Case No.: 1054

THE DISCIPLINE APPEALS BOARD

THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on August 24, 2018

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] M[redacted]

Appellant
(Respondent by Cross-Appeal)

- and –

THE PROVOST OF THE UNIVERSITY OF TORONTO

Respondent
(Appellant by Cross-Appeal)

REASONS FOR DECISION

Hearing Date: August 18, 2020 **(via Zoom)**

Members of the Discipline Appeals Board Panel:

Ms. Patricia D.S. Jackson, Chair
Professor Aarthi Ashok, Faculty Panel Member
Mr. Said Sidani, Student Panel Member

Appearances:

Ms. Tina Lie, for the Respondent, Appellant by Cross-Appeal, Paliare Roland Rosenberg Rothstein LLP
Mr. Sean Grouhi for the Appellant, Respondent by Cross-Appeal, Downtown Legal Services

Parties in Attendance:

A[redacted] M[redacted] (the "Student")

Hearing Secretaries:

Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances, University of Toronto

Krista Kennedy, Administrative Clerk and Hearing Secretary, Office of Appeals, Discipline and Faculty Grievances, University of Toronto

The Appeal

1. The Student was found guilty of the offence of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage in connection with a Midterm examination, contrary to section B.1.3(b) of the *Code of Behaviour on Academic Matters, 1995* (the "*Code"*). This was the Third Charge of three charges that were the subject of the hearing.

2. The Tribunal imposed sanctions consisting of: a grade of zero in the course in which the Midterm occurred; a suspension from the University until July 13, 2022; a notation to this effect on his academic record and transcript until the date of his graduation or June 1, 2023, whichever is later; and the publication of the decision and sanctions, with the Student's name withheld.

3. The Student appeals the finding of the Tribunal on the basis that the Tribunal erred in law by permitting the University to call reply evidence.

4. The University cross-appeals from the decision below on the basis that the Tribunal erred in acquitting the student of a charge under section B.I.1(a) of the *Code*. That section makes it an offence to forge, alter or falsify a document required by the University and to make use of such forgery. In this case, the University alleged that the Student had falsified and made use of a Scantron sheet submitted at the conclusion of the Midterm examination in which the student identified the version of the multiple-choice Midterm examination he had received and responded to. This was the First Charge of the three charges that were the subject of the hearing.

5. It was not the University's position that the Student should be subject to conviction under two charges. Rather, it submitted that the appropriate conviction was under the First Charge, and that if this Board were to return a conviction under that charge the alternative charges would and should be withdrawn. The University further submitted that any such change in the offence subject to conviction should not to affect the sanction imposed, which the Student had not appealed.

6. As a result of the constraints imposed by the pandemic, the hearing took place virtually, on Zoom.

The Charges

7. The Student was charged with three offences under the *Code*:

> *The First Charge*: On or about March 15, 2018, you knowingly forged or in any other way altered or falsified a document or evidence required by the University, or uttered, circulated or made use of such forged, altered or falsified document, namely a Scantron sheet that you submitted in a Midterm examination in LMP301H1, contrary to section B.I.1(a) of the *Code*.
>
> *The Second Charge*: On or about March 15, 2018, you knowingly obtained unauthorized assistance in connection with a Midterm examination that you wrote in LMP301H1, contrary to section B.I.1(b) of the *Code*.
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> *The Third Charge*: In the alternative, on or about March 15, 2018, you knowingly engaged in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage of any kind in connection with a Midterm examination that you wrote in LMP301H1, contrary to section B.I.3(b) of the *Code*.

8. At the hearing, the University confirmed that the Second Charge and the Third Charge were in the alternative, and that the Second and Third Charges would be withdrawn if the Tribunal convicted the Student under the First Charge.

The Hearing Below

9. The event giving rise to the charges was a Midterm examination in one of the Student's courses. The examination was multiple-choice. There were two versions of the exam, both containing the same questions, but arranged in a different order. The two versions were called Version A and Version B. When the Student had completed the exam, he handed in a question paper for Version B of the exam and a Scantron sheet indicating that he had answered Version A.

10. Much of the evidence at the hearing was contained in an Agreed Statement of Fact. In relevant part, it recounted the following:

> 11. The Midterm was comprised of 25 multiple-choice questions. Students were given either Version A or Version B of the Midterm. Students were asked to submit their answers on a Scantron sheet and to indicate on the Scantron sheet which version of the Midterm (Version A or Version B) they had been given.
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> 12. Students were required to work individually on their Midterms and were not permitted to obtain assistance from any other students during the Midterm.
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> 13. [The Student] was given a Version B examination paper. He did not provide his name or student number on the examination paper.… [The Student] admits that all markings on the [Student's] Scantron were created by him.
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> 14. The Scantron sheets that were submitted by students who had written the Midterm were marked using software to compare the answers given by students with the answer key.
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> …..
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> 18. The [Student's] Scantron was graded as a Version A examination and received a score of 18 out of 25. If the answers given on the [Student's] Scantron have been graded as a Version B examination, the [Student] would have received a score of 4 out of 25.

11. The University also called two witnesses. The first, Dr. Lei Fu, was the course instructor who invigilated the Midterm with the help of three teaching assistants.

12. She testified that the examination took place in a large room with individual tables and chairs lined up in columns. The teaching assistants distributed one copy of the examination, either Version A or B, and one Scantron to each table by column, alternating by column between the two versions. The placement and the use of two versions of the exam were so that students could not copy the answers of students sitting to their sides.

13. Students were told that there were two versions of the examination and were instructed to indicate the version received on their Scantron. After the examinations were distributed, no one kept track of which version any particular student had received. It was each student's responsibility to honestly and accurately indicate on their Scantron the version of the examination that he or she had received.

14. At the end of the examination, students were required to remain in their seats while the examinations and Scantrons were collected.

15. After all the examination materials were collected and the students had left the examination room, Dr. Fu and the teaching assistants sorted the examinations and the Scantrons. At that time, Dr. Fu noticed that there was one mismatch between the exam version and the Scantron version. After the teaching assistants had counted the Midterm materials three times, it was concluded that they had collected 62 Version A and 62 Version B exam papers, but 63 Version A and 61 Version B Scantrons.

16. The University's second witness was Dr. Elizabeth Cowper, who conducted the Dean's Designate Meeting with the Student.

17. She testified that in that meeting the Student insisted he had received a Version A exam and denied receiving a Version B exam. He was asked about apparent erased markings on the Version B exam that had been turned in, and denied that the markings were his. He denied any knowledge as to why there was a discrepancy between the Scantron form and the version of the exam he handed in with it.

18. By the time of the hearing the Student acknowledged in the Agreed Statement of Fact that the markings on the Version B exam were his.

19. The University had obtained affidavit evidence and an expert report from Dianne Kruger, a forensic document examiner, who determined that the erased markings on the Version B exam were the Student's. Ms. Kruger's opinion evidence went in on consent and was not contested.

20. The Student testified in his own defence.

21. He said that when he entered the exam room, the examinations and Scantron forms had been distributed to the individual tables. He said that he had a Version A exam and so entered the code for Version A on his Scantron form. At some point after he began answering the questions he realized he had two versions of the exam — Version A and Version B.

22. He acknowledged that he could then have raised his hand to ask what he should do about having received two versions of the exam, but he said he was worried that he would get into trouble. So he kept both, and focused on the Version A exam that he had indicated in his Scantron. Although he intended to hand in Version A at the end of the exam, he inadvertently handed in version B, and subsequently disposed of Version A.

23. He maintained that the answers on his Scantron form were his, based on his copy of the Version A exam, and that he had not copied from anyone.

24. His explanation for his erased markings on the Version B exam that he submitted was that he had used it as a worksheet when he ran out of space on the no-longer-available Version A of the exam. His explanation for why he had denied making the markings at the Dean's Designate meeting was that he thought Professor Cowper had already made up her mind. He said that he did not think she would listen to him so he simply denied the Version B exam was his.

25. Upon hearing the Student's evidence, the University moved for an adjournment to have an opportunity to call reply evidence. The student opposed both.

26. The basis for the University's request was that the Student's explanation about having received both Version A and Version B of the exam was an explanation they had neither heard nor anticipated before he gave that evidence. They wanted to consider and potentially call the evidence of the teaching assistants who were responsible for the distribution and collection of the examination papers.

27. The Student objected. In the first place, he said the University was impermissibly splitting its case. Secondly, he said he would be prejudiced by the further delay in a case that had now been outstanding for more than a year and a half, and that prejudice was augmented because another day of hearing would require him to travel back from England where he then lived.

28. The Tribunal decided to grant the adjournment request and permit reply evidence on terms.

29. In the Tribunal's opinion it was reasonable to argue that the University could have called the teaching assistants as witnesses during their case in chief because of their involvement in the events in question. But, as was his right, the Student chose to provide the explanation that he did for the first time during his testimony. Fairness dictated that University should be given an opportunity to call reply evidence.

30. In order to negate any potential prejudice, the Tribunal directed that:

a. the University was not to discuss the evidence that had occurred at the hearing with the potential reply witnesses;

b. any reply evidence was to be strictly limited to responding to evidence that was raised for the first time in the Student's testimony;

c. the delay was to be brief, and at the time the adjournment was granted the parties and counsel had been able to find a date within one week to resume the preceding (although in fact it was delayed beyond that); and

d. the Student was able to participate in the resumed hearing via videoconference, which, since he had already testified, was thought to have no impact on the quality of the evidence as a result.

31. Following the adjournment and prior to the reply evidence being called, the Tribunal made a further direction that the University review counsel's notes and provide a summary of any additional facts not reflected in "Will Say" summaries that had already been produced, whether or not the University intended to call such evidence.

32. When the hearing resumed, the University called two teaching assistants, Scott Ryall, who was the individual primarily responsible for preparing and distributing copies of the exams, and Kristiana Xhima.

33. Mr. Ryall testified that he made separate copies of Version A and B of the Midterm. He kept careful track of the number of Midterms: that he printed and brought into the examination room; that were actually distributed at the beginning of the Midterm; that were collected from empty desks after the Midterm was underway; and that were collected at the end.

34. He testified that one of the reasons for being so careful was to ensure that students did not remove any Midterm examinations from the room. He said the Midterm was "restricted", meaning that the professors reserved the right to reuse Midterm questions in subsequent years.

35. He said that he distributed Version A of the examination to alternating columns of desks in the examination room. When Ms. Xhima arrived she distributed Version B to the remaining alternate columns.

36. He further testified that Dr. Fu noticed the mismatch between the Midterm exam and the Scantron form during the course of the collection of the Midterm materials and described the counting process that led to the results noted in paragraph 15 above.

37. While she generally confirmed aspects of Mr. Ryall's evidence, Ms. Xhima did not add any material details as she lacked specific recollection with respect to many of the details of the administration of the Midterm exam.

38. The Student did not seek to call evidence in sur-reply to these witnesses, and there was no argument that the evidence violated the Tribunal's directions limiting the evidence to new issues raised by the defence.

The Tribunal's Decision

39. The central issue in dispute before the Tribunal was whether the Student had received a Version A exam. Although at the time of his meeting with the Dean's Designate the Student denied having received Version B, by the time of the hearing there was no dispute that he had received Version B, that he had made markings on that version and then erased them, and that he had denied both these facts at the Dean's Designate meeting.

40. The Tribunal did not accept the Student's explanation at the hearing that he had been given both Versions A and B of the exam. Among the reasons for which they gave this finding were:

- It was inconsistent (and directly contrary in some respects) to the explanation he gave at the Dean's Designate meeting.
- The Student's evidence as to why he did not tell Prof. Cowper that he had received two exams was not credible since by that time he knew he was facing an allegation of serious misconduct and it did not make sense for him to lie if he had received two versions of the exam.
- It was more likely that his denial of receiving a Version B of the exam was what he believed was his best opportunity of avoiding liability. But when the University's expert handwriting evidence tied him to the Version B exam, he had to change his explanation to the Tribunal.
- They did not accept that the Student would not have raised his hand and asked for assistance if he had actually discovered that he received two versions of the exam.
- Nor did they accept the Student's evidence that he inadvertently handed in the Version B exam and left with the Version A exam he had intended to submit.

- The Student had no explanation for why he erased the answers that he wrote in the Version B booklet and it was more likely than not that he erased the answers in an effort to conceal them when he handed in the exam booklet.

41. The Tribunal then directed their attention to the reply evidence, and observed:

> 56....[Mr. Ryall's] evidence established that it was very unlikely that the Student inadvertently received two different versions of the exam.
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> 57. Finally, while the Tribunal was satisfied by the evidence that the Student had committed an academic offence, we were not convinced that the Student cheated in the manner alleged by the University. There was no direct evidence showing that he copied off another student at the exam. All of the University's witnesses testified that they did not notice any unusual activity while the exam was being written.
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> 58. In light of the fact that the professors use the same exam for several years (a practice they may wish to reconsider going forward), it is just as likely that the Student had access to the answers for a version A exam before the exam was administered. He could have then copied the answers to his exam paper from memory and then erased those markings in an effort to conceal that the version B exam was his.

42. The Tribunal then turned to the question of whether any of the three charges was made out, saying:

> 59. The panel accepted the University's submission that it did not have to prove exactly how the Student cheated in order to establish that an academic offence was committed. It relied on the "Ms. B" ….and the "Ms. K" …Tribunal decisions that stand for this proposition. The University did establish on a balance of probabilities, with clear and convincing evidence, that the student had violated the *Code*.
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> 60. Based on the evidence before it, and the fact that the precise method of cheating on the exam was not established but various forms of misrepresentation were proven, the Tribunal determined that there had been a violation of the third charge, pursuant to section B.I.3(b) of the *Code*.

43. The section of the *Code* which the Tribunal determined had been violated (the Third Charge noted above) provides as follows:

> B.I.3. It shall be an offence for a… student …knowingly ....
>
> (b) to engage in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation *not herein otherwise described*, in order to obtain academic credit or other academic advantage of any kind. (Emphasis added.)

44. In order to find the Student guilty of an offence under this section of the *Code*, the Tribunal was in effect determining that the conduct that was the subject of the charges was "not …otherwise described" in the *Code*. Since the First Charge concerned an offence under a different section of the *Code*, section B.I.1(a), the Tribunal's decision thereby determined that the conduct was not an offence under that section of the *Code*.

45. It is that decision that gives rise to the University's cross-appeal.

The Appeal

46. The Student appeals the decision below on the basis that the standard of review is correctness and that the Tribunal erred in law in permitting the University to call reply evidence from the two teaching assistants.

47. The Student relies on the following principle in the Supreme Court of Canada's decision in *R. v. Krause*, [1986] 2 SCR 466:

> 16. The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown or the plaintiff has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will

> be permitted only when it is necessary to ensure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

48. The Student acknowledged that the Tribunal "lacked clear guidance from Tribunal authorities on this point". And the case of *R. v. Krause* was not referred to before them.

49. The Student asserts that there has been a long trend of Tribunal decisions allowing reply evidence without legal analysis or justification, but argues that these are contrary to the law as set forth in *R. v. Krause*. In this case, he says that the University cannot say that it could not reasonably have anticipated his defence.

50. The Student particularly focuses on the portion of the Tribunal's decision where it noted that "it was reasonable to argue that the University could have called the TAs as witnesses during their case in chief" as an indication that this is the kind of case that the Supreme Court of Canada has said does not justify allowing reply evidence.

51. He argues that the University should have anticipated his evidence that he received both Version A and Version B of the exam, and dealt with it in chief. He says this is because in the face of his agreement that he received the Version B Midterm, filled out his Scantron sheet as responsive to Version A and denied cheating, this was the only realistic possible defence to his case.

52. He also argues that the cross-examination of Dr. Fu clearly signaled the contours of that defence because Dr. Fu was questioned on the following points:

- the number of exams printed;
- the number of exams of each version;
- the number of students enrolled in the class;
- the number of students who wrote the Midterm;
- whether there were extra copies of the Midterm in the room;

- whether the exams were placed on the desks before the students came in; and
- who was involved in distributing the exams.

53. The Student asks this Board to substitute an acquittal for the decision, or alternatively, to send the case back to the Tribunal panel who initially heard the case, with a direction to decide the case without regard to the reply evidence.

54. For its part, the University submitted the decision whether to allow a party to call reply evidence is discretionary, and that, absent an error in principle, this Board should defer to the Tribunal's findings. The University acknowledged that there is a general rule in civil cases that a plaintiff is not permitted to split her case, but argued that the strict requirements of *R. v. Krause* do not apply to proceedings before the Tribunal, which is not bound by the strict rules of evidence that would obtain in court.

55. The University further argued that the Student's expression of the test for the admission of reply evidence, even in a criminal case, was too restrictive. It noted that the Court of Appeal had described the circumstances in which of the Crown may call reply evidence as follows:

> "when the defence has raised some new matter or defence which the Crown could not have reasonably anticipated and with which it had no opportunity to deal"; or
>
> "when an aspect of the Crown's case has taken on added significance as a result of the defence case". (*R. v. R.D.*, 2014 ONCA 302 at para 16-17).

56. Finally, the University argues that even if the strict requirements of the test for permitting reply evidence in criminal cases is applied to the circumstances of this case, the test noted above was met under both branches.

57. In the first place, the University said that the Student's defence could not have been reasonably anticipated. It notes the following:

- The Student did not give the explanation he gave in evidence before the Tribunal at the Dean's Designate meeting, and in fact gave a different explanation.

- He did not disclose his anticipated evidence prior to the start of the hearing.

- He elected not to give an opening statement.

- He did not put the theory of having both versions of the exam to Dr. Fu in cross-examination.

- It did not follow from the admissions in the Agreed Statement of Fact that the only realistic possible defence was the one he in fact advanced. The Student could have advanced a number of defences or positions, or simply put the University to its burden of proving the charges.

- The questions put to Dr. Fu on the cross-examination did not reveal the anticipated defence. Indeed, as noted by the Court of Appeal in *R. v. Sanderson,* a cross examination may give notice of potential issues to the opposing party, but that does not mean that every suggestion put to a witness necessitates the Crown calling evidence on that issue in chief. To suggest otherwise would lead to speculation, a wasteful use of hearing time, and the creation of confusion in the evidence. (*R. v. Sanderson*, 2017 ONCA 470 at para. 38-39)

58. On the second basis on which reply evidence may be admitted, the University noted that the Tribunal had said that it would have been reasonable to call the teaching assistants in chief given their involvement in the exam. But it did not follow that the University was compelled to do so given the significance of their evidence at the time. The manner of distribution of exam papers and the steps taken to account for all exam papers were not, in and of themselves, probative of the Student's guilt. It was only when the Student testified that he had received both versions of the exam that this evidence gained added significance.

Decision on Appeal

59. We agree that it is an important element of a fair hearing that the University should not split its case, leading in reply evidence that it could and should have made part of its initial case against a student. At the end of the University's case, a student should know fully the case to be met. Thus, in general terms, the principles enunciated in the cases such as *R. v. Krause,* and *R. v. Sanderson* apply. But they do not do so in a hard and fast fashion. As the University noted, the Tribunal is not bound by the strict rules of evidence and, as there have been in the past, there may in the future be circumstances where fairness -- to a student, the University, or the process -- justify the calling of reply evidence which might not be permitted in a criminal case. The Tribunal is nonetheless required to hold a fair hearing and the principle that the University should not split its case is generally an element of such fairness.

60. We do not think it is necessary to elaborate further on the circumstances in which a departure from the principles set forth in *R. v. Krause* and *R. v. R.D.* might be warranted, since in our review, this is a case where there was no such departure. We conclude that this is a case where it cannot be said that the University ought to have reasonably anticipated the Student's defence.

61. We arrive at that conclusion for all of the reasons cited by the University (and summarized a paragraph 56 above). Importantly, though, we think all of those reasons are also consistent with the Agreed Statement of Fact.

62. In that statement, the Student agreed with the following:

> "11. …. Students were given *either* Version A *or* Version B of the Midterm.…
>
> 13. [The Student] was given a Version B examination paper.…" (Emphasis added.)

63. We think an ordinary reading of this statement is that the Student agreed that each student in the exam got one or the other version of the exam but not both, and that the version he got was B.

64. We do not think that the University can be faulted for reading it that way, and structuring its case accordingly. So while some of what Dr. Fu testified to was confirmatory of the Agreed Statement, there was no obligation on the University to prove the contents of the Agreed Statement, and still less to call further confirmatory evidence from the teaching assistants. Indeed, we think it unwise and a waste of hearing resources to have multiple witnesses confirm facts that the parties have agreed to. We do not think that in suggesting that the University might have called the teaching assistants in chief that the Tribunal was departing from this view, but if they were we disagree.

65. We adopt the point that emerges from the Court of Appeal's decision in *R. v. Sanderson*. The principles that govern the calling of reply evidence should not be interpreted so rigidly that the University should call as part of its case evidence that addresses any possible issue that a student may raise, and still less to address a position that is at odds with the facts to which the student appears to have agreed. The obligation is to lead evidence on the issues that are relevant to material issues in dispute or to a defence that they can or ought reasonably to anticipate.

66. It is certainly open to the Student not to disclose his defence to the University, including by declining to deliver an opening. But in this case the decision not to do so meant that the University had no reason to suspect that the Student intended to depart from the facts to which he appeared to have agreed.

67. As to the cross-examination of Dr. Fu, we agree with the University that it did not reveal the nature of the defence.

68. Indeed, an argument can be made that there was an obligation to put to Dr. Fu that the Student intended to give evidence that contradicted Dr. Fu's assertion that the distribution process was such that each student received only one examination – either Version A or Version B. In civil cases there is such a principle, known as the rule in *Browne v Dunn*. It is that one cannot lead evidence that directly contradicts what a witness has said without giving the witness an opportunity to respond to the contrary evidence in

cross-examination. Whether or not there was such a requirement in this case, the failure to do so contributed to the surprise that resulted from the Student's evidence.

69. In summary, we conclude that it cannot be said that the University ought reasonably to have anticipated the defence that the Student put forward in his evidence. In the result, we conclude that the Tribunal's decision was both reasonable and correct.

70. We note as well that we cannot conclude that the reply evidence was in any material respect prejudicial to the Student's case, or that it would have made a difference to the result.

71. As noted above at paragraph 40, the Tribunal's conclusion that it did not accept the Student's defence that he received two versions of the exam had virtually no regard to the reply evidence. Indeed, were we to have to decide this case, we would have come to the same result as the tribunal without regard to the reply evidence at all.

72. Nor did the Student lead any argument or evidence of such prejudice. He did complain that the Tribunal's observation that he might have memorized the results of an earlier examination arose from evidence given in reply. However, that was not material to the Tribunal's conclusion on the Student's guilt, since they noted it was not incumbent upon the University to establish the precise method by which the Student committed the offense. Moreover, as more fully described below, we conclude this point is immaterial to the offence committed by the Student, which we conclude is more properly the offence expressed in the First Charge.

Decision on Cross-Appeal

73. The issue raised by the cross-appeal lies in the definition of the offence which the Tribunal found had been committed. As noted above at paragraphs 43 - 44, that offence can only be found in

circumstances where the conduct in question is not an offence under any other section of the *Code.* Therefore, conviction under the Third Charge implies that the First Charge could not be established.

74. It is not at all apparent that the Tribunal was alive to this issue, and that impression is reinforced because their reasons for decision contain no analysis of whether or why the First Charge was not made out.

75. The First Charge alleges that the Student' s conduct was contrary to section B.I.1(a) of the *Code*. That section reads as follows:

> B.I.1 It shall be in offence for a student knowingly:
>
> > (a) to forge or in any other way alter or falsify any document or evidence required by the University, or the utter, circulate or make use of any such forged, altered or falsified document, whether the record be in print or electronica form…

76. As noted above, the Tribunal found that the Student received a Version B exam, that he did not receive a Version A exam, and that he submitted a Scantron form indicating that he had received a Version A exam.

77. Based on these facts, the Student falsified the Scantron form, which is clearly a "document …required by the University". Indeed, the Tribunal has previously convicted students who have altered or falsified exam papers or Scantron forms under this section of the *Code* in the cases of *University of Toronto v. Noohi* (Case No. 710, October 1, 2014) and *University of Toronto v. Rashid* (Case No. 861, April 3, 2017).

78. As the trier of fact, the Tribunal has made findings of fact which make out the offence set forth in the First Charge. It would appear to be an error of law not to find an offence where the factual findings

make out the offence. And indeed Justice Sopinka said as much in *R. v. Theroux*, [1993] 2 SCR 5 at 10-11.

79. The Student suggests that we should defer to the Tribunal's acquittal, because it is a finding of mixed fact and law to which deference is owed. However, we do not disturb the Tribunal's findings of fact, but rather rely upon them. And, likely through inadvertence, the Tribunal below made no analysis or legal finding of whether those facts constituted the offence contained in the First Charge.

80. The Student appears to suggest that there might be ambiguity as to whether the Scantron was requiring the Student to indicate the exam which he had received or the exam which he had answered, and also appears to suggest that the Student did not intend to provide a false answer. Not only did the Student not testify to any such ambiguity or lack of intention, his evidence was to the effect that his answer was correct because he had in fact received and answered Version A of the exam. That evidence is inconsistent with ambiguity or lack of intention. The difficulty for the Student is that it was not believed.

81. In the circumstances we consider that the facts found by the Tribunal make out the offence contained in the First Charge. We agree with the University that the Student should not also be convicted for the same conduct under the Third Charge. Moreover, as soon as it is found that the conduct is an offence under the section of the *Code* referenced in the First Charge, the offence referenced in the Third Charge ceases to apply. We accordingly substitute a conviction under the First Charge for the conviction found by the Tribunal.

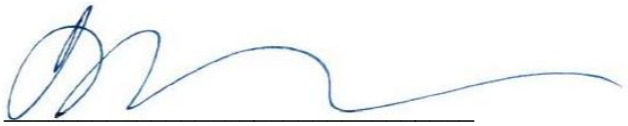
82. No appeal has been taken from the sanctions imposed, and we agree with the position advanced at the hearing that the substitution of a conviction under the First Charge ought not to alter the sanctions imposed.

83. We are indebted to both counsel for their thorough and lucid analysis of the facts of the case, and the legal principles engaged.

Disposition

84. We accordingly dismiss the appeal, allow the cross-appeal and substitute a conviction on the First Charge and vacate the conviction on the Third Charge.

November 17, 2020



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