**FILE: 2000/01-02**

**UNIVERSITY OF TORONTO**
**UNIVERSITY TRIBUNAL**
**TRIAL DIVISION**

**Members of the Panel**:
**C. Anthony Keith, Q.C.**, Senior Chair
**Roland J. Le Huenen**, Faculty member
**Paul Macerollo**, Student member

**IN THE MATTER** of the *University of Toronto Act, 1971*, S.O. 1971, c. 56, as amended;

**AND IN THE MATTER** of the University of Toronto Code of Behaviour on Academic Matters, 1995;

**AND IN THE MATTER** of disciplinary charges against K.U.;

**AND IN THE MATTER** of disciplinary charges against R.D.

*Maurice Vaturi*, Campione & Vaturi, for K.U.
*Yvonne D. Fiamengo,* Barrister & Solicitor, for R.D.
*Linda R. Rothstein*, Discipline Counsel and *Lily I. Harmer*, Assistant Discipline Counsel, for the University of Toronto

Appearances:

*Siobhan Brady*, Invigilator
*James B. Campell*, Faculty
*R. D.*, accused
*Mazda Jenab*, Invigilator
*Betty I. Roots*, Emeritus faculty
*Rebecca Spagnolo*, Chief Presiding Officer, BIO 351Y examination
*Lilian U. Thompson*, Faculty
*K.U.*, accused
*Tanya Wood*, Chief Presiding Officer, NFS 386H examination

## BACKGROUND

**[1]** A hearing of the Trial Division of the University Tribunal was convened on the evenings of February 28, 2001, March 7, March 14, April 17, April 25, 2001 and

concluded on June 5, 2001 to consider charges under the *Code of Behaviour on Academic Matters, 1995* [the "*Code*"] laid against K.U. and R.D. by letters dated September 20, 2000, from the Vice-President and Provost as he then was, Professor Adel Sedra.

**[2]** The charges laid against the two students were identical. Specifically, the charges were as follows:

1. On or about April 24, 2000, you did obtain unauthorized assistance and/or attempted to obtain unauthorized assistance and/or aided or assisted another person to obtain or attempt to obtain unauthorized assistance namely, during the writing of the final exam in BIO 351Y, contrary to Section B.I.1.(b) and B.II.1(a) and B.II2 of the *Code of Behaviour on Academic Matters, 1995*. Pursuant to Section B of the *Code* you are deemed to have acted knowingly if you ought reasonably to have known that you obtained or attempted to obtain or aided or assisted another to obtain or attempt to obtain unauthorized assistance.

2. In the alternative, on or about April 24, 200, 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 the final exam submitted to fulfill course requirements in BIO 351Y contrary to Section B.I3.(b) of the *Code of Behaviour on Academic Matters, 1995*. Pursuant to Section B of the *Code* you are deemed to have committed the offence knowingly if you ought reasonably to have known that you engaged in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage of any kind.

3. On or about December 21, 1999, you did obtain unauthorized assistance and/or attempted to obtain unauthorized assistance and/or aided or assisted another person to obtain or attempt to obtain unauthorized assistance namely, during the writing of the final exam in NFS 386H, contrary to Section B.I.1.(b) and B.II.1(a) and B.II2 of the *Code of Behaviour on Academic Matters, 1995*. Pursuant to Section B of the *Code* you are deemed to have acted knowingly if you ought reasonably to have known that you obtained or attempted to obtain or aided or assisted another to obtain or attempt to obtain unauthorized assistance.

4. In the alternative, on or about December 21, 1999, 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 the final exam submitted to fulfill course

> requirements in NFS 386H contrary to Section B.I3.(b) of the *Code of Behaviour on Academic Matters, 1995*. Pursuant to Section B of the *Code* you are deemed to have committed the offence knowingly if you ought reasonably to have known that you engaged in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage of any kind.

**[3]** The particulars of the charges were similarly identical:

> 1. At all material times you were a student in NFS 386H taught by Professor L.V. [*sic*] Thompson during the 1999/2000 academic year.
>
> 2. At all material times you were a student in BIO 351Y taught by Professor Campbell during the 1999/2000 academic year.
>
> 3. During the final exam on NFS 386H you engaged in appropriate communications with [K.U., R.D.] in an attempt to cheat or obtain unauthorized assistance.
>
> 5.[*sic*] During the final exam of BIO 351Y you engaged in inappropriate communication with [K.U., R.D.] in an attempt to cheat or obtain unauthorized assistance.

**[4]** At the commencement of the proceedings counsel for Mr. U., with the support of counsel for Mr. D., raised an objection to hearing the charges against the two accused students in a joint hearing. In the submission of counsel for Mr. U., this was a proceeding to which the provisions of the *Statutory Powers Procedure Act* [*S.P.P.A.*] applies and that under sub-section 9.1(1) the Tribunal may proceed to combine the proceedings or any part of them *only* with the consent of the parties. Counsel for Mr. U. advised that his client did not consent to a joint hearing. He has argued that to combine the proceedings or hear them at the same time was prejudicial. His submissions were echoed and supported by counsel for Mr. D. Counsel for the University opposed this request and referred the Chair to other sections of the *S.P.P.A.* as well to sections of the *Code*.

**[5]** Paragraph C.II.(a).22 of the *Code* provides that at trial hearings the Chair shall determine all questions of law in addition to voting on verdict and the sanction. It is

therefore the Chair's function and responsibility to rule individually on the issue that was raised by counsel for Mr. U. with the support of counsel for Mr. D.

**[6]** The application of the *S.P.P.A.* to a proceeding of this nature must be founded on section C.II.(a).7. of the *Code*, which reads that "the procedures of the Tribunal shall conform to the requirements of the *Statutory Powers Procedure Act*, as amended from time to time." That section requires conformity but does not say that the procedures followed by the Tribunal are *bound* by the provisions of the *S.P.P.A.* which it might very well have said if the intention was that the proceedings of the Tribunal be governed explicitly by that statute. It was pointed out by counsel for the University that the power of the Tribunal to hear and dispose of charges includes the power to determine its practice and procedure subject to the provisions of the *Code*.

**[7]** The definition in the *S.P.P.A.* of a proceeding is simply "a proceeding to which this Act applies". There is a question as to whether or not this was two proceedings or, in effect, one proceeding involving charges against different people. The *S.P.P.A.* also indicates that the consent requirements upon which counsel for the accused based their submissions do not apply if another act or regulation that applies to the proceedings allows the Tribunal to combine them or hear them at the same time without consent. While this matter is not free from doubt, and while an appellate tribunal or another Chair might come to a different conclusion, it is this Chair's view that this is *a* proceeding involving two accused against whom identical charges have been laid. In the submissions of counsel for the University, we were advised that the same evidence will be tendered with respect to the charges against both of the students. Therefore these are not separate proceedings, but in a sense one proceeding involving the same evidence.

**[8]** While this is an administrative tribunal within the University called to deal with matters in accordance with the *Code*, the Tribunal must be mindful of the University community and the exigencies that relate to that community. The attendance of witnesses and the attendance of the accused is a part of those exigencies. While it is not certain that

the matter is free from doubt, on the facts this matter should be heard as one proceeding and the application for separate proceedings was therefore dismissed.

**REASONS FOR DECISION**
**(Delivered orally by Senior Chair Keith)**

**[9]** In this case the University of Toronto has laid four charges against the accused R.D. and K.U. with respect to two separate examinations, namely NFS 386H written in December 1999 and BIO 351Y written in April of 2000. In each case the charges laid relate to "knowingly obtaining or attempting to obtain unauthorized assistance" or "knowingly engaging in a from 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." The particulars set out in the charges allege inappropriate communication between them.

**[10]** The two accused students were acquainted with each other during their high school years but became friends after both enrolled at the University of Toronto where they took many, if not most, of their courses together. They studied together and on the evidence were mutually supportive. They were good students, perhaps even exceptional having particular regard to the commendations received by Mr. D. for impressive academic achievement on at least three occasions.

**[11]** At the time of the two examinations referred to, both students were in their third year. The first examination in NFS 386H in December 1999 was a final examination in that course. Two separate rooms were designated for students to write the examination according to the first letter of their surnames. The two students as a result ought to have written in different rooms but instead both wrote this examination in the same room seated beside one another. When it was discovered that Mr. D. was in fact in the wrong room, the invigilator assigned to collect signatures was asked by Mr. D. if he should move to the correct room. Mr. D. was told it was not necessary. On all the evidence

indeed we are satisfied that students writing in the wrong room does occur from time to time and is not considered significant although for record keeping purposes a separate notation is made.

**[12]** The evidence relied upon by the University with respect to the charges arising from the irregularities observed during the NFS 386H examination consists of observations by the Chief Presiding Officer, Ms. Tanya Wood, who noticed four students entering the room together in what she described as a somewhat loud confident manner. She asked her colleague Mazda Jenab to keep an eye on these students. In due course Mr. Jenab, who was assigned to collect signatures, reported to Ms. Wood that one of them was in the wrong room. Ms. Wood then continued her observation of these two students and testified that although she was quite sure she had, prior to the examination, placed the examination materials on alternate chairs, noticed at a certain point during the examination that these two students were sitting what she termed "unusually close together". For that reason she decided to observe them more closely. She accordingly positioned herself directly behind and above them and observed them intently for a number of minutes. During this time she testified that she noted what she described as three "head-tilts"; movements of the head by one of the students, perhaps as much as two to three inches, although the demonstration that she gave at this hearing seemed to indicate somewhat less significant movements.

**[13]** Mr. Jenab at another time during the examination noticed one of the two accused lift the corner of his paper a distance of two to three inches. He reported this to Ms. Wood. At that point she decided to separate them and move Mr. U. to a seat as far away as possible from Mr. D. in the front corner of the room. On retrieving their papers at the conclusion of the examination she observed what she took to be an unusual pattern of similarity between their two papers and she thereupon completed an anomaly report. She and other witnesses testified that an anomaly report is required from an invigilator when anything unusual occurs during the course of an examination which could involve, for example, the room being unusually hot or cold.

**[14]** The pattern of similarity being relied upon by the University consists of what is termed an unusual number of identical right and wrong answers. Indeed, between the papers submitted by the two accused in the NFS 386H examination, all but three of their answers were identical either correct or incorrect. Mr. Jenab also testified as to his observations of the students during the NFS 386H examination. In his observation, there was amble elbowroom between them and that if he had thought they were too close together he would have moved them.

**[15]** The examination in BIO 351Y was written in April 2000. Again, it was a final examination. Again both students wrote in the same examination room and sat side by side. This time Mr. U. was in the wrong room according to the surname designation, but again, as with Mr. D. previously, he was permitted to remain in the room by the invigilator charged with identifying those present. One of the invigilators, Siobhan Brady, observed what she interpreted as unusual behavior and positioned herself behind the defendants to observe them further. She described her initial observation as "the two students seated side by side angled across their desks toward each other and engaging is some form of communication". As indicated, she moved to a position directly behind them where she remained for a period of three to four minutes. She testified that during this time she made noise in an effort to alert them to her presence but it was only after an extraordinarily long period of time that they returned to what she considered to be a more normal position. She then reported this observation to the chief presiding officer, Rebecca Spagnolo, who testified that she had not previously noticed anything unusual with respect to the two accused. She then looked in their direction, as pointed out by Ms. Brady, and at that moment observed what appeared to be communication between them. She then moved to a position alternately behind and between them and remained in that vicinity for twenty minutes. During this time she noticed no further unusual behaviour but did note what to her appeared to be a remarkable similarity between the partially completed scantron sheets of both students that she stated were visible to her.

**[16]** As with the previous NFS 386H examination, the University relies upon what is seen as a remarkably similar common pattern between the two answer sheets submitted by the two accused and the observation that once the students realized that they were under observation that perceived similarity appeared to cease.

**[17]** The accused each testified in their own defence. Both related how they had become close friends and studied together. Both related how Mr. D.'s father had become seriously ill at some time prior to the NFS 386H examination. Mr. U. testified that he carried a cell phone and received a message shortly before the NFS 386H exam with respect to Mr. D. Sr. and his deteriorating health, which message he had passed on to his friend before the examination began.

**[18]** Both accused denied any form of improper communication during the NFS 386H examination and said that if there had been some form of communication it would have related to Mr. D. Sr. That gentleman unfortunately died some time after the NFS 386H exam and before the BIO 351Y exam and as a result of this family circumstance the accused, R.D., ceased to attend classes at the University. He was persuaded by his friend Mr. U. to write the BIO 351Y exam relying on his, that is Mr. U.'s, notes. Mr. U. stated that he consciously chose to accompany Mr. D. to the wrong examination hall, again with reference to the designated surnames, in order to provide support and comfort for his friend and out of concern for his well-being. Both denied any improper communication between them during that examination.

**[19]** The evidence upon which the University relies is entirely circumstantial in our view. The onus is upon the University to show on clear and convincing evidence that the accused have committed the offences as charged. The elements of each offence include intention, that is, in order to convict, the Tribunal must be shown on evidence, which it accepts as clear and convincing, that the accused acted knowingly with the intent to commit the offence described. There is no question that the invigilators in both exams

became aware of conduct that they regarded as suspicious. For this, one can only commend them for their diligence. However, more than mere suspicion is required.

**[20]** Having carefully considered all of the evidence, including the oral testimony and the written exhibits and the submissions of counsel, we are not satisfied that University has discharged the required onus of proof. We have examined all of these matters on the basis of looking at the two events separately and individually and also at the evidence as a whole. We are not satisfied that on the basis of the evidence before us it would be safe to register a conviction. We therefore accordingly dismiss all charges against both accused.

**[21]** Before leaving this case we would say to both Mr. D. and Mr. U. that this was not an easy decision for us and you may consider yourselves fortunate. It is reckless to engage in behaviour during any academic exercise may which may reasonably lead those charged with enforcing the *Code of Conduct on Academic Matters, 1995*, to conclude that an offence may have been committed. We trust that you will have learned from this experience and that such equivocal behaviour will not be repeated.

## DECISION ON COSTS

[Following submissions on costs from counsel, Senior Chair Keith made the following ruling]

**[22]** It is true that the *Code* grants to the Chair of the hearing the discretion to award costs. It is my view that that discretion must, of course, be exercised judicially and based upon proper principles and that because of the principles which have been enunciated in the past, both in this Tribunal and in the broader court system, there is a reluctance on the part of this tribunal to make an award for costs lest that operate as a deterrent to the

University in fulfilling its obligation to ensure that the principles set out in the *Code of Conduct on Academic Matters, 1995,* are upheld.

**[23]** There have been judgments in the Ontario Superior Court (previously the General Division) in which an order for costs was made against the Attorney General. I am thinking particularly of a case some years ago where there was clear evidence that either the prosecutor acted maliciously with a view to seeking to punish or persecute individuals, or with a degree of recklessness that amounted almost to malicious conduct. In those situations I would be prepared to say that it would not be out of the ordinary for a Tribunal to consider the exercise of the discretion that was granted by sub-paragraph C.II.(a).17.(b) of the *Code*.

**[24]** My view of the evidence here is that there was conduct which reasonably led a number of invigilators to conclude that the behaviour they had observed needed to be investigated. That investigation was carried out and resulted in the laying of charges. I am not prepared to say that the University acted recklessly or maliciously in laying those charges, nor am I prepared to say that it acted in an unreasonable manner in bringing forward the evidence that it did.

**[25]** It is always a difficult matter to decide what evidence needs to be put forward. In this case it would have been inappropriate, in my respectful submission, not to tender the evidence of the invigilators who were present. The two professors in charge of the courses and Professor Roots, the Dean's designate who interviewed the students, gave additional evidence. It seems to me that it was entirely appropriate to call those persons. In order that the hearing may be conducted fully, fairly and impartially, it is necessary to accord whatever time is reasonably necessary to the examination of those witnesses. The fact that the hearing may be perceived by some to be unduly long, to have caused stress to those involved, and to have caused expense, is unfortunately something that is very difficult to avoid if one is prepared to deal with charges under the *Code* as the serious

matters that they are. For all of those reasons I would not be prepared to exercise my discretion in this particular case and grant the motion for costs.

I certify that this is the decision of the Tribunal

April 25, 2001 — Date

C. Anthony Keith — C. Anthony Keith, Q.C.