UNIVERSITY OF TORONTO

UNIVERSITY TRIBUNAL

IN THE MATTER OF charges of academic dishonesty made on December 8, 2014;

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:

THE UNIVERSITY OF TORONTO

- AND -

S[redacted] H[redacted] [redacted] AND S[redacted] P[redacted]

REASONS FOR DECISION

Hearing Dates: Friday, December 4, 2015 and Friday, January 15, 2016

Members of the Panel:
Ms. Sana Halwani, Barrister and Solicitor, Gilbert's LLP, Chair
Professor Chris Koenig-Woodyard, Department of English, Faculty Panel Member
Ms. Alice Zhu, Student Panel Member

Appearances:
Ms. Lily Harmer, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Tegan O'Brien, Law Student for Mr. P[redacted], Downtown Legal Services
Mr. Lawrence Veregin, Law Student for Mr. P[redacted] Downtown Legal Services
Ms. Rabiya Mansoor, Law Student for Mr. P[redacted] Downtown Legal Services
Professor Steve Joordens, Course Instructor for PSYA01H3Y
Dr. Ada Le, Invigilator for final exam in PSYA01H3Y
Ms. Ainsley Lawson, Undergraduate Course Coordinator, Department of Psychology & Neuroscience
Professor Wayne Dowler, Dean's Designate, University of Toronto Scarborough (WD)
Ms. Emily Dies, Law Student, University of Toronto Faculty of Law
Dr. Kinson Leung, Invigilator for final exam in PSYA01H3Y

In Attendance:
Ms. Hayley Ossip, Articling Student, Gilbert's LLP
Mr. Christopher Lang (December 4, 2015), Director, Appeals, Discipline and Faculty Grievances
Ms. Krista Osbourne, Administrative Assistant, Appeals, Discipline and Faculty Grievances
Ms. Tracey Gameiro, (Observer, January 15, 2016)
Ms. Nisha Panchal, (Observer, Student Conduct & Academic Integrity Officer, Office of the Dean & Vice-Principal Academic, University of Toronto, Scarborough)
Mr. S[redacted] J[redacted] P[redacted] the Student

Mr. S H L the Student

I. Charges

1. The Trial Division of the University Tribunal convened on July 8, 2015 to consider charges under the University of Toronto Code of Behaviour on Academic Matters, 1995 (the "Code") laid against Mr. S H L ("L") and Mr. S J P ("P") from letters to each student dated December 8, 2014 from Professor Sioban Nelson, Interim Vice-Provost, Faculty & Academic Life.

2. L did not attend the hearing at the scheduled time. The hearing was thus adjourned and rescheduled for December 4, 2015. Details of the adjournment are recorded in the Reasons for Decision of the July 8, 2015 Hearing, and are attached to these Reasons as Appendix 1.

3. The matter was heard on Friday, December 4, 2015 and Friday, January 15, 2016.

4. L stands accused of three Charges. The University alleges that L:

   a. on or about August 9, 2014, knowingly used or possessed an unauthorized aid or obtained unauthorized assistance in connection with a final exam ("Exam") in PSYA01H3Y (the "Course"), contrary to section B.I.1(b) of the *University of Toronto Code of Behaviour on Academic Matters, 1995* (the "Code");

   b. on or about August 9, 2014, knowingly altered or falsified a document or evidence required by the University, or uttered, circulated, or made use of any such altered or falsified document in connection with the Exam, contrary to section B.I.1(a) of the Code; and

   c. on or about August 9, 2014, 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 in the Exam, contrary to section B.I.3 (b) of the Code.

5. P stands accused of two Charges. The University alleges that P:

a. on or about August 9, 2014, knowingly provided an unauthorized aid or unauthorized assistance to L in connection with the Exam in the Course contrary to section B.I.1(b) of the Code;

b. in the alternative, on or about August 9, 2014, 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, in connection with the Exam, contrary to section B.I.3(b) of the Code.

6. L and P both pied not guilty to their respective charges.

7. At the conclusion of the hearing on January 15, 2016, the Tribunal found L guilty of the charges against him, but dismissed the charges against P, finding that the University had not proven its case on a balance of probabilities based on "clear and convincing evidence."

II. Background to the Charges

8. L and P both took the Course taught by Professor Joordens in Summer 2014.

9. The Course was an online course with no in-class component. Final grades for the Course were determined by online evaluations worth 38%, a written assignment to be evaluated by peers worth 12%, and the Exam worth 50%. The syllabus (Exhibit 5) clearly stated the course requirements and the university policy on academic dishonesty.

10. The Exam was a multiple choice exam, which was held in multiple locations on the University of Toronto Scarborough ("UTSC") Campus at the same time. L and P wrote the Exam in different buildings. L wrote in the Academic Resource Centre ("ARC") Room 223, a large, ranked classroom with two floors; P wrote the final exam in the Arts Administration ("AA") building Room 112. The relative locations of ARC and AA can be seen in the UTS map at Exhibit 21.

11. During the Exam, L was allegedly caught using an unauthorized aid. The University alleged that P provided L with the unauthorized aid. The theory of the University was that P had produced the unauthorized aid from a piece of paper ripped out of his own exam, on which he had written down answers, and which he had taken to a washroom near ARC, where L picked it up during a bathroom break during the exam.

12. The charges at issue in this proceeding arise from this series of events.

13. The University called five witnesses:

    a. Professor Steve Joordens, Course Instructor for PSYA01H3Y;

    b. Dr. Ada Le, Invigilator for final exam in PSYA01H3Y in ARC 223;

    c. Ms. Ainsley Lawson, Undergraduate Course Coordinator, Department of Psychology & Neuroscience and Invigilator for final exam in in PSYA01H3Y in AA 112;

    d. Professor Wayne Dowler, Dean's Designate, University of Toronto Scarborough; and

    e. Dr Kinson Leung, Invigilator for final exam in PSYA01H3Y in ARC 223.

14. P█ called two witnesses:

    a. Mr. Yoon Jang, a friend who wrote the PSYA01H3Y exam in AA 112; and

    b. Ms. Emily Dies, a University Faculty of Law Student with knowledge of statistics.

15. The Panel also heard from L█ and P█.

III. Summary of Evidence

The Exam

16. The Exam was held on August 9, 2014 and was a two-hour multiple choice exam.

17. Students were given exam booklets containing 80 multiple choice questions with four answer choices – A, B, C, D. There were two versions of the exam: A and B. Questions 1-40 of Version A were questions 41-80 of Version B (and vice versa). There was also an 81st question, which simply asked students to clarify if they were given Version A or B. Students were also given "Scantron" pages in which to input their answers. These Scantron pages – not the exam booklets – were graded electronically by a Scantron machine.

18. The first page of the Exam booklet explained that use of unauthorized aids during the examination was prohibited. L[redacted] and P[redacted]'s respective booklets were made Exhibits 6 and 9, respectively, in the proceeding.

19. The Exam was held in multiple locations on the University of Toronto Scarborough ("UTSC") Campus at the same time. Indeed, L[redacted] and P[redacted] wrote the Exam in different buildings. L[redacted] wrote in the Academic Resource Centre ("ARC") Room 223, a large, theater-style classroom that spanned two floors; P[redacted] wrote the final exam in the Arts Administration ("AA") building Room 112. The relative locations of ARC and AA can be seen in the UTSC map at Exhibit 21.

20. Dr. Ada Le and Dr. Kinson Leung were invigilators in ARC where L[redacted] wrote the Exam.

21. Ms. Lawson was an invigilator in AA where P[redacted] wrote the Exam. In addition, Mr. Yang, P[redacted]'s friend, also wrote the exam in AA.

22. None of these details about the Exam were disputed.

<u>L[redacted]'s examination</u>

23. The evidence was consistent that during the two hour exam, L[redacted] went to the washroom at least twice. L[redacted] testified that he had a stomach ache during the exam and that was the reason for his multiple visits.

24. It is clear that students in AA were taken to a washroom on the lower level (through the doors at the front/bottom of the classroom). It is also clear that there were other washrooms available on the upper level (through the doors at the back/top of the classroom). L[redacted]s testimony was that he had no way of knowing to which bathroom Dr. Leung would take him. Dr. Leung testified that he could not take students to the washroom on the upper level, as the upper door out of the exam room is a "one-way door" which does not permit re-entry. Professor Joordens testified that there were multiple washrooms, and students would not necessarily know to which washroom they would be taken during an exam. Dr. Leung testified that there was only one bathroom stall, while L[redacted] testified that there were multiple stalls.

25. L[redacted]'s evidence was that Dr. Leung made him turn out his pockets before each washroom visit and followed him into the washroom (not into the stall). Once in the

washroom, Dr. Leung allegedly examined the stall before allowing L to enter. Anyone, including the general student population, can use these washrooms during exams.

26. Dr. Leung stated that L did not act suspiciously after the first washroom visit. However, after the second, L looked around the exam room. He then continued to work on his multiple choice exam by simply filling in bubbles, without looking at the exam booklet which contained the questions.

27. Near the end of the exam (about ten to fifteen minutes before its conclusion), Dr. Leung observed L copying answers onto his Scantron sheet from a piece of paper containing rows of numbers and letters under L's exam booklet. The piece of paper appeared to be an unauthorized aid containing answers to the exam questions. Dr. Leung described the paper as being roughly the size of a hand or a palm – "a pretty big piece, actually" – containing handwritten rows of numbers and corresponding letters. On the back of the paper, the words "6 or 8 of 15" were typed. Dr. Leung did not recall the precise number but rather the shape of the number.

28. On observing this, Dr. Leung took L's exam from him and directed him to the front of the room.

29. Dr. Le testified that Dr. Leung called her over to L's chair right after he confiscated the paper and had a chance to look at it. He handed her the piece of paper and she walked with it down to the front of the classroom. On this walk she had the chance to look at the piece of paper. She noted that the paper was roughly 5x3 inches or 4x1.5 inches (Dr. Le put her forefingers together and her thumbs together to form an oval to demonstrate the approximate size) and that it had 3-4 rows of 20 or so numbers that were handwritten on the paper in small writing in pencil. "VA" was also written in pencil on the piece of paper. Dr. Le also noticed that there was a typed mark on the page indicating a number she did not recall followed by the words "of 15".

30. When Dr. Le reached the front of the classroom, she placed the piece of paper on the podium in front of her. Dr. Le then asked L to take a seat at the front of the classroom. L did not ask the invigilators why his exam had been taken away. Instead, when Dr. Le had her back turned to him, he bumped her, managed to grab the piece of paper from the podium, and proceeded to run out of the classroom.

31. L█ testified that he did not have a piece of paper on his desk and that there was no piece of paper involved in the situation at all. He also denied jostling Dr. Le or grabbing anything from her. L█ testified that he had run out of the room because he was frustrated by the way he had been treated by Dr. Leung during his bathroom breaks as well as by the way Dr. Leung had taken his exam away from him before the end of the Exam (his testimony was not clear on this point).

32. L█ left his car keys in the classroom and so had to return to the room to retrieve them. When he returned, Dr. Le observed that he had a calm demeanour. Dr. Le asked if he had the piece of paper and he said several times that he did not have it.

33. As is required by the University, both Dr. Leung and Dr. Le wrote incident reports describing what had occurred in the classroom. Dr. Leung wrote his incident report at 11:21 AM – roughly 10 minutes after the exam ended (Exhibit 22), and Dr. Le wrote her incident report at 11:40 AM (Exhibit 15).

<u>P█'s exam</u>

34. Ms. Lawson was an invigilator in AA, the room where P█ wrote the Exam. She testified that she did not notice P█ during the exam. Her only interaction with him was when she signed him in to the exam room and when he handed back his exam.

35. P█ testified that he was nervous during the exam, and was chewing a piece of gum to manage his anxiety. When the gum lost its flavour, he spat it out and disposed of it into a piece of paper that he ripped out of the exam booklet. He stated that he stayed in the exam room until the end and then met Mr. Yoon Jang (a friend of his who also wrote the PSYA01H3Y exam in AA 112) at the front of the classroom where they proceeded to pick up their belongings and head for lunch.

36. Mr. Yoon Jang also testified that he did not see P█ leave the room during the exam, that P█ stayed for the entire exam, and that he met P█ at the end of the exam at the front of the classroom where the two gathered their belongings and went for lunch.

37. Dr. Joordens' testified that the majority of the class finishes the exam in under an hour and a half, but that he gave the class two hours so everyone can finish. He also stated that the bulk of students leave the exam between forty-five minutes and one hour before

the end of the exam. Ms. Lawson testified that students started leaving about an hour into the exam, with a steady stream leaving between the hour and hour and a half mark.

38. However, there was no evidence provided to the Panel that P[redacted] left the Exam early.

39. As will be discussed below, the University's theory with respect to P[redacted]'s involvement in this matter requires that P[redacted] completed his exam and left the room before the end of the exam. The Panel heard no evidence to support such a finding of fact.

Collecting Evidence after the Exam

40. Following the exam, the invigilators met and reviewed the entire class' exams, and noticed that a section of a page in P[redacted]'s exam booklet was ripped out. The part of the page is also where the page number – "6 of 15" – would have been written. Dr. Le testified that no other students' exam booklets had pages that were ripped. She also checked the unused exam booklets and all of them had intact pages. P[redacted]'s exam booklet was made Exhibit 8 in this proceeding. Measuring the rip as presented in the Exhibit, it is just over 4 inches X 1 inch.

41. Dr. Le testified that she wrote a second exam incident report after reviewing P[redacted]'s exam booklet (Exhibit 16). In this incident report, Dr. Le stated that Dr. Leung "knew that the cheat sheet was ripped out of another student's exam booklet" and that "6 of 15" had been written on it. P[redacted]'s exam booklet was the only exam booklet with a corner ripped off. Dr. Le also stated in her incident report that "the size and shape of the ripped out corner coincides with the size and shape of the cheat sheet."

42. In her testimony, Dr. Le concluded that, in order to pass the note to another student, P[redacted] would have needed to finish the exam, walk over to the men's bathroom in ARC, and leave the note there, since students may not leave an exam room unattended before they have completed their exam.

Descriptions of the Unauthorized Aid – The "Cheat Sheet"

43. Dr. Le and Dr. Leung provided the following descriptions of the cheat sheet:

    a. Size and shape

        i. Dr. Le: Described the cheat sheet as roughly 5 inches by 3 inches or 4 inches by x 1.5 inches. Dr. Le put her forefingers together and her

thumbs together to form an oval to demonstrate the approximate size. In her incident report, as described above, she had correlated the size and shape of the cheat sheet to the size and shape of the ripped corner from P█'s exam.

ii. Dr. Leung: Described the cheat sheet as being roughly the size of a hand or a palm – "a pretty big piece, actually". In his incident report he had described the cheat sheet as both "small" and "the size of a palm".

b. Answers

i. Dr. Le: The cheat had three to four rows of 20 or so numbers 1-4 that were handwritten on the paper in small writing arranged in rows in pencil. There were no handwritten letters. Dr. Le's evidence was that she understood the cheat sheet to be using a simple code of A=1, B=2, C=3 and D=4 to convey the multiple choice answers. It was unclear from the evidence how the recipient of the cheat sheet would know whether to go down or across first.

ii. Dr. Leung: The cheat sheet contained handwritten rows of numbers and corresponding letters.

c. Other handwritten markings

i. Dr. Le: "VA" was also written in pencil on the piece of paper. Her evidence was that she assumed this meant Version A.

ii. Dr. Leung: Provided no evidence of any additional markings on the cheat sheet, or of any way in which to determine which version the answers related to.

d. Typed page number reference

i. Dr. Le: There was a typed mark on the page indicating a number she did not recall followed by the words "of 15". Dr. Le did not indicate whether the typed page number was located on the same side of the cheat sheet as the handwritten answers.

ii. Dr. Leung: On the back of the paper (i.e. not the side of the paper containing the answers), the words "[6 or 8] of 15" were typed. Dr. Leung did not recall the precise number but rather the shape of the number.

Analysis of the Exam Responses

44. After the exam, Professor Joordens and Ms. Lawson compared the exam answers of the entire class, and noted that P[redacted] and L[redacted] had identical answers to the first twelve questions of the exam. Of these twelve answers, both P[redacted] and L[redacted] answered questions 3, 4, and 12 incorrectly.

45. Further, L[redacted] and P[redacted] were the only students who answered questions 1-12 in the same manner. No analysis was done to determine if any other students had also answered questions 3, 4 and 12 incorrectly.

46. Professor Joordens, with the assistance of Ms. Lawson, conducted a statistical analysis of the answers given by P[redacted] and L[redacted]. Professor Joordens explained that he had taught statistics and used statistical analysis in experiments. This experience was provided as the basis for this testimony. Professor Joordens was not qualified as an expert in statistical analysis prior to giving this testimony, but there was no objection to his testimony by L[redacted] or P[redacted], the former of which was self-represented and the latter of which was represented by Downtown Legal Services.

47. Although the statistical analysis conducted by Professor Joordens appears on its face to consist of simple math, and so to fall into the category of facts rather than opinions, upon further scrutiny, it is clear that both the assumptions underlying the analysis and the inferences drawn from the analysis push this testimony squarely into the realm of opinion.

48. Professor Joordens made clear that this kind of analysis must focus on common incorrect answers since common correct answers are to be expected (since they are correct).

49. Professor Joordens testified that it is highly unlikely that L[redacted] and P[redacted] could have come up with the same answers by coincidence. He had designed the exam such that certain wrong answers would be more tempting than others, given their proximity in sound or subject matter to the correct answer. In particular, two answers given by both students

were considered "low probability" wrong answers. Question 4 was only answered incorrectly in the same way as P■ and L■ by approximately 5% of the class. Question 12 was answered incorrectly in the same way as P■ and L■ by approximately 19% of the class.

50. There was also evidence presented that the two students had the same answers to the last eight questions in the Exam, if P■s answers were seen as shifted up from L■'s by one number. If this shifting theory is accepted, P■s answers to questions 74-78 correspond with L■'s answers to questions 75-79. However, P■ answered all these questions correctly, and as already noted, correct answers are not helpful to this kind of statistical analysis. If this shifting theory is not accepted, then the answers do not correspond and, again, these questions are not helpful to the analysis. In any case, Professor Joordens placed little emphasis on this part of his analysis, preferring to focus on the first 12 questions.

51. Overall, Professor Joordens stated that there was a 0.4% chance that two random students would provide identical answers to the first 12 questions. He also stated that if probability is less than 5%, a result is statistically significant and it is possible to reject the notion that the occurrence happened by chance alone. The implied inference was that there was a 99.6% chance that P■ and L■ had cheated together.

52. On cross-examination, it became clear that Professor Joordens had assumed that all the questions analysed were independent – i.e. that the probability of answering one question right or wrong would not affect the probability of answering any other question right or wrong. This assumption would not be reasonable if, for example, two questions came from the same chapter of a textbook. This assumption also does not take into account any language difficulties or other weaknesses that students may have in common and that may influence student responses.

53. Ms. Emily Dies, a law student with extensive math undergraduate studies called by P■'s DLS representative, also examined the analysis conducted by Professor Joordens. Ms. Dies was initially presented as an expert witness to counter Professor Joordens' testimony. Because insufficient notice and information had been provided by DLS to counsel to the University about Ms. Dies' testimony (The University Tribunal Rules of Practice and Procedure Rules 72-73), there was an initial objection to Ms. Dies testifying. However, after being told the intended scope of Ms. Dies testimony it became

clear that Ms. Dies would be providing no opinion evidence, or at the very least no more opinion evidence than Professor Joordens had already provided. On that basis, the Panel allowed her to testify.

54. Ms. Dies testified that there was only a 0.02% chance that any student would answer all twelve questions correctly when the probabilities of a student's answering each question correctly were multiplied. When this probability, in turn, was multiplied in order to discern the likelihood of any student getting 100% on the exam, the probability "approached zero very quickly." In contrast, Professor Joordens had noted that some students did indeed get 95% – or possibly higher – on the exam.

55. The intent of the testimony – as the Panel understood it – was to highlight the way in which statistics could be misleading when taken at face value. Thus, the reality was that getting 100% on the exam was completely feasible, but the statistical analysis made it look impossible (a probability approaching zero). This was a caution well received by the Panel and discussed in greater detail below.

The Relationship between the Students

56. The relationship between the students was a contested issue at the Hearing. The University sought to provide evidence that P███ and L███ were friends, even very close friends. This was strongly disputed by both P███ and L███.

57. After establishing that L███ and P███'s answers were so similar, Ms. Lawson testified that she checked Facebook and learned that L███ and P███ had on at least two occasions communicated on Facebook. Screenshots from Facebook were labeled Exhibit 18 of the proceeding. Most of the messages between P███ and L███ were in Korean and had been translated by Ms. Lawson using a "Bing" translation widget. Ms. Lawson could not confirm the accuracy of the translations since she does not speak Korean. She rather relied on the accuracy of the widget.

58. The two messages on which the University focussed were as follows:

    a. A message in English from L███ to P███ on April 21, 2014 which stated "I love you Hyung" followed by a smiley face emoticon.

    b. A happy birthday message (in Korean) from L███ to P███ in July 2014.

59. P and L both testified that they had met before at a party, but they "were not friends outside of Facebook". P and L also both testified that L's Facebook post of "I love you Hyung [big brother]" on April 21, 2014 was much more casual in its Korean context than in English, because "love" is not interpreted the same way and "Hyung" is a term of respect used for someone older. Similarly, L's message to P on his birthday (July 16, 2014) was also rather impersonal; it was just one that he sends to many Facebook friends on their birthdays after receiving Facebook birthday notifications.

60. The "I love you" statement was followed by an exchange on April 24, 2014 in which (according to the translations provided by P) L asked P "When did I write this down?"; to which P replied, "hahahaha, I am the hacker"; and then to which L replied "hahaha I think I do remember". The way the Panel understood this exchange, based on the testimony of P, was that L could not remember having written the message on P's Facebook page, L joked that he must have hacked into P's Facebook page to leave the message, to which P replied ("laughing") that he thought he did now remember leaving the message.

61. Professor Dowler was questioned about the students' academic histories. L's academic history was made Exhibit 19 and P's academic history was made Exhibit 20. These academic histories made clear that the students only had two courses in common (apart from the Course at issue here).

62. Both students had taken "Health and the Environment" and "Introduction to Japanese". The Health and Environment course occurred prior to the Course at issue here, while the Japanese course was taken the semester after the Course.

63. Professor Dowler explained that the Health and the Environment class was a large lecture class of about 400 students. In contrast, Japanese classes are small, do not have online components, and he did not believe that there were multiple sections of that course, though he was not sure. Therefore, Professor Dowler testified that the chance of knowing someone in the Introduction to Japanese class would be much higher than in the Health and the Environment class.

64. P testified that he did not know that L was in his Health and the Environment class. Further, he testified that, the Japanese course was divided into three sections and that

he and L were not in the same section. He stated that he had only learnt that L was in the Japanese class because of these disciplinary proceedings.

<u>P and L Meetings with Professor Dowler</u>

65. In October 2014, L and P met with Professor Dowler. Professor Dowler testified that he administered the Dean's Warning to the students and presented the evidence against them.

66. Professor Dowler met with L once on October 20, 2014 and testified that L denied having a cheat sheet and stated that the invigilator had searched his pockets after he went to the washroom and had not found anything.

67. Professor Dowler met with P three times in September and October 2014. P explained to Professor Dowler that he was nervous during the exam and was chewing gum, and that he tore off a piece of paper to throw out the gum. Professor Dowler went over this account with P several times.

68. P testified that Professor Dowler did not at first tell him which L he was accused of aiding, explaining that L is a very common Asian surname. According to P, Professor Dowler rather said that P would "find out later." P stated that he only learned which L was at issue when the charges were provided to him in a December 8, 2014 letter. On cross-examination, University counsel challenged P on this point, during which P clarified that he knew that the "L" at issue must have been someone in his PSYA01H3Y class.

IV. <u>The Onus of Proof</u>

69. The onus of proof in the Code is described in section E.4(b): "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."

70. To prove the charges against L and P the University must satisfy us on a balance of probabilities standard with clear and cogent evidence that (1) L used an unauthorized aid to assist him in the Exam and then destroyed the unauthorized aid, and that (2) P provided the unauthorized aid to P. See *University of Toronto and O.M.* (Case 497- Appeal), a decision of the Discipline Appeal Board, March 25, 2009 and *F.H.*

v McDougall, 2008 SCC 53. The question is whether it is more likely than not that the relevant events occurred.

71. P█'s DLS counsel cited *University of Toronto and K.U. and R.D.* (Case 00-01-02), a decision of the University Tribunal, April 25, 2001, in which the Tribunal stated that the "clear and convincing evidence standard" includes intent, and that more than a mere suspicion is required to satisfy the standard (at para 19). In this case, K.U. and R.D. sat beside each other and provided almost identical answers in two separate exams, and both students were observed as being suspicious. This evidence was not deemed sufficient to amount to a conviction for either student. The University's position was that this case is no longer good law since it was decided before *McDougall* clarified the standard for discipline hearings. However, that is not entirely clear.

72. *McDougall* established that the only civil standard of proof at common law is proof on a balance of probabilities (para 40). Further, *McDougall* equates the "clear and convincing" standard and the "balance of probabilities" standard:

> ...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test [...] If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test (para 46).

73. It is clear that more than a mere suspicion is required to meet this standard.

74. Further, there is no explicit formula for assessing whether an event is "more likely than not" – it is up to the trier of fact to make that determination in the circumstances (para 48). It could therefore be open to a Panel of the Tribunal to include a consideration of intent into the weighing of the evidence.

75. In the context of this case, however, clear and convincing evidence does not require separate evidence of intent. Rather, intent would be a corollary of the use or provision of a cheat sheet.

V. Findings

The Existence and Destruction of the Cheat Sheet

76. With respect to L's charges, there are two material factual findings that need to be made: (1) did L have or use an authorized aid during the Exam? And (2) did L destroy that unauthorized aid?

77. On the basis of all the evidence the Panel finds that L used an unauthorized aid in the Exam to cheat, and then destroyed that unauthorized aid, thereby destroying evidence needed by the University.

78. The Panel preferred the evidence of Drs. Leung and Le to that of L. Both Drs. Leung and Le handled and observed the cheat sheet. In addition, Dr. Leung witnessed L actually using the cheat sheet during the exam. Further, Dr. Le testified that she was bumped by L when he took back the cheat sheet, and both Dr. Le and Dr. Leung saw L run out the exam room.

79. L's evidence, in contrast, was simply not credible and is rejected by the Panel. In particular, L provided no explanation for the observations of Drs. Leung and Le. He simply denied the existence of the cheat sheet. Further, his explanation for why he ran out of the exam room was unclear and implausible. L testified that he had run out of the room because he was frustrated by the way he had been treated by Dr. Leung during his bathroom breaks and by the way Dr. Leung had taken his exam away from him before the end of the Exam. However, instead of asking the invigilators why his exam had been taken away or if he could continue his exam, he ran out.

80. The University pointed the Panel to the decision in *University of Toronto and C E*, November 12, 2013, (Case 648), in support of the argument that the Panel could return convictions in this case even without the physical cheat sheet being in evidence. In that case, as here, the student was entirely responsible for this lack of evidence. Despite this lack, the University had provided ample evidence to meet its burden of proving the existence of the cheat sheet.

The Relationship Between P and L

81. With respect to P's charges, there are several factual findings that must be made, the first of which is establishing the relationship between P and L.

82. The relationship between P[redacted] and L[redacted] is important to University's theory of the case because it helps to answer the question of why P[redacted] would be willing to assist L[redacted] in cheating.

83. P[redacted] and L[redacted] admit that they are acquaintances and have at least some overlap in their social network. That they are acquaintances may make the assistance alleged to be plausible, but it certainly is not enough to explain why one student would go so far as to help another student cheat on a final exam.

84. The University attempted through Facebook evidence to show a stronger connection between P[redacted] and L[redacted], but on the evidence, the Panel cannot find that the students were more than acquaintances.

85. It is a notorious fact that social networks like Facebook are not reflective of actual friend networks, and certainly, the two exchanges introduced as evidence by the University and discussed above do not reflect a strong friendship between P[redacted] and L[redacted]. In a nutshell, to the Panel, these exchanges reflected the trivial interactions common on Facebook, and not the sincere emotion that the words "I love you" might reflect in "real life".

86. The University also drew the Panel's attention to the courses that P[redacted] and L[redacted] had in common. However, these were not helpful in establishing anything more than an acquaintance status.

87. Although, at times, P[redacted] tried perhaps a little too hard to distance himself from L[redacted] that instinct is understandable given the circumstance in which he found himself. On the whole, the Panel accepts as credible the evidence of P[redacted] and L[redacted] that they were not close friends.

<u>The Common Answers and the Statistical Analysis of the Exams</u>

88. Before addressing the substance of the statistical analysis provided by the University, we must address a threshold question: was the statistical evidence provided in the nature of expert opinion evidence, or was it fact evidence, as characterized by the University?

89. Professor Joordens was not put forward as an expert witness. However, the statistical analysis he conducted and testimony he gave in that regard were opinion evidence. While the math itself (the multiplication of ratios to calculate probabilities) is factual, Professor Joordens made assumptions in deciding how to do that math. In particular,

Professor Joordens assumed that the events at issue (each incorrect answer) were independent and provided opinion evidence to the Tribunal about why that was a reasonable assumption.

90. Similarly, the testimony he gave about the likelihood of L█ and P█ having the same three incorrect answers based on his analysis was also an opinion. He did not simply provide the mathematical answer, he told the Panel that it was extremely unlikely that two students would randomly answer those questions the same.

91. Given Professor Joordens' involvement in this case, it is questionable that he would have been qualified as an expert even if had he had been tendered as such. We do not say this to impugn Professor Joordens' credibility or evidence generally – he was a credible witness and provided other clear and helpful testimony to the Panel. But he was too closely linked to the case – it was his exam, after all – to be considered independent

92. Had his evidence been restricted, for example, to pointing out that L█ and P█ had identical answers in the first 12 questions, three of which were incorrect, he would likely have stayed on the right side of the expert/opinion divide. That evidence would obviously not have been as helpful a statistical analysis because it does not allow for any "easy" inferences to be drawn from those facts (12 identical answers, 3 of them incorrect) to the likelihood that L█ and P█ cheated together. But those kinds of ready-made inferences are the purview of an independent expert, not of a fact witness, no matter how well-meaning.

93. When opposing Ms. Dies' testimony (discussed above), counsel to the University made statements to the effect that the Tribunal sometimes allows professors with some knowledge of a specialised subject matter like statistics to provide evidence to the Panel that may be helpful in making this determination. We are also keenly aware that the Tribunal is not a Court and so the rules of evidence can be somewhat relaxed. (See for example, *Bailey v Barbour* 2013 ONSC 4451 at 8 in which the Court referenced the "the potential for relaxed rules of evidence before administrative tribunals."

94. Where statistical evidence is concerned, however, a Panel should proceed with extreme caution. Much has been written about the difficulties associated with statistical evidence, including the many statistical fallacies that the uninitiated can be drawn into.

95. For example, the *Fundamentals of Probability and Statistical Evidence in Criminal Proceedings: Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses*, published by the Royal Statistical Society[1] begins with a caution: "There is a long history and ample recent experience of misunderstandings relating to statistical information and probabilities which have contributed towards serious miscarriages of justice." That caution extends to ensuring that experts are competent to provide statistical evidence:

> Perhaps somewhat more surprisingly, even forensic scientists and expert witnesses, whose evidence is typically the immediate source of statistics and probabilities presented in court, may also lack familiarity with relevant terminology, concepts and methods. Expert witnesses must satisfy the threshold legal test of competency before being allowed to testify or submit an expert report in legal proceedings.

96. For these reasons, during the hearing, I expressed concerns about the statistical evidence. I also specifically asked counsel to the University what if any inferences the Panel should draw from the statistical evidence. Perhaps heeding my concerns, Ms. Harmer answered that she was not asking for inferences to be drawn regarding Professor Joordens' analysis. Rather, Ms. Harmer stated that she was attempting to demonstrate that the statistical evidence corroborated the unlikelihood that Mr. L and Mr. P could have answered the questions in the same manner by coincidence.

97. Regardless, because of the concerns we have with the lack of expert evidence in this regard, the Panel is not willing to place any weight on the statistical analysis conducted by Professor Joordens and Ms. Lawson, or Ms. Dies.

98. We now turn to the factual, non-statistical evidence relating to the exam answers. The Panel has taken into consideration the fact that L and P had 12 common answers of which three were incorrect and that of the 400 students in the class, only L and P had those same 12 answers. However, we are not willing to draw any inferences from this evidence to the likelihood that L and P cheated. Further, the Panel has

---

[1] Colin Aitken, Paul Roberts, Graham Jackson *Fundamentals of Probability and Statistical Evidence in Criminal Proceedings: Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses* (Royal Statistical Society Law, 2010) online: <http://www.rss.org.uk/Images/PDF/influencing-change/rss-fundamentals-probability-statistical-evidence.pdf> at p. 3.

not placed any weight on the answers to the last eight questions in the Exam for the reasons set out above.

99. The Panel has taken into consideration the cross-examination and submissions of DLS counsel with respect to the whether there was any common element to the three wrong answers that could explain why both L and P answered them incorrectly. Professor Joordens was clear that the three questions came from different chapters and covered different subject-matter. However, it does not appear that he considered that L and P's shared cultural background, or the fact that English was a second language for both of them, could have played a role.

100. There does appear to be some evidence that language could have had an impact on the incorrect answers. P's exam booklet (Exhibit 9) contains notes alongside certain questions. Next to two of the questions he got wrong in those first 12 questions (Questions 3 and 4), P made notes that indicated that he struggled with certain terms in those questions during the Exam: "gender" and "prey". Interestingly, one of those questions was a rare wrong answer (Question 4) with only 5% of students getting it wrong. If L similarly struggled with the language in those questions, that could provide an alternative explanation for why the students had similar answers.

101. The point here is not to speculate but to explain that Professor Joordens' evidence that it was unlikely that L and P would provide those same three incorrect answers randomly was rooted in a view that the questions were independent, and that view is questionable.

102. In all these circumstances, we have placed little weight on the analysis of L and P's Exam answers in coming to our decision.

<u>The Origin of the Cheat Sheet</u>

103. The University urged us to rely on *University of Toronto and S K* (Case 595), a decision of the University Tribunal, dated October 12, 2010, in which the Tribunal held that it is not necessary to determine how cheating occurred but rather the test is whether the University has provided "clear and convincing evidence that the student violated the Code in the manner described" (para 32).

104. We agree that, for the purposes of L█'s charges, it is not necessary for us to determine how or where L█ obtained the cheat sheet. However, for the purposes of P█'s charges these questions are engaged as there is no direct evidence linking P█ to the cheat sheet. That is not to say that the Panel must determine every aspect of the alleged cheating plan, but to convict we must be satisfied that it was more likely than not that (1) P█ produced the cheat sheet and (2) P█ had an opportunity to deliver the cheat sheet (directly or indirectly) to L█. We are not.

105. With respect to the evidence that P█ produced the cheat sheet, given the concerns set out above with respect to the statistical evidence, we are left with (1) the fact that a ripped corned was missing from one page of P█'s exam booklet; (2) the ripped corner was roughly the size and shape of the cheat sheet; (3) no other booklets from the Exam were found with a ripped corner; and (4) the cheat sheet contained the printed text "__ of 15" that indicated it originated from an exam booklet (the Exam had 15 pages and was marked on each page with "__of 15").

106. P█ provided a very plausible explanation for the missing corner from P█: he needed to spit out some gum during the exam. That explanation extends to the size and shape of the missing corner. Interestingly, during her examination, Ms. Le noted that students sometimes rip out corners from exam booklets in order spit out a piece of gum – and even she, on occasion, would rip out a corner for such a purpose. As a result, she checked every exam booklet in the class twice.

107. P█ was a credible witness and his evidence was clear and consistent. His explanation for the torn corner had been given consistently to Professor Dowler, the Dean's Designate, and to the Panel.

108. With respect to the printed text and links to the Exam booklets more generally, Dr. Leung's testimony was that the number was either 6 or 8 (the missing corner from P█'s booklet would have had the text "6 of 15" on it) and Ms. Le did not remember what specific number appeared on the page, just that it was a number "of 15". There are additional inconsistencies in their evidence about the cheat sheet as detailed above. Although the evidence that no other booklets from the Exam were found with a ripped corner is compelling, it does not sufficiently link the cheat sheet to P█.

109. We also note that there was no evidence that P was acting suspiciously in the exam. Just as Dr. Leung noticed L's suspicious behaviour when he was copying answers from the cheat sheet, one might have expected an invigilator in P's exam to have noticed L copying 80 answers onto his exam booklet and ripping that corner. We heard no evidence that P drew any attention from the invigilators during his exam.

110. Nor are we convinced that P had an opportunity to deliver the cheat sheet to L. The University's theory is that L retrieved the cheat sheet from a bathroom stall during one of his bathroom breaks. The only evidence in support of this theory is that most students finished the exam within an hour and a half, and the inference is that if P had finished the exam in this time, he would have been able to plant the cheat sheet in the bathroom near L's exam classroom. There is no evidence that P in fact left the Exam early. This evidence is insufficient for the University to meet its burden of proof.

111. Further, there is significant evidence that contradicts or calls into question the plausibility of the University's theory. Most importantly, P and Mr. Jang testified that P stayed in his exam room to the end of the Exam, and this evidence was found to be credible and accepted by the Panel. Further, there were multiple bathrooms near L's exam room and students would not know which one they would be taken to during the exam.

112. For these reasons, there is insufficient evidence to find, on a balance of probabilities, that P was the origin of the cheat sheet, or was involved in any way with L's cheating.

VI. Conclusion on Charges

L

113. Following deliberation and based on the testimony of Professor Joordens, Dr. Le, Ms. Lawson, Professor Dowler, Dr. Leung, Ms. Dies, Mr. Jang, P and L, the Panel concluded that there was clear and convincing evidence that it was more likely than not that L had used or possessed an unauthorized aid during the exam, disposed of the unauthorized aid, and engaged in academic misconduct.

114. The Panel therefore held that L is guilty on three charges: using or possessing an unauthorized aid or obtaining unauthorized assistance in connection with a final exam,

contrary to section B.I.1(b) of the Code; knowingly altering or falsifying a document or evidence required by the University, or uttering, circulating, or making use of any such altered or falsified document in connection with the Exam, contrary to section B.I.1(a) of the Code; and knowingly engaging 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 in the Exam, contrary to section B.I.3(b)) of the Code.

P█t

115. Following deliberation and based on the testimony of Professor Joordens, Dr. Le, Ms. Lawson, Professor Dowler, Dr. Leung, Ms. Dies, Mr. Jang, P█t and L█ the Panel concluded that there was insufficient evidence to convict P█ of any of the charges on a balance of probabilities.

116. The Panel therefore found P█ not guilty on all charges.

VII. Penalty

117. Counsel for the University started her submissions by requesting a sanction similar to that imposed on other first time offenders: a mark of zero in the course, a two year suspension from the University, notation on the student's record for three years, and reporting of this decision to the provost for publication with L█'s name withheld. Counsel recommended starting the suspension and notation in January 2016, such that they would end on December 31, 2017 and December 31, 2018 (or until graduation, whichever occurs first), respectively.

118. This proposed penalty is in line with the Provost's Guidance on Sanctions in the *Code*.

119. Counsel for the University provided the Panel with a number of cases involving cheating by first time offenders. Of note, a three year – rather than a two year – suspension was ordered in *University of Toronto and C█ E█* November 12, 2013 (Case 648), because of misconduct following the event. Although L█ did not accept responsibility, and the nature of the offence he committed is serious, there is no evidence of extenuating circumstances in this case besides the fact that L█ ran out of the room and denied the note's existence. Thus, the University took the position that a three year suspension was not warranted. We agree.

120. The Panel also took the following into account as relevant to penalty:

a. L[redacted] was a first time offender;

b. Instead of dealing with the repercussions of being caught cheating, L[redacted] ran out of the room and destroyed the evidence of his cheating – this behaviour was extremely inappropriate and the Panel strongly condemns this behaviour;

c. The serious nature of the offence – it is because of this type of offence that the University has to take significant steps to ensure that cheating does not take place during exams; and

d. The student's conduct prior to and throughout the proceeding – there was no evidence that L[redacted] had sincerely accepted the offence or that he was remorseful.

VIII. Decision of the Panel

121. At the conclusion of the hearing, the Panel conferred and made the following order:

a. L[redacted] is guilty of

   i. one count of knowingly using or possessing an unauthorized aid or obtaining unauthorized assistance in connection with a final exam, contrary to section B.I.1(b) of the Code;

   ii. one count of knowingly altering or falsifying a document or evidence required by the University, or uttering, circulating or making use of such forged, altered or falsified document, contrary to section B.I.1(a) of the Code; and

   iii. one count of knowingly engaging 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 in the Exam, contrary to section B.I.3 (b) of the Code.

b. The following sanctions shall be imposed on L[redacted]:

   i. L[redacted] shall receive a final grade of zero in PSYA01H3Y for the Summer 2014 term;

ii. L shall be suspended from the University for a period of two years, commencing on January 1, 2016 and ending on December 31, 2017;

iii. the sanction shall be recorded on Mr. L's academic record and transcript to the effect that he was sanctioned for academic misconduct, from January 1, 2016 until December 31, 2018, or until his graduation from the University, whichever occurs first; and

iv. This case shall be reported to the Provost for publication of a notice of the decision of the Tribunal and the sanctions imposed, with the name of the students withheld.

IX. Post Script: The Recent Discipline Appeals Board Decision in *K*

122. Shortly after the hearing and before an Order had been signed, the Discipline Appeals Board released a decision holding that students should not be convicted of duplicative charges and called into question whether L should be convicted of all three charges at issue. In *The University of Toronto and K* (Case 718 - Appeal) dated February 3, 2016, the Discipline Appeals Board stated:

> The rule against multiple convictions has developed in the criminal context, and been well established as a matter of Canadian law since at least the decision in *Kienapple v The Queen*, [1975] I SCR 729. The essence of the rule is that "Canadian courts have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict." The principle is equally applicable in the case of noncriminal convictions, such as those in issue here. (para 27)

123. The Discipline Appeals Board held that the rule against multiple convictions is applicable where there is a relationship of sufficient proximity between (1) the facts and (2) the offences which form the basis of the two or more charges. The factual proximity requires that the charges arise from the same transaction or act. The proximity of the offences requires, essentially, that one charge is no more than a specification of the other, without any distinguishing or additional elements.

124. In *K*, the plagiarism and unauthorized aid charges arose from the same factual circumstances (the plagiarism occurred when the student represented the ideas of another in the unauthorized aid as her own), and the plagiarism charge did not add any additional elements to the unauthorized aid charge.

125. In this case, charges 2 and 3 both relate to L's action in removing from the Exam room and destroying evidence (the cheat sheet). Charge 2 addresses the element of knowingly altering evidence required by the University, while charge 3 adds that the misconduct engaged in be to obtain an academic advantage.

126. These charges against L arise from the same facts: the removal and destruction of a cheat sheet. Further, the altering evidence charge provides no distinguishing or additional elements over the misconduct charge. Put another way, altering evidence is a type of misconduct engaged in to obtain an academic advantage.

127. The Panel asked the University for its views on whether the conviction should be amended. The University agreed and on that basis, the Panel gave the parties an opportunity to provide brief written submissions on whether the change in conviction should have any impact on penalty.

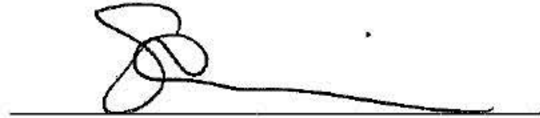
128. Very brief submissions were received from both L and the University on whether the change in conviction should have any impact on penalty. L simply asked the Panel to reconsider his penalty on the basis that this was his first offence and that the conviction had been reduced to two counts. The University stated that the penalty ordered was entirely consistent with those usually given for a single first offence, that the Provost had not sought any additional penalty despite there having been two offences, and that the amendment to the conviction should not change the imposed sanction.

129. In our view, it is clear that conviction on two or three charges would not have had any impact on L's penalty as it is in line with the Provost's Guidance on Sanctions in the *Code* that a student be suspended for two years for any offence involving academic dishonesty, where a student has not committed any prior offences. This recommendation is the same regardless of the number of counts with respect to which the student is found guilty.

130. Further, as noted by the University, it did not seek any additional penalty to reflect the fact that L was convicted of multiple charges.

131. In these circumstances, the Panel did not see a need to revisit L[redacted]'s penalty, and maintains the penalty ordered at the hearing.

DATED at Toronto, March 24 2016



Sana Halwani, Co-Chair

APPENDIX 1

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on December 8, 2014,

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 -

S H L and S J P

REASONS FOR DECISION

Hearing Date: Wednesday, July 8, 2015

Members of the Panel:

Mr. Bernard Fishbein, Chair
Professor Markus Bussman, Faculty of Applied Science and Engineering, Faculty Panel Member
Mr. Carl Shen, Student Panel Member

Appearances:

Ms. Lily Harmer, Assistant Discipline Counsel, Paliare Roland Barristers
Ms. Tegan O'Brien, Law Student for Mr. P, Downtown Legal Services
Ms. Nicole Wilkinson, Law Student for Mr. P, Downtown Legal Services

In Attendance:

Mr. S J P, the Student
Professor Wayne Dowler. Dean's Designate, University of Toronto Scarborough
Ms. Andrea Russell, Office of the Vice-Provost, Faculty and Academic Life, Observer
Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances

Not in Attendance:

Mr. S H L, the Student

[1] These are Charges under the *Code of Behaviour on Academic Matters, 1995* (the "*Code*") of the University of Toronto ("the University") brought against S H L and S J P ("the Student(s)"). The Charges are as follows:

S J P

CHARGES

1. On or about August 9, 2014, you knowingly provided an unauthorized aid or unauthorized assistance to S H L in connection with a final exam ("Exam") in PSYA01H3Y (the "Course"), contrary to section B.I.1(b) of the Code.

2. In the alternative, on or about August 9, 2014, 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, in connection with the Exam, contrary to section B.I.3(b) of the *Code*.

Particulars

The particulars of the offences charged are as follows:

(a) At all material times you were a registered student at the University of Toronto Scarborough.

(b) In Summer 2014 you enrolled in the Course, taught by Professor Steve Joordens.

(c) Part of the requirements for the Course was the writing of the final Exam, which you wrote on August 9, 2014. The Exam was worth 50% of the final Course grade.

(d) No aids were allowed in the Exam.

(e) You knowingly provided an unauthorized aid in the form of a small piece of paper containing answers to the Exam questions or other

information relevant to the subject matter of the Course to S[redacted] H[redacted] L[redacted], who was also writing the Exam.

(f) You knowingly provided the unauthorized aid to S[redacted] H[redacted] L[redacted] to assist him to use the unauthorized aid in the Exam to obtain academic credit or other academic advantage.

S[redacted] H[redacted] L[redacted]

CHARGES

1. On or about August 9, 2014, you knowingly used or possessed an unauthorized aid or obtained unauthorized assistance in connection with a final exam ("Exam") in PSYA01H3Y (the "Course"), contrary to section B.I.1(b) of the *Code*.

2. On or about August 9, 2014, you knowingly altered or falsified a document or evidence required by the University, or uttered, circulated or made use of any such altered or falsified document in connection with the Exam, contrary to section B.I.1(a) of the *Code*.

3. On or about August 9, 2014, 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 in the Exam, contrary to section B.I.3(b) of the *Code*.

Particulars

The particulars of the offences charged are as follows:

(a) At all material times you were a registered student at the University of Toronto at Scarborough.

(b) In Summer 2014 you enrolled in the Course, taught by Professor Steve Joordens.

(c) Part of the requirements for the Course was the writing of the final Exam, worth 50% of the Course grade, which you wrote on August 9, 2014.

(d) No aids were allowed in the Exam.

(e) During the Exam you knowingly used or possessed an unauthorized aid in the form of a small piece of paper containing answers to the Exam questions or other information relevant to the subject matter of the Course.

(f) You knew, or ought to have known, that you were not permitted to have such an aid in your possession during the Exam.

(g) You knowingly used or possessed the unauthorized aid in the Exam in order to assist you to obtain academic credit or other academic advantage.

(h) After the unauthorized aid was confiscated from you, you pushed the Exam invigilator out of the way, grabbed the unauthorized aid, and ran from the room, after which you disposed of the unauthorized aid.

(i) You did this knowing that the unauthorized aid was evidence that could be used to implicate you in the commission of an academic offence, and that the unauthorized aid was required by the University as such evidence.

(j) You knowingly engaged in a form of cheating, academic dishonesty, or misconduct in order to obtain academic credit or other academic advantage during the Exam.

[2] Not surprisingly, due to the common incident and the interrelationship of the allegations involving the two Students, both Students and the University had agreed that there be a single hearing for both sets of Charges. That hearing was scheduled for July 8, 2015.

Background with respect to Adjournment

[3] At approximately 3 a.m. on July 8, 2015, Christopher Lang, the Director, Appeals, Discipline and Faculty Grievances at the University received an email from Mr. L█. Mr. L█ advised Mr. Lang:

> "From July 7th, my body condition was not good. I tried to have a rest at home but it is getting worse and worse now.
> I am writing an email at 3:00 A.M because I cannot sleep well with this poor condition.
> As the sun comes out, I will go to walk-in clinic to see a doctor.
> I think that I cannot got to hearing due to my illness.
> Please email me back asap with future instructions."

[4] At approximately 4:36 a.m., Mr. Lang forwarded Mr. █s email to counsel for the University seeking the University's position. At approximately 7:47 a.m., counsel for the University responded to Mr. Lang:

> "I will get instructions as soon as I can when I get to the office. I am very concerned about losing this hearing date, as I have 5 witnesses, and there are 3 parties, and so expect that finding a future mutually available hearing date in the next few months could be very difficult. At a minimum I expect we will need to see clear medical evidence from Mr. L█ which provides sufficient details of the nature of his illness and it's impact on his ability to attend the hearing to permit us (and the Chair) to make an informed assessment. I don't expect a short note simply saying he is unable to attend school for the day will be sufficient. I would therefore ask that Mr. L█ be required to obtain such a note by no later than 10:00 a.m. and to advise his physician about the hearing, it's significance, and the issues it will cause if he is truly unable to attend, and to request a detailed note explaining why Mr. L█ is unable to attend in those circumstances. Once we have such a note we will be in a better position to assess the request and provide an informed response."

[5] Mr. Lang forwarded that email from counsel for the University to Mr. L█ and to counsel for Mr. P█ at approximately 8:51 a.m. At approximately 9:17 a.m., Mr. Lang sent an email to Mr. L█ advising him that counsel for Mr. P█, the other Student, agreed with the position of counsel for the University.

[6] At approximately 9:58 a.m., Mr. Lang received an email from Mr. L indicating:

> "I just went to the doctor's office.
> I kept vomiting and diarrhea from yesterday and asked it to the doctor.
> Doctor thought that it was a problem with the food that I ate yesterday (Sushi and so on).
> I attached two medical files so that you can look at it.
> If you have any questions, feel free to call doctor's office."

Attached to that email was a hand-written note on the letterhead of the Northtown Medical Clinic (which indicated that it was a "Walk-In Clinic | No appointment needed") dated July 8, 2015. It indicated:

> "Patient assessed today. Due to medical illness he is unable to attend school July 7-11, 2015. Please excuse. He may return earlier if better."

The note was signed over a stamp of Dr. C.K. Ng. Also attached was a medical requisition form from Dr. Cindy K. Ng at the Northtown Medical Clinic for some microbiology lab tests, particularly, a stool culture and stool ova & parasites. It was also signed by Dr. Ng and dated July 8, 2015.

[7] As a result, at approximately 10:27 a.m., Mr. Lang sent Mr. L an email:

> "I have spoken with the chair and have sent him your medical documents attached. He asked that I email you and copy Ms. Harmer and DLS.
>
> **The hearing is NOT yet adjourned.**
>
> You can seek an adjournment at the beginning of the hearing this afternoon, **unless you can provide medical documentation from the same doctor that contains ALL of the following information:**
>
> - That the doctor knows there is a hearing today;
> - That the doctor knows the nature of the hearing today;
> - That the doctor knows that it has been scheduled for a long time;
> - That the doctor knows you have to testify;
> - That the doctor specifically provide clear information that says you are in no medical condition to attend and testify; **AND**,

- That the doctor provide the medical reasons for which you are unable to testify.

IF you provide this information before the hearing, it does not necessarily mean the hearing is adjourned, as the new information will have to again be assessed by the parties and the chair. **Depending on the positions of the parties and instructions from the chair, the hearing is not adjourned unless you hear otherwise from us.**

As stated above, if you do not provide any further information, the hearing is not adjourned, but you can attend and request an adjournment at the beginning of the hearing. ..."

This solicited an email response from Mr. L at approximately 10:30 a.m.:

"Thanks for your replying.
As you know, I could not sleep yesterday because of vomiting and diarrhea.
I cannot go to doctor's office again as well as hearing.
I sincerely hope that the hearing will be adjourned.
Also, you can call to the doctor's office and asked questions about me.
I hope you can understand my situation."

Mr. Lang acknowledged receipt of Mr. L's email indicated that he had copied it to counsel for Mr. P and counsel for the University and would forward it to the Chair of the panel.

[8] Mr. Lang responded with a further email at 11:09 a.m. indicating:

"I have received instructions from the chair.
Unfortunately the hearing is not yet adjourned because both the other parties at this point in time are not consenting to adjourn the hearing. I have already indicated to you the missing information that the other parties have indicated they require in order to consider consenting to the adjournment—as well as the information the Chair has asked to be provided in order for the panel to also consider the adjournment request. At this point in time I cannot assure you that if you do not attend the hearing, that the hearing will not proceed in your absence."

[9] As well, at 12:49 p.m., counsel for the University sent Mr. L an email indicating:

"Tribunal hearings have accommodated students' attendance via Skype, if that would assist you to participate this afternoon I will request that the Tribunal could accommodate you in that way. Please respond immediately so that we can make

the request and the technical requirements can be arranged. You would only need your computer."

[10] Neither the University nor the Tribunal received any further response to its last email or the email from counsel for the University. The hearing convened at 1:45 p.m. as scheduled. The panel waited 20 minutes before commencing the hearing. Mr. L did not attend. Arrangements had been made so that Mr. L could have participated by Skype.

The Positions of the Parties

[11] The University advised us that until late in the week before the hearing, Mr. L had been represented by counsel who then notified the other parties that she was withdrawing as counsel and Mr. L would no longer be represented.

[12] The University also pointed out (without going into any extensive detail) that there was a history of Mr. L seeking deferrals of examinations at the last moment based on late-emerging acute medical issues.

[13] However, as skeptical as the University was about the circumstances of Mr. L's request for an adjournment, it would not oppose the request although it did so regretfully as it had four witnesses arranged to attend that day.

[14] The University did say that if an adjournment was granted, it would seek conditions to be imposed on such an adjournment. It also wished the Charges against Mr. P and Mr. L to continue to be scheduled together, as the Charges were interrelated, essentially arising out of the same incident, involved the same witnesses, and would risk the possibility of inconsistent conclusions if they proceeded separately.

[15] Lastly, in response to questions from the panel, the University advised that both Mr. P and Mr. L remained currently enrolled at the University. They were both significantly short of credits necessary for graduation so that a delay in the hearing of these Charges would not necessarily delay their graduation. Moreover, Mr. L's status in the Course was subject to a grade withheld pending review notation ("GWR") which would preclude his graduation in any event until such notation was removed.

[16] Counsel for Mr. P█, however, opposed the adjournment. She confirmed that Mr. L█ had been represented by counsel until days before and there had been no inkling of an adjournment. She also confirmed that after Mr. L█ was no longer represented by counsel, she had spoken directly to Mr. L█ at approximately 2 p.m. on the day prior to the hearing and there had equally been no inkling at that time of any illness or any need for an adjournment.

[17] She also indicated that Mr. P█ wished to call one witness who, although not present at the time the hearing had commenced, was going to be contacted to appear later.

[18] When questioned by the panel as to the prejudice that the adjournment Mr. L█ sought would cause Mr. P█, counsel indicated that Mr. P█ also had a GRW notation on his academic record with respect to the Course. Although also not scheduled to graduate imminently, the GRW notation precluded Mr. P█ from taking further courses for which the Course was a required prerequisite and, in that sense, would delay his graduation should he wish to major in that course area (although Mr. P█ conceded that approval to major in that area had not yet been granted by the University). As well, there were suggestions that Mr. P█'s ability to participate in an exchange program in the Winter Term 2016 might be jeopardized by the delay in resolving these Charges. That suggestion was subsequently withdrawn.

[19] Lastly, counsel for Mr. P█ indicated that although Mr. P█ had agreed to his and Mr. L█'s Charges being heard together, that consent was given at an earlier time when there was no way Mr. P█ could be aware of how events would unfold. In the present circumstances, Mr. P█ withdrew his consent for the Charges to be heard together, although he conceded that his consent would be dependent on the adequacy of the conditions imposed on any such adjournment.

[20] In reply, the University indicated that the prejudice to Mr. P█ of an adjournment did not outweigh the prejudice to Mr. L█ if the hearing proceeded in his absence. Moreover, in view of the position of Mr. P█ announced only at the hearing, i.e., withdrawing his agreement that the Charges be heard together, the University took the position that it would make a motion for the Charges to be heard together pursuant to Part 6 of the Tribunal's *Rules of Practice and Procedure* (the "Rules"). Section 27 of the Tribunal's Rules provides

that a panel may direct charges to be heard at the same time (or one immediately after the other) if:

(a) the proceedings have a question of fact, law or mixed fact and law in common;

(b) the proceedings involve the same parties;

(c) the proceedings arise out of the same transaction or occurrence or series of transactions or occurrences; or

(d) for any other reason an order ought to be made.

Moreover, section 28 of the Tribunal's Rules allows a motion for the hearing of cases together to be made either prior to the hearing on the merits or at any time with leave of the panel. In the event that the panel was prepared to adjourn the Charges against Mr. L but proceed with the Charges against Mr. P, the University wished an opportunity to make full submissions (in writing, if necessary) why these Charges should be heard together.

Decision

[21] The panel ruled unanimously that regrettably, and with some degree of reluctance, the hearing scheduled for July 8, 2015 would be adjourned. Simply put, the prejudice advanced by Mr. P in granting the adjournment did not outweigh the obvious prejudice of proceeding in the absence of Mr. L. This was particularly so when the scanty evidence before us with respect to Mr. L's illness, although perhaps warranting a healthy degree of scepticism, was still essentially uncontradicted.

[22] At this point, the Tribunal was prepared to leave the Charges against both Messrs. P and L scheduled to be heard together. If Mr. P wished to pursue a motion to sever the Charges, he would be free to do so. A *prima facie* review of the circumstances seemed to warrant that the Charges should be heard together and Mr. P's withdrawal of his agreement to do so was conditional on the decision the panel would make, and more importantly, the adequacy of any condition the panel imposed on any such adjournment.

[23] However, the panel was concerned about how this adjournment arose, and therefore imposes these further conditions on the adjournment:

(a) The hearing was to be scheduled to the next available date to the parties. That scheduled date would be marked peremptory and would not be adjourned again unless completely unforeseen circumstances, completely beyond the control of any party, arose. In the event such circumstances should arise, and they were medically related, the party seeking the adjournment would be required to provide the Tribunal and the other parties with medical information confirming:

(i) that the Doctor was aware of the history of these proceedings;

(ii) that the Doctor was aware of the nature of the hearing;

(iii) that the Doctor was aware that the hearing was scheduled on a peremptory basis;

(iv) that the Doctor was aware that the party seeking the adjournment is required to attend and will have to participate in the hearing (if only to instruct counsel if so retained);

(v) that the Doctor provide clear and specific information in the event that the party seeking the adjournment is not in any medical condition to participate in the hearing;

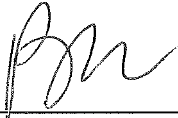
(vi) that the Doctor provide clear medical information that the party seeking the adjournment would alternatively not be able to attend electronically by video conference or otherwise;

(vii) that the Doctor provide medical reasons why the party would be unable to participate on any of these bases.

(b) This panel was not necessarily seized so a hearing could be arranged as soon as possible before whatever panel was available.

(c) That whatever hearing is scheduled, it is recommended that it possibly commence at 9 a.m. so that it could possibly be concluded in a single day.

Dated at Toronto, this 23 day of July, 2015



Mr. Bernard Fishbein, Chair