Case No.: 948

THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty file on September 14, 2017, and revised on June 29, 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 :

UNIVERSITY OF TORONTO

- and -

S (W

INTERIM DECISION

Hearing Date: September 12, 2018

Members of the Panel:
Mr. Nader R. Hasan, Co-Chair
Professor Pascal van Lieshout, Faculty Panel Member
Ms. Yusra Qasi, Student Panel Member

Appearances:
Ms. Lily Harmer, Assistant Discipline Counsel, Paliare Roland
Ms. Lauren Pearce, Assistant Discipline Counsel, Paliare Roland
Mr. Lorne Sabsay, Counsel for Ms. S (W, the Student
Ms. Jennifer Jackson, Assistant to Mr. Lorne Sabsay, Counsel for the Student
Ms. S (W, the Student (via Skype)

Hearing Secretary:
Ms. Krista Osbourne, Administrative Clerk & Hearing Secretary, Appeals, Discipline and Faculty Grievances, University of Toronto

[1] This is an academic discipline matter in which the Student, S[redacted] ([redacted] W[redacted] ("the Student"), has been charged with academic misconduct. The charges were filed by the Provost of the University of Toronto ("the University") against the Student under the University's *Code of Behaviour on Academic Matters, 1995* ("the *Code*") on September 14, 2017. At the crux of the charges is the allegation that the Student submitted fraudulent transcripts to support her transfer application to the University. The Student vigorously denies those allegations. There is no dispute among the parties that fraudulent transcripts *were submitted* on the Student's behalf. The only dispute is whether the Student *was aware* of the fraudulent nature of the transcripts.

[2] These are the decisions in relation to motions brought at the hearing held on September 12, 2018.

[3] The September 12, 2018 motions dealt with:

(a) The Student's motion to preclude the Provost's witness, Mr. Yifan Liu, from testifying in these proceedings;

(b) The Provost's motions seeking an order declaring that:

(i) the Judgment in Mr. Liu's criminal trial, per Maxwell J., is admissible in the hearing on the merits of the charges against the Student;

(ii) portions of the transcripts from Mr. Liu's criminal trial, attached to the Provost's Notice of Motion as Appendix "A" (the "Transcripts") are admissible in the hearing on the merits of the charges against the Student; and

(iii) the Transcripts are admissible for the purpose of impeaching Mr. Liu or the Student during their respective cross-examinations.

[4] Oral reasons dismissing the Student's motion were delivered on September 12, 2018. I advised the parties at that time that I may edit or supplement those reasons in writing.

[5] I reserved on the Provost's motions after reviewing the facta, motion records and hearing oral submissions from counsel for the parties.[1]

(A) The Motion to Preclude Mr. Liu from Testifying

[6] The Provost intends to call as a witness Mr. Yifan Liu, the ex-boyfriend of the Student. Mr. Liu is expected to testify about the extent of the Student's knowledge about the fraudulent transcripts. Mr. Sabsay, counsel to the Student, asserts that it would be a violation of the Student's rights under the Can*adian Charter of Rights and Freedoms* (the "*Charter*") to have Mr. Liu testify. He also submits it would violate her rights under the *Ontario Human Rights Code*. He asserts not only that a portion of Mr. Liu's evidence should be excluded but that the Provost should be precluded from calling him altogether. He submits that allowing him to testify would amount to a violation of the Student's *Charter* rights.

[7] This motion presented a threshold issue of whether the *Charter* applies to university discipline proceedings. The Provost vigorously contests the application of the *Charter* to these proceedings. As I indicated in my oral reasons, it is not necessary to decide that issue because even if the *Charter* did apply, generally, the Student's motion must be dismissed.

[8] The Student's motion is novel in almost every respect, which Mr. Sabsay appears to concede. There is no reasonable dispute that Mr. Liu's evidence would be relevant, as his proposed evidence goes to the heart of the issues: whether the Student had knowledge of the fraudulent nature of the transcripts.

[9] Mr. Sabsay provided no authority for the proposition that the Tribunal has the power to preclude a witness with relevant evidence from testifying because of the

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[1] Although these motions were argued before a full panel, the decision was made by the Chair alone, as these motions involve questions of law.

emotional impact that her or his testimony may have on another party. Nor am I aware of any such authority.

[10] I note also that while Mr. Sabsay asserts that the Student would be traumatized by having Mr. Liu testify, Mr. Sabsay has not tendered any evidence in that regard (i.e., affidavit or viva voce evidence from a physician, from the Student or from any other person that would support the proposition that she would be traumatized).

[11] Without an evidentiary foundation, it is difficult to contemplate how such extraordinary relief could be granted, or what measures might properly mitigate or limit the amount of emotion duress that the Student would face. Yet even if one were to assume that having Mr. Liu testify would be difficult or even traumatic for the Student, the Panel is not persuaded that having him testify would amount to a *Charter* rights violation or a *Human Rights Code* violation. At least not one that could not be accommodated in some way.

[12] After the conclusion of my oral reasons, I invited Mr. Sabsay to seek alternative relief in the form of accommodation of the Student to deal with the anticipated emotional duress. Following the hearing, I was advised that the parties had agreed that the Student could be accommodated. Since the Student is appearing in these proceedings by way of Skype, the parties agree that Mr. Liu should testify immediately below the screen upon which the Student appears. Given the position of the camera, neither of Mr. Liu nor the Student would be able to see each other. This is a sensible approach.

(B) Admissibility of the Judgment from Mr. Liu's Criminal Trial

[13] The Provost seeks admission of the Judgment from Mr. Liu's criminal trial. The Provost is not asking the Tribunal to adopt Maxwell J.'s findings or analysis in relation to the Student's credibility. Instead, the Provost is tendering the Judgment to provide the Tribunal with "contextual information that is relevant to these Tribunal Proceedings".

[14] The Provost relies principally on the Supreme Court of Canada's decision in *British Columbia (Attorney General) v. Malik*,[2] and on s. 15(1) of the *Statutory Powers and Procedure Act* ("SPPA").

[15] The Provost cites *Malik* for the proposition that a judgment in a prior civil or criminal case *may* be admissible as evidence in a subsequent proceeding, including administrative or disciplinary proceedings, as proof of its findings and conclusions.

[16] *Malik* is of limited applicability. The primary finding and conclusion of Maxwell J.'s Judgment is that the Crown had not proven its case against Mr. Liu beyond a reasonable doubt and that Mr. Liu must be acquitted. Nobody disputes that this was the result of the criminal proceeding. (If that does become a contested issue of fact, then the Judgment can be admitted for that limited purpose.)

[17] It is true that, in the context of rendering the Judgment, Maxwell J. did make adverse findings of credibility against the Student (and, to some extent, Mr. Liu). Generally, one trier of fact's assessment of a witness' credibility in one proceeding is not relevant to another tribunal's assessment of that witness' credibility in a subsequent proceeding.[3] It is for this Tribunal to independently assess and come to its own conclusions with respect to the Student's credibility — a fact that the Provost appears to acknowledge.[4]

[18] The Provost states that it does not seek to rely on the Judgment for the findings on the Student's credibility, but rather for "context". Upon reviewing the Provost's submissions and during oral argument, it was not clear to me what the Provost could mean by "context". As the Supreme Court notes in *Malik*, to the extent that a party seeks to rely on a previous judgment, it must specify the purpose for which it is tendered, and that purpose must be a permissible one.

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[2] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18.
[3] *R. v. Ghorvei*, 1999 CanLII 2475 at para. 31 (ON CA).
[4] Factum of the Provost, para. 20.

Tendering a judgment for “context” lacks the specificity to allow this Tribunal to make an informed decision as to whether the purported purpose is a permissible one.

[19] I must also consider subsection 15(1) of the SPPA. That section provides in relevant part:

> 15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
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> (a) any oral testimony; and
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> (b) any document or other thing,
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> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[20] Section 15(1) thus provides for the relaxation of the rules of evidence and gives greater scope to the admission of evidence by a tribunal.

[21] The section is permissive; it affords a tribunal latitude in admitting evidence that may not be admissible in a criminal or civil proceeding.

[22] While section 15(1) enlarges the ambit of admissible evidence, it is not without limitation. The evidence must be relevant to the proceeding. It must also not lead to unfairness.[5]

[23] In determining whether admission of the evidence could lead to unfairness, I can be guided by those rules of evidence that are aimed at ensuring fairness in legal proceedings. Under the rules of evidence, even where evidence is otherwise admissible, it can be excluded where its probative value is outweighed by its prejudicial effect.[6]

[24] The risk of prejudice here is significant. The criminal courts are expert in the evaluation of credibility of witnesses. Maxwell J. assessed and made

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[5] *Bartashunas v. Psychology Examiners*, [1992] O.J. No. 1845 (Ont. Div. Cut.).
[6] *R. v. Seaboyer,* [1991] 2 S.C.R. 577.

negative credibility findings with respect to the Student. This Tribunal will be asked to perform a similar exercise. But Maxwell J.'s findings have the potential to overwhelm this Tribunal. Although the members of the Tribunal would no doubt direct themselves to not be unduly influenced by Maxwell J.'s findings, given the overlap between the issues, the risk of prejudice is high.

[25] On the other side of the ledger, I must consider probative value. As noted above, one trier's of fact's assessment of a witness' credibility is not relevant to a subsequent tribunal's assessment of that witness' credibility. It is for this Tribunal to independently assess and come to its own conclusions with respect to the Student's credibility.

[26] Given its slight probative value and its high potential for prejudice, the Judgment is inadmissible.

(C) Admissibility of the Transcripts from Mr. Liu's Criminal Trial

[27] Different considerations apply with respect to the Provost's motion to tender the Transcripts from Mr. Liu's criminal trial. Although the Transcripts are hearsay for purposes of these proceedings, the Provost submits that they satisfy the "party admissions" and "statements against interest" exceptions to the rule against hearsay. I agree. It is established law that an out-of-court statement made by a party to a proceeding that is adverse to her or his interest in that proceeding may be tendered by an opposing party to prove the truth of the facts contained in the statement.

[28] Even if I am wrong in the regard, I would admit the Transcripts under s. 15(1) of the SPPA. In my view, the balancing of probative value and prejudicial effect with respect to the Transcripts is different from the Judgment. The probative value of admitting the Transcripts thus outweigh its prejudicial effects.

[29] Although Transcripts are hearsay statements, they contain the hallmarks of reliability.[7] The Transcripts are the testimony from taken under oath and subject to cross-examination. The Transcripts therefore have the indicia of reliability. They are reliable evidence of what the witnesses did in fact say about matters that are directly relevant to these proceedings.

[30] Further, as counsel for the Provost points out, the Student is not a compellable witness in these proceedings. She may or may not testify. If she chooses not to testify, then the Transcripts from Mr. Liu's criminal trial would be the only evidence in these proceedings of what the Student has said about the nature and genesis of the fraudulent academic transcripts — a key issue in these proceedings.

[31] In light of the foregoing, the risk that the admission of the Transcripts would result in unfairness is attenuated, and I may exercise my discretion under s. 15(1) to admit those statements.

(D) Use of Transcripts for Impeachment Purposes

[32] The Provost seeks an order that the Transcripts can be used for the purposes of impeaching the Student should she choose to testify.

[33] It is well-established at common law and under the Ontario *Evidence Act*,[8] that parties may be cross-examined on their prior statements. A witness, including a respondent charged with misconduct (or even a criminal accused), can be cross-examined on prior statements. Cross-examination on a prior inconsistent statement may be used to impeach the credibility of the witness, or in an attempt to have the witness adopt the prior statement as true.[9]

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[7] See *R. v. Bradshaw*, 2017 SCC 35 at paras. 26-58 (for discussion of factors to consider in determining whether out-of-court statements are sufficiently reliable to overcome hearsay dangers).
[8] *Evidence Act*, R.S.O. 1990, c. E.23, s. 21.
[9] *R. v. Hill*, [2015] O.J. No. 4758 at para. 43 (C.A.).

[34] There is no basis here for interfering with these long-established principles and none has been put forward.

(E) Decision and Order

[35] Ms. W[redacted]'s motion to preclude Mr. Liu from testifying is dismissed.

[36] The Provost's motion is allowed in part:

a. The Judgment is inadmissible.

b. The Transcripts are admissible in the hearing on the merits of the charges against the Student.

c. The Transcripts may be used for the purpose of cross-examination.

Dated at Toronto, this 21st day of December, 2018

Nader R. Hasan, Chair