing of the application, or if the administrative hearing was likely to be more severely disrupted.**
>
> [emphasis added]

[11] Equally, in *Pereira v. Hamilton (City) Police Service*, [2017] ONSC 924; 2017 Carswell Ont 1443, an application for judicial review of a decision of a hearing officer who earlier declined to recuse himself on the basis of a reasonable apprehension of bias, before the penalty portion of the hearing in a police discipline case, was dismissed as premature since, *inter alia*, the appellate level would have authority to deal with the bias issue – in other words, the bias allegation was not sufficient to constitute exceptional circumstances warranting early intervention.

Decision

[12] In the end, I am not persuaded by Dr. S[redacted]'s arguments and I find the University arguments and legal precedents far more compelling.

[13] I am not attempting to usurp the role of the Divisional Court, and make no comments on Dr. S[redacted]'s judicial review application – but am simply not persuaded to exercise my discretion in favour of an adjournment. I believe that all the reasons why the courts invoke prematurity to prevent the fragmenting of judicial review applications apply here and that is an appropriate consideration for me to weigh in exercising my discretion (recognizing that it is for the Divisional Court, not me, to determine whether to dismiss Dr. S[redacted]'s judicial review application on that basis). But adjudicative efficiency and an appropriate allocation of resources, particularly in long delayed proceedings like these, in my view, dictate no adjournment. Not only is there a real possibility that the charges against Dr. S[redacted] could be dismissed on the merits, rendering any judicial review application (even on the basis of bias) moot, but even if not, Dr. S[redacted] will have a full right of appeal including raising the bias issue again. That is to be contrasted, were I to adjourn, not only would four hearing days (already agreed to by the parties weeks ago) be lost – but to a completely uncertain future, as it is not clear when the judicial review application will be heard. Dr. S[redacted] has done nothing that I am aware of, to even attempt to ameliorate that situation – he neither sought his judicial review application on an urgent basis nor sought a stay from the Divisional Court as he certainly could have. As the University has correctly pointed out, a stay is not automatic in these circumstances. Moreover, to the extent that *MacDonald* is even applicable here and not distinguishable (see the comments of Karakatsanis, J. quoted, *supra*), I believe the better view is in those cases referred to me by the University (and the dissent of Swinton, J. in *MacDonald*). I have already expressed my views about Dr. S[redacted]'s arguments of reasonable apprehension of bias in my decision declining to recuse myself – I do not regard his seeking to make them again to the Divisional Court (as is his unquestionable right) as the basis of either exceptional circumstances as explained in the jurisprudence, or the basis for me to exercise my discretion to adjourn the scheduled hearings.

Dated at Toronto, this 8th day of June, 2017

Mr. Bernard Fishbein, Chair

APPENDIX B

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
March 12, 2013	Provost files charges under the *Code of Behaviour on Academic Matters* **(Ex 2)**
March 13, 2013	Dr. S[redacted] requests that the Provost delay the proceedings so that Dr. S[redacted] can "deal with an urgent family matter". **(Ex 3-4)**
April to May 2013	Dr. S[redacted]'s first lawyer, Jonathan Shime, requests that the matter be put on hold due to Dr. S[redacted]'s health issues **(Ex 5-6)**
June 2013	Provost attempts to schedule hearing on the charges. Dr. S[redacted] asks to schedule the hearing for a date in October 2013 and Provost agrees **(Ex 7-9)**
July 25, 2013	Dr. S[redacted] gives interviews to the media, which include references to his ongoing job search **(Ex 11-12)**
August 2013	Parties agree to hold October 16, 2013 for a hearing on the charges **(Ex 15-16)**
October 8-9, 2013	Dr. S[redacted] provides new information and documents, which results in adjournment of October 16, 2013 hearing **(Ex 17)**
October 2013 to January 2014	Provost conducts further investigations due to new information received from Dr. S[redacted] and parties discuss potential joint retainer of forensic document examiner
Mid February 2014	Provost attempts to schedule hearing for March or April 2014 **(Ex 21, 23)** Mr. Shime advises the Provost that he and Dr. S[redacted] have "amicably ended [their] relationship" **(Ex 22)**
February 24, 2014	Dr. S[redacted] retains his second lawyer , Selwyn Pieters, who advises that Dr. S[redacted] intends to raise conflict of interest allegation against Paliare Roland Provost denies allegation **(Ex 24-25)**
March 17, 2014	Dr. S[redacted] brings motion before Tribunal for disqualification of Paliare Roland as counsel for the University and for a stay (on the grounds of abuse of process) **(Ex 26)**
April to May 2014	Parties attempt to reach agreement on protocol for Dr. S[redacted]'s disqualification motion. No agreement is reached. The Provost brings a motion for directions to obtain documents necessary to respond to Dr. S[redacted]'s disqualification motion. The motion for directions is scheduled for July 15, 2014 **(Ex 28-29)**
Mid to Late July 2014	Chair of Tribunal, Paul Schabas, withdraws as Chair of Tribunal **(Ex 31)** New Chair, Paul Morrison, is appointed as Chair of Tribunal **(Ex 32)**
July 25, 2014	Case conference is held with Chair Morrison to address procedural issues. Chair Morrison releases Case Management Direction, directing motion for directions to be heard in writing **(Ex 33)**

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
September 8, 2014	Chair Morrison releases Motion Decision on motion for directions, ordering Dr. S[redacted] to produce documents and to comply with protocol for assertions of privilege, which required Dr. S[redacted] to provide a list of documents over which he asserted privilege and a brief statement of the basis for the claim of privilege **(Ex 34)**
October 16, 2014	Dr. S[redacted] produces documents in response to Motion Decision of September 8, 2014 Provost has concerns with scope of disclosure and privilege assertions
Late October 2014 to February 2015	Parties attempt to reach a resolution on production and privilege issues
March 25, 2015	Provost suggests "streamlined" approach to deal with issues relating to Dr. S[redacted]'s disqualification motion **(Ex 35)**
April 23, 2015	Dr. S[redacted] raises a new defence based on the "ultimate limitation period" for the first time and suggests that issue should be addressed first **(Ex 36)**
May 8, 2015	Provost writes to Dr. S[redacted] to respond to the new "ultimate limitation period" issue **(Ex 37)**
July 8, 2015	Provost requests case conference with Chair Morrison to address Dr. S[redacted]'s failure to disclose certain documents and his assertion of privilege of documents ordered produced by Chair Morrison **(Ex 39)**
August 25, 2015	Case conference held with Chair Morrison
August 27, 2015	Chair Morrison releases Case Management Decision directing Dr. S[redacted] to provide further materials to substantiate his assertion of privilege over documents and that he do so by October 19, 2015 **(Ex 40)** To this day, Dr. S[redacted] has never complied with this Case Management Direction
October 5, 2015	Mr. Pieters advises that he no longer represents Dr. S[redacted] **(Ex 41)**
October 19, 2015	Dr. S[redacted] advises he intends to pursue disqualification motion but needs an extension **(Ex 43)** Provost requests case conference with Chair Morrison **(Ex 44)**
November 11, 2015	Chair Morrison withdraws as Chair because of allegation raised by Dr. S[redacted] of a reasonable apprehension of bias **(Ex 46)**
January 2016	New Chair, Bernard Fishbein, appointed as Chair of the Tribunal. Chair Fishbein requests dates from parties for a case conference **(Ex 47-49)**

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
February 2016	Dr. S[redacted] advises he intends to pursue disqualification motion but is unavailable until late April or May 2016 for case conference **(Ex 50)** At the same time, Dr. S[redacted] gives interview to media about a new book he has written **(Ex 51)** Case conference is ultimately scheduled for April 29, 2016
April 18, 2016	Dr. S[redacted] requests 6-8 month adjournment of case conference because he has been unable to retain counsel and is navigating "two personal issues" **(Ex 52)** Provost opposes adjournment request **(Ex 53)**
April 20, 2016	Dr. S[redacted] provides medical note in support of adjournment request (note from Dr. Zizzo dated April 14, 2016) **(Ex 54)** Provost continues to oppose adjournment request on the basis that the medical note is inadequate and is insufficient to justify an adjournment **(Ex 55)**
April 26, 2016	Over Provost's objection, Chair Fishbein grants adjournment of case conference scheduled for April 29, 2016 **(Ex 56)**
May 4, 2016	Chair Fishbein releases Adjournment Decision, directing Dr. S[redacted] to provide better doctor's note by May 24, 2016, if he wishes a further adjournment **(Ex 57)**
May 24 and 31, 2016	Dr. S[redacted] provides further medical notes in support of adjournment request (notes from Dr. Zizzo dated May 16 and 30, 2016) **(Ex 58-59)** Provost takes position that the further medical notes are inadequate to justify continued adjournment of hearing **(Ex 60)**
June 13, 2016	Chair Fishbein releases Interim Decision finding that Dr. S[redacted] has failed to provide sufficient basis to indefinitely adjourn the proceedings. Chair Fishbein schedules case conference for August 29, 2016 **(Ex 62)**
August 21, 2016	Dr. S[redacted] writes to Tribunal, advising that he is scheduled for psychiatric appointment on September 13, 2016 **(Ex 63)**
August 23, 2016	Provost takes the position that Dr. S[redacted]'s disqualification motion should be treated as abandoned and parties should proceed to schedule hearing on the charges **(Ex 64)**
August 29, 2016	Case conference is held with Chair Fishbein. Dr. S[redacted] does not attend. Over Provost's objection, Chair Fishbein declines to proceed in Dr. S[redacted]'s absence
September 1, 2016	Chair Fishbein releases Interim Decision, granting a further adjournment to October 5, 2016 and directing Dr. S[redacted] to file psychiatric assessment by September 30, 2016 **(Ex 65)**

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
September 27, 2016	Provost brings motion for an order dismissing Dr. S[redacted]'s disqualification motion returnable at the hearing on October 5, 2016 **(Ex 71)** Dr. S[redacted] does not comply with deadline to file psychiatric assessment by September 30, 2015
October 2 and 5, 2016	Dr. S[redacted] writes to Tribunal, advising that he has been diagnosed with major depressive disorder and is unable to participate in the proceeding, and attaching medical report (reports from Dr. Illyas dated September 13, 2016) **(Ex 67-69)**
October 5, 2016	Case conference is held with Chair Fishbein. Dr. S[redacted] does not attend. Over Provost's objection, Chair Fishbein grants a further adjournment of the case conference and the hearing of Provost's motion to dismiss
October 19, 2016	Chair Fishbein releases Interim Decision on adjournment, directing parties to file submissions and adjourning hearing of October 5, 2016 to December 1, 2015 **(Ex 70)**
November 11, 2016	Provost files responding medical report (report of Dr. Ramshaw dated November 10, 2016) **(Ex 71)** Dr. S[redacted] does not file reply materials within deadline **(Ex 77)**
November 30, 2016	Advisor to Dr. S[redacted] (Warren Kinsella) writes to Tribunal on Dr. S[redacted]s behalf, advising that Dr. S[redacted] will not attend hearing on December 1, 2016 and attaching additional medical note (note from Dr. Zizzo dated October 31, 2016) **(Ex 73)**
December 1, 2016	Case conference is held with Chair Fishbein. Dr. S[redacted] does not attend. Chair Fishbein orders hearing to proceed in Dr. S[redacted]'s absence and dismisses Dr. S[redacted]'s disqualification motion and orders the hearing on the charges to proceed on February 17, 2017 **(Ex 75-76)**
December 19, 2016	Chair Fishbein releases Interim Decision on dismissal of Dr. S[redacted]'s disqualification motion **(Ex 77)**
January 16-17, 2017	Dr. S[redacted] gives media interviews **(Ex 78-79)**
February 6, 2017	Dr. S[redacted] retains his third lawyer, Carol Shirtliff-Hinds, and requests adjournment of February 17, 2017 hearing **(Ex 80)** Provost opposes request for adjournment **(Ex 81)**
February 13, 2017	Case conference is held with Chair Fishbein to address adjournment request. Over Provost's objection, Chair Fishbein grants Dr. S[redacted]'s request, directing case conference to be held on February 28, 2017, and adjourning hearing of the charges to April 18, 2017 **(Ex 82-83)**

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
February 15, 2017	Chair Fishbein releases Case Management Interim Decision on the adjournment request **(Ex 82)**
February 28, 2017	Case conference is held with Chair Fishbein. Dr. S[redacted] advises that he intends to bring at least three applications before the hearing on the charges
March 1, 2017	Chair Fishbein releases Case Management Interim Decision, directing earlier start time for hearing on April 18, 2017 to accommodate Dr. S[redacted]'s applications **(Ex 84-85)**
March 17-21, 2017	Dr. S[redacted] brings motion seeking (1) recusal of Chair Fishbein; (2) disqualification of Paliare Roland; and (3) a stay of proceedings due to an abuse of process created primarily by delay **(Ex 86)** Provost requests case conference to schedule motions to strike Dr. S[redacted]'s disqualification and abuse of process motions as an abuse of process **(Ex 89)**
March 28, 2017	Case conference is held with Chair Fishbein, who directs that outstanding motions will be held on April 6, 2017, subject to Dr. S[redacted]'s availability **(Ex 90)**
March 29, 2017	Case conference is held with Chair Fishbein because Dr. S[redacted] claims he unavailable on April 6, 2017, and he refuses to participate by Skype. Chair Fishbein denies Provost's request to continue with motions on April 6, 2017, but provided directions for the hearing of the motions on April 18, 2017 **(Ex 92)**
April 12, 2017	Case conference is held with Chair Fishbein. Chair directs that hearing on the charges will start on April 18, 2017, after the outstanding motions (depending on outcome of motions) **(Ex 95)**
April 18, 2017	Hearing is held. Chair Fishbein dismisses Dr. S[redacted]'s recusal motion, grants Provost's motion to strike Dr. S[redacted]'s disqualification motion and allows Dr. S[redacted]'s abuse of process motion to proceed as part of hearing on the charges. Hearing dates for the charges set for June 20, 21, 22 and 26, 2017 **(Ex 96)**
May 17, 2017	Chair Fishbein releases Interim Decision on motions **(Ex 97)**
May 18-31, 2017	Dr. S[redacted] informs Provost that he intends to bring application for judicial review and hearing on the charges should not proceed while application is pending **(Ex 98)** Provost opposes adjournment request **(Ex 100)**
May 23, 2016	Dr. S[redacted] gives interview, which is posted online **(Ex 105-106)**
June 1, 2017	Case conference is held to address Dr. S[redacted]'s request to adjourn hearing scheduled for June 20, 2017. Chair Fishbein denies adjournment request
June 6, 2017	Dr. S[redacted] informs Provost and Divisional Court that he intends to bring an urgent motion for stay of the Tribunal proceeding on June 16, 2017 **(Ex 103)**

Chronology of proceedings in U of T and C[redacted] S[redacted] – References to Tina Lie Affidavit

Date	Event
June 8, 2017	Chair Fishbein releases Interim Decision on adjournment request **(Ex 102)**

APPENDIX C

Allegation	Thesis Page Number	Source	Is Source Cited for this passage?	Is Source Listed in Bibliography?	Note
1.	2-3	Alladin (Tab 1)	No	No	
2.	7-8	Coakley & White (Tab 2)	No	No	
3.	9	Spreitzer (Tab 3)	No	No	
4.	10	Troyna (Tab 4)	Yes	Yes	
5.	11	Troyna (Tab 4)	Yes	Yes	
6.	18-19	Harris (Tab 5)	No	Yes	
7.	19	Sellers (Tab 6)	No	No	
8.	19-20	Harris (Tab 5)	No	Yes	
9.	20	Sellers (Tab 6)	No	No	Cite in thesis is to a different Sellers article.
10.	22	Sellers (Tab 6)	No	No	
11.	23-27	Harris (Tab 7)	No	No	Cite in thesis is to different Harris article.
12.	28-32	Harris (Tab 7)	No	No	Cite in thesis is to different Harris article.
13.	33	Fejgin (Tab 8)	No	No	
14.	34	Fejgin (Tab 8)	No	No	
15.	36	Fernandez-Balboa (Tab 9)	Yes	Yes	
16.	36-37	Snyder & Spreitzer (Tab 10)	No	Yes	Cite in thesis (to Gaston and Edwards) appears to be incorrect.
17.	39	Edwards (Tab 11)	No	No	Cite in thesis is to different Harris article.
18.	44-45	United Church of Canada (Tab 12)	No	No	Cites in thesis (to Novogrodsky) appear to be incorrect.
19.	54	Velez & Fernandez (Tab 13)	No	No	
20.	59	Holland (Tab 14)	No	No	

Allegation	Thesis Page Number	Source	Is Source Cited for this passage?	Is Source Listed in Bibliography?	Note
21.	59	Ascher (Tab 15)	No	No	
22.	60	Ascher (Tab 15)	No	No	
23.	61	Ascher (Tab 15)	No	No	
24.	61	Ascher (Tab 15)	No	No	
25.	62	Ascher (Tab 15)	No	No	Cite in thesis (to Ogbu) appears to be incorrect.
26.	62	Ascher (Tab 15)	No	No	
27.	63	Ascher (Tab 15)	No	No	
28.	64	Ascher (Tab 15)	No	No	
29.	65	Slavin and Madden (Tab 16)	Yes	Yes	
30.	65	Cummins (Tab 17)	No	No	Cite in thesis is to a different Cummins article.
31.	65-69	Harris (Tab 7)	No	No	Cite in thesis is to a different Harris article – one para. is block quoted with correct page reference, but not to the source article (which does not appear in bibliography)
32.	69	Edwards (Tab 18)	No	No	
33.	69-70	Sailes (Tab 19)	Yes	Yes	
34.	74	Spreitzer & Snyder (Tab 20)	No	No	
35.	74-75	Edwards (Tab 18)	No	No	Cite in thesis is to a different Edwards article
36.	75	Ebony (Tab 21)	No	No	Cite in thesis is to Edwards.
37.	75-76	Harrison (Tab 22)	No	Yes	
38.	77-78	Harrison (Tab 22)	Yes	Yes	

Allegation	Thesis Page Number	Source	Is Source Cited for this passage?	Is Source Listed in Bibliography?	Note
39.	80	Gaston (Tab 23)	No	Yes	
40.	82	Sailes (Tab 24)	No	No	
41.	84	Marsh (Tab 25)	No	No	
42.	144	Holland and Andre (Tab 26)	No	No	
43.	146	Holland and Andre (Tab 26)	No	No	
44.	146	Spreitzer (Tab 3)	No	No	
45.	147	Spreitzer (Tab 3)	No	No	
46.	153	Eitzen and Purdy (Tab 27)	No	No	
47.	153	Harrison (Tab 22)	No	Yes	
48.	153-154	Messner (Tab 28)	No	No	
49.	155	Good (Tab 29)	No	No	
50.	156	Good (Tab 29)	No	No	An article by Brophy & Good appears in the Bibliography, but it does not appear to be this article.
51.	156-157	McCombs (Tab 30)	No	No	
52.	157-158	Harrison (Tab 22)	No	Yes	
53.	158	Troyna (Tab 4)	Yes	Yes	
54.	161	Harrison (Tab 22)	No	Yes	
55.	161-162	Harrison (Tab 22)	Yes	Yes	
56.	164-165	Essed (Tab 31)	No	Yes	
57.	167-169	Sellers (Tab 6)	No	No	
58.	169-170	Fernandez-Balboa (Tab 9)	No	Yes	
59.	171-172	Eitzen and Purdy (Tab 27)	No	No	

Allegation	Thesis Page Number	Source	Is Source Cited for this passage?	Is Source Listed in Bibliography?	Note
60.	172	Eitzen and Purdy (Tab 27)	No	No	
61.	174	Nocera (Tab 32)	No	No	
62.	177-178	Eitzen and Purdy (Tab 27)	No	No	Cite in thesis is to a different Eitzen article
63.	178	Eitzen and Purdy (Tab 27)	No	No	
64.	178	Edwards (Tab 11)	No	No	Cite in thesis is to a different Edwards article
65.	179	Eitzen and Purdy (Tab 27)	No	No	Cite in thesis (to Edwards) appears to be incorrect
66.	184	Siegel (Tab 33)	No	No	
67.	189	Winbush (Tab 34)	No	No	