FILE: 2000/01-01
PRELIMINARY MATTER
(see trial decision at 2000/01-02)

UNIVERSITY OF TORONTO
THE UNIVERSITY TRIBUNAL

BETWEEN:

THE UNIVERSITY OF TORONTO

and

R.D.

and

K.U.

RULING ON ADMISSIBILITY OF EVIDENCE

The following are my reasons with respect to the disposition by me, as the Chair of a panel of the Tribunal convened to hear certain charges under the Code of Academic Behaviour ("the Code"), of a point of law which arose during the course of the hearing with respect to those charges. Section 22(a) of the Code requires the presiding Chair to deal with such matters alone.

Before commencing the examination in chief of Professor Lilian U. Thompson, a witness called by the University to testify at the hearing, counsel for the University informed the panel that there were some parts of the evidence to be given by Professor Thompson to which the defence objected as not being properly admissible. The disputed evidence consisted of what was seen by the University as extraordinarily similar patterns of responses by the two accused in two earlier tests administered in course NHS 386 during the fall of 1999, prior to the final examination which is the subject of the first two charges against the two accused. It was asserted that this information should be admitted as similar fact evidence in that it would tend to show that the accused had committed the offences with which they are charged; it was further asserted that the probative value of this evidence would outweigh any prejudice which might result to the accused by reason of its admission.

University Counsel asked for a ruling on the admissibility of this evidence in advance, and relied upon the decision of the Supreme Court of Canada in *Arp* v. *The Queen*, (1998) 129 C.C.C. (3d) 321. At p.338 Cory J., speaking for the Court, stated that

> The rule allowing for the admissibility of similar fact evidence is perhaps best viewed as an 'exception to an exception' to the basic rule that all relevant evidence is admissible. Relevance depends directly on the facts in issue in any particular case. The facts in issue are in turn determined by the charge in the indictment and the defence, if any, raised by the accused To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the fact in issue.

At page 340, after observing that evidence which merely would tend to show that the accused is the sort of person likely to have committed the alleged offence is not admissible, Cory, J. continued:

> It can be seen that in considering whether similar fact evidence should be admitted, the basic and fundamental question that must be determined is whether the probative value of the evidence outweighs its prejudicial effect.

And again at page 341,

> Because similar fact evidence is admitted on the basis of an objective improbability of coincidence, the evidence necessarily derives its probative value from the degree of similarity between the acts under consideration. The probative value must, of course, significantly outweigh the prejudice to the accused for the evidence to be admissible…….A principled approach to the admission of similar fact evidence will in all cases rest on the finding that the accused's involvement in the alleged similar acts or counts is unlikely to be the product of coincidence. This conclusion ensures that the evidence has sufficient probative force to be admitted and will involve different considerations in different contexts." (My emphasis)

He concludes at page 344 by saying:

> Thus, where similar fact evidenced is adduces to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

The accused are charged with the offences of obtaining or attempting to obtain unauthorized assistance, assisting or attempting to assist another person to obtain unauthorized assistance, and knowingly engaging in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or advantage, with respect to two specific examinations which took place on April 24,2000 and December21, 1999 in courses BIO 351 Y

and NFS 3 86H respectively. The panel was informed that the evidence of alleged similar facts related to two term tests in course NHS 3 86H written in October and November, 1999. No charges have been laid against either accused with respect to their participation in those tests.

After hearing submissions from all counsel, I ruled initially that it was incumbent upon me to hear the disputed evidence in order to be able to make the determination identified by Cory, J. in *Arp* v. *The Queen*. I was further mindful of the provisions of section 15 of the *Statutory Powers Procedure Act* which gives some considerable latitude to tribunals as to the evidence which they may receive. I further ruled that I would not require the other members of the panel to retire while the disputed evidence was being heard, although it is the function only of the Chair to rule on questions of law. Indeed they were not asked to do so. I indicated that having heard the disputed evidence, I would give my ruling as to its admissibility at the appropriate time thereafter.

Professor Thompson then proceeded to testify in chief and was cross-examined by counsel for the accused. She was the professor who had taught course NHS 3 86H in the fall of 1999 and who had prepared the final examination and term test questions. Her evidence as to the two term tests consisted of presenting and discussing the following documents which were marked as exhibits:

Exhibit 19	-	a copy of the question paper comprising term test 2 in NHS 386H dated November 17, 1999 written by the accused K.U.
Exhibit 20	-	a copy of the question paper comprising term test 2 in NTIS 386H dated November 17, 1999 written by the accused R.D.
Exhibit 21	-	a copy of the scantron sheet for term test 2 handed in by the accused R.D.
Exhibit 22	-	a copy of the scantron sheet for term test 2 handed in by the accused K.U.
Exhibit 23	-	a copy of a handwritten comparison prepared by Professor Thompson with respect to wrong answers made by the two accused to certain questions on term test 2, with a further comparison to the overall class results on those questions
Exhibit 24	-	a copy of a computer analysis of examination questions for term test 2
Exhibit 25	-	a copy of a handwritten comparison prepared by Professor Thompson made between the wrong answers made by the two

accused and those made by certain selected other members of the class who also wrote the examination

Exhibit 26 - a copy of a computer analysis of candidate incorrect responses found in the answers submitted by students re term test 2

Exhibit 27 - a copy of the signature sheets collected from certain students who wrote term test 2

Exhibit 28 - a copy of the signature sheets collected from certain students who wrote term test 1

It was established at once, and university counsel so conceded, that Professor Thompson had no qualifications or expertise which would enable her to give opinion evidence as to similarity, probability or statistical analysis. Her expertise lies in the field of food chemistry wherein she has taught at the University for over thirty years and in which subject she holds an earned doctorate.

Regretfully, it was clear from her evidence that as a result of comments made by the invigilator at the final course examination in December, 1999 she formed the suspicion that the two accused had engaged in some form of improper communication or cheating during that examination and then went looking for some other evidence which would back up those suspicions. Her investigation led her to compare the answers submitted by the accused on the two earlier term tests to those of other students who wrote those tests.

The so-called similar fact evidence, put at its highest, would establish that during each of the two term tests the two accused might have been sitting in the same area of the examination room (exhibits 27 and 28), and that their answers to the questions on term test 2 might be seen as showing a unique pattern. She acknowledged that she had no recollection of the exact seating pattern on those days and that there were some empty desks which may have physically separated the accused from one another. As to there being a unique pattern of answers, the comparison which she presented shows that the answers provided by the two accused to the questions on term test 2 were nearly identical and did not exactly match those of any other students or group of students, although in some respects there were certain similarities. However she was hesitant to acknowledge the rather obvious fact, as disclosed by the relevant exhibit, that unique patterns of similarity were also displayed among the answers submitted by other students whose performance she had chosen to include as part of her comparison, but which for some reason did not arouse the same sort of suspicions.

As to the comparators which she selected for her purposes, her choice was clearly an arbitrary one, and its validity broke down on cross-examination. She also acknowledged that on the whole the two accused had scored well throughout her course, although they had fallen back in the

second term test which she had deliberately made harder than the first. She also acknowledged that at least one of them was a "bright student".

The alleged similar fact evidence is adduced for the sole purpose of tending to confirm that the accused committed the offences with which they are charged. Having considered carefully all of the disputed evidence, I am unable to find that there is very little, if any, probative value in the evidence tendered. The analysis and comparisons put forward are significantly flawed and in my view clearly demonstrate the intention of Professor Thompson to find some basis for bolstering the suspicions raised by the invigilator at the time of the final examination on December 21, 1999. As far as being helpful as "similar facts" I find that they are unreliable and therefore of no assistance to the Tribunal.

Having made the above determination, it is clear that there is no basis for making a finding that there is such a degree of similarity between the alleged similar facts and the facts in issue in this hearing which would satisfy the test of objective improbability of coincidence laid down in *Arp* v. *The Queen*, or that their probative value "significantly outweighs the prejudice to the accused". As to the latter, I am satisfied that the admission of the disputed evidence would indeed cause significant prejudice in that neither accused presently faces any charges with respect to the two term tests; therefore evidence relating to those tests is quite irrelevant and if admitted would lead the tribunal into areas of inquiry to which the accused have not been called upon to respond.

I therefore direct that the evidence relating to the two term tests, including both the oral evidence of Professor Thompson and the Exhibits above listed, is inadmissible in this hearing and will be disregarded by the panel in disposing of the charges. The remaining portions of the evidence given by Professor Thompson will be considered at the proper time as part of the totality of the evidence in this ease.

I had indicated to counsel upon adjourning at the end of the day on March 14 that I would probably give my ruling on this point as part of the overall disposition of the charges. Upon further reflection I concluded that it was important to dispose of the matter immediately so that both counsel for the University and for the accused will know what evidence is being considered by the Tribunal and what evidence must be met and dealt with; and so that the other members of the panel may be aware of what evidence may and may not be considered in disposing of this case. In closing, I wish to thank all counsel for their assistance in this matter.

March 16, 2001

C. Anthony Keith

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C. Anthony Keith, Q.C.
Senior Chair