THE DISCIPLINE APPEALS BOARD

THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty filed on April 12, 2016

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:

A[redacted] S[redacted]

Appellant

- and –

THE PROVOST OF THE UNIVERSITY OF TORONTO

Respondent

Members of the Discipline Appeal Panel:

Ms. Patricia D.S. Jackson, Chair
Dr. Ramona Alaggia, Faculty Panel Member
Ms. Alena Zelinka, Student Panel Member
Professor Aarthi Ashok, Faculty Panel Member

Appearances:

Mr. Hatim Kheir, Downtown Legal Services, for the Appellant, also in attendance
Mr. Robert A. Centa, for the Respondent

Date of Hearing: February 1, 2019

Hearing Secretary:

Tracey Gameiro, Office of Appeals, Discipline and Faculty Grievances

REASONS FOR DECISION

The Appeal

1. The appellant (the "Student") appeals from the decision of the University Tribunal on January 15, 2018. In that decision, the Tribunal confirmed its reasons for finding the Student guilty of two academic offences, namely, that he knowingly:

> (a) submitted a research report that contained concocted references to two academic articles that did not exist, contrary to section B.i.1(f) of the *Code of Behaviour on Academic Matters* (the "*Code*"); and
>
> (b) submitted to the Provost an altered and falsified version of a disciplinary letter from his Vice-Dean, contrary to section B.i.1(a) of the *Code*.
>
> In the same decision the panel imposed a final grade of zero in the course at issue and suspended the Student for 5 years. It further recommended that the Student be expelled from the University.

2. The Student submits that the Tribunal applied the wrong standard of proof, specifically that it found the Student guilty on a balance of probabilities. The Student submits that in so doing the Tribunal erred by applying a lower standard of proof than that required under the *Code of Behaviour on Academic Matters, 1995* (the "*Code*"), namely that it be proved on a balance that is clear and convincing.

3. On this basis, the Student asks that the appeal be allowed, and the matter remitted to a new panel of the Tribunal for a new hearing.

4. For the reasons which follow, we dismiss the appeal.

The Decision Below

5. **Procedural Background** The charges against the Student date back to April 2016. At the time, the Student was suspended for an unrelated academic offence. The first hearing in this matter took place on July 12, 2016. The Student did not attend, and the Tribunal found him guilty of the charges, and imposed a penalty which included a recommendation to the President that he recommend to Governing Council that the Student be expelled.

6. As set out more fully in the June 26, 2017 Reasons for Decision of the Discipline Appeal Board in this matter, the Student appealed the decision on the basis that he had not received notice of the hearing. As he was under suspension, he said he did not check his University of Toronto email during the period of his suspension. The Discipline Appeals Board concluded that he did not have appropriate notice of the proceedings and remitted the matter to a new hearing before the Tribunal.

7. A second hearing before the Tribunal was held over two days. The Student was again convicted of the charges, and the Tribunal imposed a sanction that included a recommendation to the President that he recommend to Governing Council that the Student be expelled.

8. The Student appealed this decision as well. On the originally scheduled date for the hearing of this appeal it was determined that it was appropriate to adjourn the proceedings in order to permit the Student to obtain legal assistance in the handling of the appeal and the proceedings were accordingly adjourned.

9. At the time of the adjournment this Appeal Panel drew the parties' attention to the decision of the Court of Appeal for Ontario in *Jacobs v. Ottawa Police Service*, 2016 ONCA

345, and asked them to address on the resumption of the hearing whether that case affected the determination of the standard of proof under the *Code*.

10. The hearing resumed on February 1, 2019, with the Student represented as noted above.

11. **The First Charge** In the winter of 2015, the Student enrolled in CCT208-Writing & Research Methods in Communication, an introductory course about quantitative and qualitative research methods taught by Professor Maharajh (the "Course"). The outline for the course contained a warning about academic integrity and provided a link to the *Code*.

12. Students in the course were required to submit a research proposal, worth 25% of the final mark, containing a proposed original research project and a brief review of the literature and scholarship they had reviewed in preparation for the project. This required the use of 5 to 7 relevant peer-reviewed academic sources.

13. The Student submitted a research proposal describing in specific terms 2 studies that the Student purported to have reviewed in the context of his research. The sources were also listed in the bibliography for his research proposal.

14. The Teaching Assistant who marked the research proposal provided detailed feedback on it. Although he noted that the Citation and Referencing was "Comprehensive, correct and consistent" he went on to make the following observations as they related to the sources proposed for the research proposal:

- "As it is now, your bibliography is both incomplete and formatted incorrectly."
- "Be sure to always include page reference – not publication date – where using direct citation."
- With reference to the citation "CCIT, 2014" a question mark.

- With reference to a quotation that is attributed to a person without citation, a specification that a citation is required.
- With reference to a description of the results of "each study": "Support this with reference to the sources. This is too vague."
- With reference to the entire bibliography: "This whole section is formatted incorrectly and/or missing information."
- With respect to a citation to "S[redacted], A[redacted] Young Male Drivers and Media" (2014). CCIT, University of Toronto – Mississauga. March, 2015: "What kind of source is this?"
- "I'm not sure if these sources are appropriate since you did not provide full citations (apparently)."

15. The next requirement in the course was to submit a final research report referencing the academic sources they relied on in their research proposals and connecting their own findings to the literature they had previously reviewed.

16. In April, 2015, the Student submitted his research report, "Poor Driving Habits and Young Males: A Strong Influence?" examining the relationship between watching action films depicting speeding and viewers' driving habits.

17. The Teaching Assistant who graded the Student's research report had concerns about 2 of the academic articles cited in it, which he drew to the attention of Professor Maharajh:

> "Lake, David. "The Mindset of Media." University of Queens, 2008. Web. – Feb. 2015"
>
> and
>
> "Thompson, Joe. "Driving Habits of Young Males." (2011) Harvard University. Web. March 2015"

18. Professor Maharajh testified that she reviewed the Student's research report and then attempted to verify the existence of the two articles in question. She tried to locate them through Google and university research databases, but was not able to locate any trace of either article. She then attempted to contact the Student in order to discuss her concerns. The Student either cancelled or failed to attend 3 meetings set for that purpose.

19. The Student admits in his factum on this appeal that he did not address these allegations in his testimony. He offered no explanation for failing to produce copies of the purported articles at the hearing, or at any time subsequently.

20. The Tribunal accepted Professor Maharajh's evidence and convicted the Student on the first charge. The Panel held:

> The evidence leads the Panel to conclude on a balance of probabilities that the Student knowingly submitted academic work that contained concocted references to one or more sources. In particular, the Panel inferred from Professor Maharajh's uncontradicted testimony that she was unable to locate any trace of the Purported Sources, together with the absence of any evidence tendered by the Student that the Purported Sources had in fact existed, that they were indeed concocted.

21. **The Second Charge** The second charge arises from circumstances surrounding a prior offence of plagiarism. Specifically, in April of 2015, the Student attended a meeting with the Dean's Designate for Academic Integrity at UTM, and in the course of that meeting admitted plagiarism, which he confirmed with a written admission of guilt.

22. Later that month, the Vice-Dean, Undergraduate at UTM sent the Student a letter imposing a sanction for the admitted plagiarism under the *Code*. The Disciplinary Letter contained the following description of the sanction:

> Therefore, under section C.I.(a)8 of the *University's Code of Behaviour on Academic Matters*, I impose the following sanctions:
>
> - a mark of zero (0) for the assignment in question;
> - a further reduction of 25 marks from the final grade in the course; and
> - an annotation on transcript of "Mark reduced in CCT200H5F, 2014(9) due to academic misconduct", for 12 months, from April 6, 2015 to April 6, 2016

23. Almost half a year later, on October 1, 2015, the Student wrote to the Vice-Provost, Faculty and Academic Life, requesting a reconsideration of the sanction. He enclosed what he said was a copy of the Disciplinary Letter. However, the version of the letter he enclosed differed from that which had been sent in material ways. It read, in relevant part:

> Therefore, under section C.I.(a)8 of the *University's Code of Behaviour on Academic Matters*, I impose the following sanctions:
>
> - a mark of zero (0) for the assignment in question;
> - a reduction of 25 marks from the final grade in the course; and
> - an annotation on transcript of "Mark reduced in CCT200H5F, 2014(9)

24. In the course of the review of the Student's reconsideration request, the differences between the Disciplinary Letter sent to the Student and the letter he enclosed with his request came to light. Specifically, the letter enclosed by the Student did not include the word "further" in the second bullet, and the second line of the third bullet, indicating that the transcript notation was to be in place for 12 months, was omitted.

25. In a letter to the Student, the Vice-Provost noted the difference between the original Disciplinary Letter, and the letter included in the Student's reconsideration request and said "we would appreciate your including a note on this in your response". The Student did not respond to this request and was in due course advised that the sanction would not be changed.

26. In his examination-in-chief before the Tribunal, the Student denied changing the Disciplinary Letter before submitting it as part of his reconsideration request. However, he offered no explanation for the difference between the two letters. Indeed, in explaining what he said was an inaccuracy in the Disciplinary Letter, he responded as follows:

> Q. Okay. So when you finally received the sanction letter, right, you were dissatisfied with it. You thought it was inaccurate. Why?
>
> A. The sanction letter and the wording of the actual sanction letter was ... I wouldn't say it's unclear, but it's a bit hard to understand. **The part where it says, "A further reduction of 25 marks, 25 marks from where? There's certain things in the sanction ... they were there, but it was just unclear to understand**. It was not explained thoroughly in the meeting. ... (Emphasis added.)

27. As the Provost notes, this is effectively an admission that the Student received the Disciplinary Letter in its original form.

28. In the circumstances, the Tribunal found the Student's denials to be not credible, particularly in light of the admission that he had received an unaltered letter, and concluded that he had falsified the letter he had submitted with his reconsideration request. It noted:

> The Student's assertion that he had not altered the April 9 Letter when he submitted the Purported April 9 Letter to the Provost, in the face of Ms. Gaspini's evidence and the Student's own acceptance that the letter he submitted to the Provost (that is the Purported April 9 Letter) differed from the sanctioning letter that he had received from Ms. Gaspini, is simply not credible. The evidence supports a finding on the balance of probabilities that the Student either altered the April 9 Letter himself and submitted the Purported April 9 Letter to the Provost, or knowingly circulated or made use of such altered letter when he made his submission to the Provost.

29. **Sanction** No further evidence was led by the Provost or the Student on the issue of sanctions.

30. The Provost sought a penalty consisting of a final grade of zero in the Course, suspension from the University for up to 5 years, and a recommendation to the President of the University that he recommend to the Governing Council that the Student be expelled. The Provost submitted that all of these penalties were consistent with those imposed in similar matters.

31. The Student's representative made submissions concerning the Student's good character, general volunteerism, willingness to help others and involvement with the University girls' volleyball team. The Tribunal noted that these submissions were not supported by any evidence and observed that they were "not entirely disregarded by the Panel" although it was "very difficult for the Panel to weigh them against the significant factors militating in favour of this sanction requested by the University".

32. The Tribunal accepted the Provost's submissions that the offences were serious, that they were second and third offences and that they involved calculated dishonesty on the part of the Student. It noted that the concoction of the purported sources was an offence committed within days of the meeting in respect of a separate, admitted academic offence, and that the doctored letter submitted by the Student was in the course of the University's discipline process itself.

33. While noting that many of the cases relied upon by the Provost had the distinguishing feature that the falsified/fabricated documents in issue were submitted to a third party, the Tribunal concluded that the offences in which similar penalties had been imposed were indeed similar. It concluded that the sanction requested by the Provost was appropriate.

The Issue on Appeal

34. The Student's appeal is limited to one ground. He asserts that the Tribunal applied the wrong standard of proof. As noted above, the Tribunal found the Student guilty on a balance of

probabilities. The Student says that is incorrect and that the *Code* requires the offence must be proved on clear and convincing evidence, which he asserts is a higher standard than on a balance of probabilities.

35. A consideration of this issue requires a review of the history of the evidentiary standard provided for in the *Code* and the applicable legal requirements.

36. The first iteration of the *Code* came into existence in 1974. At the time, Tribunal decisions were rendered by a jury and the *Code* required that "the onus and standard of proof that an alleged offence has been committed by the accused shall be the same as in criminal cases".

37. In 1995 the *Code* was comprehensively amended. Cases were no longer decided by juries. And the standard of proof was amended to be as it remains today:

> C. II. (a.) 9. The onus of proof shall be on the prosecutor, who must show on clear and convincing evidence that the accused has committed the alleged offence.

38. In its submissions, the Provost noted that since this amendment the Tribunal and the Discipline Appeals Board have exclusively applied a single civil standard of proof and provided a list of 44 such cases (which list is reproduced as Schedule A to these Reasons for Decision). The first of these decisions was in March 2009.

39. Earlier, in 2008, the Supreme Court of Canada considered at length the proper standard of proof to be applied in civil cases in *C. (R.) v. McDougall*, 2008 S.C.C. 53. It concluded that in civil cases there is only one standard of proof:

> 40. Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the

> seriousness of the allegations or consequences. However, these considerations do not change the standard of proof....
>
> 46. Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.
>
> 49. In the result, I would reaffirm, that in civil cases there is only one standard of proof and that is proof on the balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

40. The 44 cases cited by the Provost were all decided after *McDougall* in the Supreme Court of Canada. It is probably not surprising, therefore, that they have all concluded that the applicable standard of proof for proceedings under the *Code* is that which *McDougall* established for civil cases, namely proof on a balance of probabilities.

41. A typical holding is found in Discipline Appeals Board decision #497 in March of 2009:

> 17. We do not think there is any question that the applicable standard of proof for proceedings under the *Code* is according to a civil standard – on a balance of probabilities. Unlike in criminal cases, there is no presumption of innocence. However, the requirement to prove the case on the balance of probabilities does not detract from the requirement found in the *Code* and in the common law that the standard must be met by evidence that is clear, convincing and cogent.

42. The issue raised on this appeal is whether this line of authority must be reconsidered and indeed overturned, on the basis of the decisions of the Supreme Court of Canada in *Penner v. Niagara Regional Services*, 2013 SCC 19 and the Ontario Court of Appeal in *Jacobs v. Ottawa Police Service*.

43. The issue the Supreme Court of Canada had to decide in *Penner* was whether issue estoppel applied in circumstances where police officers had been acquitted under the *Police Services Act* and were subsequently faced with civil claims.

44. The Court concluded (at paragraph 60):

> ... because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" ... it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude re-litigation of the issue of liability in a civil action where the balance of probabilities – a lower standard of proof – would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the Court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a higher standard of proof and might have been different if it had been decided based on the lower civil standard".

45. The finding that the "clear and convincing" standard of proof in the *Police Services Act* was a higher standard of proof than the balance of probabilities is somewhat confusing in light of the *McDougall* case. This is all the more so, as the Supreme Court of Canada did not refer to the *McDougall* case in its decision in *Penner*.

46. The apparent contradiction seems to have been reconciled by the decision of the Court of Appeal for Ontario in *Jacobs v. Ottawa Police Service*, referred to above. The Court of Appeal concluded that the *McDougall* decision was a determination of the civil standard of proof in a civil claim at common law. But, the Court held, it was well settled that it was within the authority of a legislature to create a standard of proof specific to a particular statute. The Court concluded that the *Police Services Act* was such a statute and it established a standard of proof in *PSA* hearings requiring clear and convincing proof, and not proof on a balance of probabilities.

47. In cogent submissions for the Student, his counsel submitted that the *Code*, like the *Police Services Act*, has established an intermediate standard of proof, higher than a proof on a

balance of probabilities. He noted that the words in issue are accompanied by a heading "Onus and Standard of Proof", that the provision is expressed in language suggesting that it is dealing with a standard of proof rather than a method of demonstration, and that to interpret the language as effecting the civil standard of proof, namely a balance of probabilities, would render the words "on clear and convincing evidence", as mere surplusage. To do otherwise, he said, would mean that the Tribunal would otherwise accept evidence that was unclear and unconvincing in quality.

48. The Provost, on the other hand, asserts that there is no statutory regime similar to the *Police Services Act* establishing a standard of proof in University of Toronto Tribunal hearings. The Provost's counsel asserts that the Tribunal is governed solely by the *Code*, which he characterizes as an internal University policy that must be interpreted and administered within the mainstream of civil and administrative law, including the *McDougall* standard of proof for civil cases.

49. These submissions by the Provost have given this Appeal Panel considerable pause. However, we have concluded that we cannot agree that the *Code of Behaviour on Academic Matters* is simply a statement of policy. Nor do we think it is simply a set of rules of procedure such as those referred to in another case relied upon by the Provost, *The Law Society of Upper Canada vs. Sriskanda*. In that case the Law Society Tribunal Appeal Division held that *Jacobs* had no application to the standard of proof on the issues before it as there was no provision in the *Law Society Act* comparable to those in the *Police Services Act*. Apparently the rules of evidence that were employed before the Tribunal were contained in an internal policy document entitled Rules of Practice and Procedure.

50. However, in this case we are dealing with the *Code of Behaviour on Academic Matters* which, though not itself a statute, is enacted pursuant to an express delegation of statutory power.

51. As is helpfully summarized in University Tribunal Decision #1997-98-04, as a result of the successive statutory provisions of the *University of Toronto Act, 1947*, and the *University of Toronto Act, 1971*, the conduct and discipline of the students of the University of Toronto, including the creation of disciplinary offences and penalties are delegated by those statutes to the Governing Council of the University of Toronto. The Governing Council has exercised that authority, in part, by enacting the *Code*. We cannot accept that the creation of offences, penalties for those offences, and the procedure to be adopted in determining whether those offences have been committed are valid exercises of the statutory authority delegated to Governing Council, but the creation of the relevant standard of proof is not.

52. An illustration of this principle is that for many years, as noted above, the *Code* imposed, without challenge, a criminal standard of proof on disciplinary proceedings under the *Code*. If one accepts, as *Penner* and *Jacobs* indicate, that some intermediate standard of proof can be created by statute, we cannot accept that it is within the statutory authority of Governing Council to impose the basic civil standard of proof, a balance of probabilities, or a criminal standard of proof, beyond a reasonable doubt, but not anything in between.

53. However, that by no means disposes of the issue before us.

54. We are still left with the fundamental question of interpretation, namely what is meant, once the onus of proof is placed on the prosecutor in section C.II.(a)(9) by the requirement that the prosecutor "*show* on clear and convincing evidence that the accused has committed the alleged offence". Unlike in the *Penner* and *Jacobs* cases requiring an offence to be "*proved* on

clear and convincing evidence", the provisions of the *Code* separate the description of the onus of proof and the description of the evidence used to meet that onus. Is that separation significant?

55. In all of the circumstances, we have concluded that it is. The section can be read as describing where the onus of proof (according to the ordinary civil standard of balance of probabilities) rests, and then describing the kind of evidence that should be led to meet that onus. Without more, we do not think such a description of the onus and the nature of the evidence to be led to discharge that onus effects an elevation of the standard of proof.

56. This is particularly so given that this is precisely the interpretation that has been given to this section of the *Code* in at least 44 decisions of the Tribunal and the Discipline Appeals Board in the last decade. These decisions are known to the Governing Council. Many of those decisions address issues (for example a recommendation for expulsion, or degree withdrawal) which must be finally determined by Governing Council. As well, Governing Council receives reports of the decisions of the Tribunal and Discipline Appeals Board.

57. If the Governing Council had intended through the use of the language in section C.II(a)(a) of the *Code* to impose a different standard of proof than the one expressly described and used in those 44 cases, one might reasonably have expected, through a reenactment of the *Code* provisions or otherwise, that Governing Council would have made that clear.

58. Moreover, the ordinary civil standard of proof, on a balance of probabilities, is, as has been noted in many articles and judgments, a concept that is much more clearly able to be described and understood than the rather more enigmatic and uncertain standard of proof "on clear and convincing evidence". Indeed, although the *Penner* and *Jacobs* cases both hold that

"proof on clear and convincing evidence" is a higher standard than the ordinary civil standard, they offer no further assistance or explanation of what that standard is.

59. The conceptual difficulties of a Tribunal forced to adopt an intermediate standard of proof are illustrated in the *McDougall* decision:

> 43. An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:
>
> > As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of "51% probability" or "more likely than not" can be understood by decision makers, the concept of 60% or 70% probability cannot.
>
> 44. Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffman explained *In re B at para. 2:*
>
> > If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the Tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.
>
> In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely or not that the event occurred.

60. The continuation of the existing standard of proof – on a balance of probabilities – provides a standard that can be clearly expressed and understood. This is a factor not to be dismissed by any tribunal which has to wrestle with issues of standard of proof, but particularly by the Tribunal charged with enforcing the provisions of the *Code*, given that the majority of the members of the Tribunal are not lawyers.

61. We do not consider that this determination of the standard of proof renders the need to meet that standard of proof by "clear and convincing evidence" as "mere surplusage" as the Student has suggested. Rather, we consider those words to be a salutary emphasis for the Tribunals and in particular for their non-lawyer members, as to the quality of evidence which should be led before a member of the University can be found to have committed the serious offence of violating the *Code of Behaviour on Academic Matters*.

62. In the result, we have concluded that the standard of proof set by the *Code of Behaviour on Academic Matters* is the ordinary civil standard of proof, on a balance of probabilities. Our conclusion is based on:

- the potential ambiguity introduced by the differences in the wording employed in the *Code* and in the statute considered in the *Penner* and *Jacobs* cases;
- more importantly, a consistent and substantial body of Tribunal and Appeal Board authority which has interpreted the standard of proof found in the *Code* in this manner over multiple cases and many years and which interpretation has been accepted by the Governing Council who is the author of that standard; and
- the salutary effect of a standard of proof that can be clearly expressed to and understood by the members of the University whose conduct will be judged according to that standard and the members of the Tribunal charged with enforcing it.

63. It follows that we consider that the standard was correctly explained in the reference of the Discipline Appeals Board decision number 497, quoted at paragraph 41 above. If we have misinterpreted the intentions of the Governing Council in its enactment of the *Code*, there are avenues available to change the *Code*.

64. However, even if we have misinterpreted the intentions of Governing Council, in the particular circumstances of this case, we have concluded that the result would not be different, even if the Student is correct and the standard of proof is higher.

65. It would not be appropriate for us to make such a determination if the issues in this case turned on finely tuned assessments of credibility. In such a case the impact of a higher standard of proof should only be assessed at the Tribunal level where the resulting impact on the credibility assessments could properly be made.

66. However, this is not a case where the determination of the Student's liability turns on any such credibility assessment.

67. As noted above, the Student admits in his factum that he did not address the allegations raised by the first offence in his testimony, and he has offered no explanation for failing to produce copies of the purported articles at the original hearing or at any time subsequently.

68. With respect to the second charge, as noted above, the Student in his evidence effectively admitted that he had received the disciplinary letter in its original form, and was confused by the language which was omitted in the incomplete copy of the letter which he subsequently submitted, the foundation of the first offence. In other words, the finding that the letter he resubmitted to the University differed from the version that he acknowledged he had received is based on the Student's evidence, not in conflict with it.

69. Further, as noted in the Provost's factum on this appeal, the Student has not attempted to tender any fresh evidence that could either establish the existence of either of the articles that he

cited in the research paper or explain how or why the disciplinary letter he admitted he received in its original form became altered before he resubmitted it.

70. In all of the circumstances, we conclude that even if we are wrong and the Tribunal should have applied the higher standard of proof set out in *Penner* and *Jacobs* and submitted by the Student, there is no basis to conclude that the result in this case would be any different.

71. For these reasons, we dismiss the appeal.

April 18, 2019

Patricia D.S. Jackson, Chair
on behalf of the Appeals Board
Panel

Schedule "A"

Case	General information	"Burden of Proof" issue
Decision #497 (March 25 2009)	Appeal by the Provost from a Tribunal decision in which the Student was found not guilty of submitting an answer booklet during a term test that was written beforehand. Student was charged under s. B.i.3(b).	• "We do not think there is any question that the applicable standard of proof for proceedings under the Code is according to a civil standard – on a balance of probabilities. Unlike in criminal cases, there is no presumption of innocence. However, the requirement to prove the case on the balance of probabilities does not detract from the requirement found in the Code and in the common law that the standard must be met by evidence that is clear, convincing and cogent" (para 17) • "While not questioning the credibility of the Professor's evidence, the Tribunal concluded that the evidence did no establish the offense because the offense was not 'determined conclusively or by necessary inference,' was not accompanied by 'independent corroboration' and that the evidence had not eliminated the 'many possibilities that are inconsistent with an inference of guilt.' These requirements strongly suggest that the Tribunal was requiring the University to prove the case to a standard higher than a balance of probabilities" (para 22)
Decision #607 (January 31, 2011)	Student was charged under s. B.i.1(d), s. B.i.1(b), and s. B.i.3(b) for plagiarism and use of an unauthorized aid during a final exam.	• "The University must satisfy us, on a balance of probabilities, with clear and cogent evidence, that this is what occurred. See University of Toronto v X, a decision of the Discipline Appeal Board, March 25, 2009 and F.H. McDougall, 2008 SCC 53" (para 21).
Decision #668 (April 27, 2012)	Student charged under s. B.i.1(b) for cheating on an exam.	• "The Tribunal accepts that the Provost need only prove her case on a balance of probabilities, albeit on clear and convincing evidence. The burden is simply on a balance of probabilities. The requirement of clear and convincing evidence simply illuminates the

		civil standard" (para 23)
Decision #738 (January 15, 2015)	Student charged under s. B.i.1(b) for the possession of an unauthorized aid. Student was allowed to write an exam on the professor's computer; used the Internet.	• "The University must satisfy us, on a balance of probabilities with clear and cogent evidence that the Student attempted to obtain unauthorized assistance in connection with the mid-term test by accessing the internet to attempt to answer certain of the questions" (para 16)
Decision #805 (August 10, 2015)	Student charged under s. B.i.1(b) and, in the alternative, s. B.i.3(b) for possession of an unauthorized aid during an exam.	• "The onus is on the University to establish on clear and convincing evidence on a standard of probabilities that the academic offence charged has been committed" (para 26)
Decision #802 (Septembe r 28, 2015)	Student charged under *s.* B.i.1(d), *s.* B.i.1(f) and, in the alternative, *s.* B.i.3(b) for knowingly representing ideas from other sources as their own in an essay as well as concocting references.	• "The onus is on the University to establish on clear and convincing evidence on a standard of probabilities that the academic offence charged has been committed" (para 24)
Decision #758 (June 22, 2015 and December 4, 2015)	The Student was charged under *s.* B.i.1.(c), s. B.i.3.(a) and, in the alternative, s. B.i.3(b) for hiring an individual to impersonate them during a final exam.	• "The University must prove its case on a balance of probabilities based on clear and convincing evidence" (para 33)
Decision #815 (January 19, 2016)	Student charged under *s.* B.i.1(d) and s. B.i.1(b) and, in the alternative, s. B.i.3(b) of the Code for knowingly representing another's ideas in an essay, and that the Student knowingly obtained unauthorized assistance in connection with the Essay.	• "The University acknowledged that the burden was on it to establish the charges were made out and it had to do so on a balance of probabilities that the Student committed the offences and it had to do so on clear and convincing evidence." (para 19)
Decision #809 (January 29, 2016)	Student charged under s. B.i.1(d), s. B.i.1(b) and, in the alternative, s. B.i.3(b) for plagiarism.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offences charged has been committed by the Student" (para 17)
Decision #808 (February	Student charged under s. B.i.1(a) and, in the alternative, under s. B.i.3(b) for the falsification of two documents that supported their	• "... the burden in these proceedings is on the University to prove the charges on a balance of probabilities with clear and convincing evidence" (para 62).

1, 2016)	grant application	
Decision #822 (March 22, 2016)	Student charged under s. B.i.3(a) and, in the alternative, s. B.i.3(b) for the falsification of an academic record	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged has been committed by the student" (para 7)
Decision #785/786 (March 24, 2016)	Students charged under s. B.i.(b), s. B.i.1(a) and s. B.i.3(b) for knowing possessing an unauthorized aid during an exam.	• "To prove the charges against L and P the University must satisfy us on a balance of probabilities standard with clear and cogent evident that (1) L used an authorized aid to assist him in the Exam and then destroyed the unauthorized aid, and that (2) L provided the unauthorized aid to P" (para 70)
Decision #807 (April 7, 2016)	Student was charged with three offenses under s. B.i.1(a) and two offenses under s. B.i.3(b) for forging various medical documentation and attempting to gain an academic advantage by representing quizzes/exams as his own.	• "The onus is on the University to demonstrate that there is clear and compelling evidence that the Student forged the medical notes and that the student attempt to mislead Mr. Tassone about (1) two quizzes he purportedly wrote and received back with a grade and (2) having submitted a second exam booklet in the final examination" (para 57) • "The Panel needs only to find the offenses on a balance of probabilities" (para 59)
Decision #842 (April 21, 2016)	Student charged under s. B.i.1(d) and s. B.i.1(b) for knowingly representing another's work as their own and obtaining unauthorized assistance. The student was charged, in the alternative, under s. B.i.3(b).	• "The onus is on the University to demonstrate that there is clear and compelling evidence that the student plagiarized part of all of her essay and/or that the student used unauthorized assistance to write her exam" (para 28) • "It is more likely than not that another person, other than the student, wrote the essay given the student's performance on the 1st assignment and on the balance of the course and writing module" (para 31)
Decision #833 (April 27,	Student charged under s. B.i.3(a) for the forgery, alteration, and/or falsification of a letter from the Registrar's office confirming	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that the academic offense charged has been committed by the

2016)	enrolment	Student" (para 21) • "…the Tribunal found that the essential elements of the academic offenses charged were proven on a balance of probabilities" (para 27)
Decision #816 (July 27, 2016)	Student charged under s. B.i.1(a) and, in the alternative, s. Bi.3(a) and s. B.i.3(b) of the Code. The charges related to allegations that the Student knowingly forged, altered, or falsified her Test before resubmitting it in an attempt to obtain additional marks	• "…the Panel concluded that it was more likely than not that the Student knew that she had made changes to the paper. The Committee finds, on the basis of clear, cogent and convincing evidence, that the Student made the marks on the paper believing them to be correct" (para 20)
Decision #843 (August 16, 2016)	Student charged with six offences under s. B.i.1(a) and, in the alternative, two offences under s. B.i.3(b) of the Code. The charges related to allegations that the Student falsified petitions to write deferred final examinations in two courses	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged have been committed by the student" (para 5)
Decision #862 (August 23, 2016)	Student charged with two offences under s. B.i.1(d), two offences under s. B.i.1(b) and, in the alternative, two offences under s. B.i.3(b) of the Code. The charges related to allegations that the Student submitted two essays for the Course containing many elements of plagiarism and unauthorized aid.	• "Our decision is therefore that with respect to Essay Number 1, the evidence establishes clearly to us on a balance of probabilities that Essay Number 1 contained work, expressions, and ideas which were not those of the Student who submitted them and we find the Student guilty under Count 1" (para 21) • "With respect to Essay Number 2, we find the evidence clear and cogent and are able to conclude again on a balance of probabilities that Essay Number 2 is not the work of the Student and therefore, the Count number 4 in the Charges is also made out. Accordingly, we do not need to make findings on Counts 5 and 6" (para 23)
Decision #836 (Sept. 11, 2016)	Student charged with nine offences under s. B.i.1(a), and in the alternative, an offence under s. B.i.3(b) for forging various documents.	• "Following deliberation and based on the submission of counsel and the facts in the Agreed Statement of Facts and Joint Book of Documents, the Panel concluded that charges 1 through 9 have been proven with

		clear and convincing evidence on a balance of probabilities" (para 20)
Decision #851 (October 15, 2016)	Student charged with one count of unauthorized assistance under s. B.i.1(b). The student was charged in the alternative under s. B.i.3(b). Student alleged to have copied multiple choice answers from another individual in their class during a final examination	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged has been committed by the Student" (para 38). • "The Tribunal notes that the burden of proof is on the University, not the student, and there is no obligation for the Student to prove that she didn't copy from M.W" (para 45).
Decision #796 (November 10, 2016)	Student charged with two charges of plagiarism contrary to *s.* B.i.1(d) of the Code and one charge of obtaining unauthorized assistance during a test contrary to *s.* B.i.1(b) of the Code	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged has been committed by the student" (para 6)
Decision #873 (December 13, 2016)	Student charged with two counts of forging medical documents under s. B.i.1(a) of the Code, or in the alternative, two charges of academic dishonesty under s.B.i.3(b) of the Code	• "Following deliberations and based on the Agreed Statement of Facts and the Joint Book of Documents, the Panel has concluded that charges 1 and 3 (as outlined in paragraph 2 above) have been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty plea of the student in respect of those charges" (para 14)
Decision #781 (January 26, 2017)	The Student was charged with one offence of concoction under s. B.i.1(f) of the Code, and alternatively, academic dishonesty under s. B.i.3(b) of the Code. The student falsified research data.	• "Following deliberation and based on the submissions of counsel for the University, the facts set out in the Agreed Statement of Facts and Joint Book of Documents, and the Student's confirmation of his agreement with the University's review of the facts at the hearing, the Panel found that the first charge was proven with clear and convincing evidence on a balance of probabilities and accepted the Student's guilty plea" (para 9)
Decision #892 (February 15, 2017)	Student was charged with plagiarism under s. B.i.1(d) of the Code, and in the alternative with academic dishonesty under s. B.i.3(b) of the Code.	• "The onus is on the University to establish based upon clear and convincing evidence on a balance of probabilities that the academic offense has been committed" (para 17)

Decision #865 (February 22, 2017)	Student charged with possession of an unauthorized aid under *s.* B.i.1(b*)*, and in the alternative, an academic dishonesty under *s.* B.i.3(b) of the Code.	• "The onus was on the University to establish on the balance of probabilities, using clear, cogent and convincing evidence, that one or more of the academic offenses charged has been committed by the Student" (para 38)
Decision #841 (March 13, 2017)	Student was charged with one offence of plagiarism under s. B.i.1(d) of the Code, and alternatively, use of an unauthorized aid under s. B.i.1(b) of the Code, and alternatively, academic dishonesty under s. B.i.3(b) of the Code	• "At the conclusion of the hearing, the Tribunal dismissed the Charges against the Student, finding that the University had failed to establish the Charges on a balance of probabilities based on clear and convincing evidence" (para 3)
Decision #845 (April 26, 2017)	The Student was charged with forgery and plagiarism under ss. B.i.1(a) and B.i.1(d) of the Code, and alternatively, academic dishonesty under s. B.i.3(b) of the Code.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offences charged has been committed by the Student" (para 5)
Decision #869 (May 1, 2017)	Student charged under ss. B.i.(1)(a) and B.i.1(b) for falsifying a document and using unauthorized assistance in a final exam. The student brought in their own exam sheet.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged has been committed by the student" (para 29)
Decision #896 (May 17, 2017)	Student was charged with knowingly representing another's idea or work as their own under s. B.i.1(d) of the Code, and alternatively, academic dishonesty under s. B.i.3(b) of the Code.	• "Consequently, the Tribunal finds that Charge 1 had been proven with clear and convincing evidence on a balance of probabilities" (para 16)
Decision #894 (May 31, 2017)	Student was charged with five counts of forging or falsifying information medical documentation contrary to *s. B.i.1(a)* of the *Code*, or in the alternative, two charges of academic dishonesty under s. B.i.3(b) of the Code.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that one or more of the academic offenses charged has been committed by the student" (para 5)
Decision #907 (June 20, 2017)	Student was charged with one count of forging or falsifying information contained in her petition for academic accommodation contrary to s. B.i.1(a) of the Code, or in the alternative, one charge of academic dishonesty under s.	• "Following deliberations and based on the ASF and the JBD, the Panel concluded that the first charge (as outlined in para 2 above) had been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty plea of the Student in respect of that charge" (para 9)

	B.i.3(b) of the Code.	
Decision #922 (August 1, 2017)	The Student was charged with plagiarism under s. B.i.1(d) of the Code, and alternatively, academic dishonesty under s. B.i.3(b) of the Code.	• "The onus is on the University to establish based upon clear and convincing evidence on a balance of probabilities that the academic offence charge has been committed" (para 6)
Decision #904 (October 5, 2017)	The Student was charged with falsifying or forging a degree from the University contrary to s. B.i.3(a) of the Code.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence..." (para 21)
Decision #906 (October 27, 2017)	The Student was charged with possession of an unauthorized aid during a final exam contrary to s. B.i.1(b) of the Code, or in the alternative one charge of academic dishonesty not otherwise described contrary to s. B.i.3(b) of the Code	• "Following deliberations and based on the ASF and the JBD, the Panel concluded that the first charge (as outlined in paragraph 2 above) had been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty plea of the Student in respect of that charge" (para 15)
Decision #931 (October 27, 2017)	The Student was charged with plagiarism contrary to s. B.i.1(d) of the Code, or in the alternative one charge of academic dishonesty not otherwise described contrary to s. B.i.3(b) of the Code.	• "Following deliberations and based on the ASF and the JBD, the Panel concluded that the first charge (as outlined in paragraph 2 above) had been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty plea of the Student in respect of that charge" (para 20)
Decision #841 (Tribunal) March 13, 2017)	Student charged under with plagiarism under s. B.i.1(b), s. B.i.1(d), and s. B.i.3(b) of the Code.	• "At the conclusion of the hearing, the Tribunal dismissed the Charges against the Student, finding that the University had failed to establish the Charges on a balance of probabilities based on clear and convincing evidence." (para 3)
Decision #841 (DAB) (October 31, 2017)	Appeal by the Provost from a Tribunal decision in which the majority acquitted the Student on charges of plagiarism contrary to s. B.i.1(b), s. B.i.1(d), and s. B.i.3(b) of the Code.	• "When taken with the very clear references to the correct standard of proof in various paragraphs of the majority's decision, we are unable to conclude that this Panel did not do exactly what it said it did, namely, apply the correct standard of proof" (para 68)

Decision #932 (November 10, 2017)	The Student was charged with one charge of forging an transcript contrary to s. B.i.3(a) of the Code, or in the alternative, one charge of academic misconduct not otherwise described contrary to s.B.i.3(b) of the Code.	• "The onus is on the University to establish based upon clear and convincing evidence on a balance of probabilities that the academic offense charge has been committed" (para 4)
Decision #941 (February 16, 2018)	The Student was charged with two charges of plagiarism contrary to s. B.i.1(d) of the Code, with alternative charges of unauthorized assistance contrary to s. B.i.1(b) of the Code; or in the further alternative, charges of academic misconduct not otherwise described contrary to s.B.i.3(b) of the Code	• "Following deliberations and based on the Agreed Statement of Facts and the Joint Book of Documents, the Panel concluded that charges 1, 4 and 7 (as outlined in paragraph 2 above) had been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty pleas of the Student in respect of those charges" (para 23)
Decision #914 (February 19, 2018)	The Student was charged with two charges of plagiarism contrary to s. B.i.1(d) of the Code.	• "The onus is on the University to establish on a balance of probabilities, using clear and convincing evidence that the academic offence charged has been committed by the Student" (para 25)
Decision #944 (March 5, 2018)	The Student was charged with one charge plagiarism contrary to s. B.i.1(d) of the Code, or in the alternative, one charge of unauthorized assistance contrary to s. B.i.1(b) of the Code	• "Following deliberations and based on the ASF and the JBD, the Panel concluded that the first charge (as outlined in para 3 above) had been proven with clear and convincing evidence on a balance of probabilities, and accepted the guilty plea of the Student in respect of that charge" (para 11)
Decision #916 (March 12, 2018)	The Student was charged with one count plagiarism on their dissertation contrary to s. B.i.1(d) of the Code, or in the alternative, one count of unauthorized assistance contrary to s. B.i.1(b) of the *Code*.	• "The University must establish on a balance of probabilities through clear and convincing evidence that an academic offence has been committed by the Student" (para 6)
Decision #960 (April 3, 2018)	The Student was charged with falsifying or forging an academic record contrary to s. B.i.3(a) of the Code, or in the alternative academic dishonesty not otherwise described contrary to s.B.i.3(b) of the Code	• "Following deliberation and based on the testimony of the witnesses and the documents in the University's Book of Documents, the Panel concluded there was clear and convincing evidence that, on a balance of probabilities, the Student had circulated or made use of a forged, altered or falsified record, namely a document that purported to be his Transcript and Academic History" (para 11)

Decision #951 (May 8, 2018)	The Student was charged with two counts of falsifying or forging an academic record contrary to s. B.i.3(a) of the Code, or in the alternative, two charges of academic dishonesty not otherwise described contrary to s.B.i.3(b) of the Code.	• "The onus is on the University to establish on the balance of probabilities, using clear and convincing evidence, that the academic offense charged has been committed by the Student"