NOTE:

The student, U., was charged under the *Code of Behaviour on Academic Matters* for plagiarizing part of this Ph.D. dissertation. The Tribunal determined that it did not have jurisdiction to hear the charges for the reasons contained in **1978/79-11**. A special "Judicial Board" was created by the Governing Council to hear the charges against U. The Judicial Board ruled that it had jurisdiction to hear the charges: **1979/80-18**. U. applied for judicial review of this decision, however the Divisional Court dismissed the application: [1981] O.J. No. 524. The Judicial Board subsequently rendered a guilty verdict and recommended the revocation of the U.'s degree: **1980/81-19**.

Even thought **1979/80-18** and **1980/81-19** are not "Tribunal" decisions under the *Code of Behaviour on Academic Matters*, the decisions have been included here because they concern academic discipline.

The same procedure was employed in **1986/87-07**.

Paul J. Holmes
Judicial Affairs Officer
June, 2004

FILE: 1978/79-11

IN THE MATTER OF THE DISCIPLINARY TRIBUNAL
OF THE UNIVERSITY OF TORONTO

B E T W E E N :

THE UNIVERSITY OF TORONTO

Complainant

-and-

Dr. U.

Accused

Appearances:

For the University of Toronto, Kathryn Feldman
For the Accused, Ronald Carr

This matter arises by way of discipline under domestic legislation known as "An Enactment of the Governing Council Respecting the Disciplinary Tribunal of the University of Toronto" (the "Enactment") dated March 1974, and its companion document entitled Code of Behaviour also dated March 1974, both of which came into force, it is agreed by all parties, October 1, 1975. In addition to these two documents, the Governing Council of the University in its wisdom enacted Rules of Procedure (referred to as "the Rules") to govern the practice of these tribunals. I note Section 2 of the Rules which states in part:

> "...the practice and procedures of the Tribunal shall be regulated by analogy to the procedure in criminal cases in the Province of Ontario under the Criminal Code of Canada.".

While it is not necessary to have this analogy brought to my attention to appreciate the seriousness of these matters, I confess it has heightened my anxiety throughout these deliberations.

By letter dated September 21, 1978 (marked as Exhibit 1 in these proceedings), the Vice-Provost of the University advised Dr. U. that he stood charged with an offence under Section E 1(a)(ii) of the Code of Behaviour and that if convicted, the Tribunal might recommend to the Governing Council the recall of the degree bestowed upon him. For ease of reference, the text of the letter initiating these proceedings is set out herein.

Upon recommendation of the School of Graduate Studies and the University Discipline Counsel I have accepted that a prima face case of plagiarism exists with respect to your doctoral thesis.

Therefore, Mr. U. , YOU ARE CHARGED that in 1974 while a member of the University of Toronto you did with intent to deceive submit a thesis entitled "Field Articulation and Critical Reading and Listening" for credit in furtherance of a Ph.D. in Educational Theory in which you represented as your own ideas and the expression of ideas of others, contrary to Section E(1)(a)(ii) of the University of Toronto Code of Behaviour. The following are the particulars:-

Significant portions of Chapter 2 of your thesis, "The Problem and Its Setting, Review of Literature" are taken without acknowledgement from the work of Dr. J. Kent Davis "Concept Identification as a Function of Cognitive Style, Complexity and Training Procedures".

Section E(2) of the University of Toronto Code of Behaviour provides:

> "In order to protect the integrity of the degrees, diplomas and certificates granted by the University, the Tribunal shall have power to recommend to the Governing Council the cancellation, recall or suspension of any degree, diploma or certificate obtained by any alumnus who, while a member, committed any academic offence, which if detected before the granting of the degree, diploma or certificate, would, in the judgement of the Tribunal, have resulted upon conviction in the application of any sanction sufficiently severe to lead to the loss of credit in any course of program of study pursued by that alumnus, so that the degree, diploma or certificate would not have been granted."

It is the intention of the University of Toronto to proceed with this allegation before the Senior Branch of the Trial Division of the University Tribunal. Procedural instructions from the Secretary of the Tribunal are enclosed with this letter.

Yours sincerely,

D.A. Chant
Vice-President and Provost

In accordance with the procedure prescribed, the Chairman of the Tribunal is notified of the pending charge and a date is assigned for the commencement of the hearing. In this instance, I raised several preliminary concerns and asked the Secretary of the Tribunal to alert the Prosecutor (a defined term in the Enactment) and the accused. At my urging through the Secretary, the accused retained counsel who together with the Prosecutor appeared before me on Thursday, February 15, 1979, when several preliminary matters were argued fully. Following argument at the end of the day, it was agreed that the proceedings would stand adjourned to such date as would be assigned by the Chairman after consultation with counsel. As the preliminary matters raised the fundamental jurisdiction of the Tribunal, no jury was empanelled, no witnesses were asked to attend and by arrangement between Mr. Carr and Mrs. Feldman the accused did not appear in person.

The preliminary objections raised by Mr. Carr were as follows:

I The Tribunal was not properly constituted and does not have disciplinary powers.

II The Code of Behaviour does not apply to someone who at the time of the charge, is no longer a student.

III If any "offence" occurred, it took place prior to the coming into force of this entire domestic legislation (Enactment, Code of Behaviour, Rules of Procedure) and that therefore this Tribunal is without jurisdiction to adjudicate or impose sanction (as contemplated by the Enactment).

Collateral to, but not necessarily part of this submission, he argues that prior to October 1, 1975, the conduct condemned in the charge was no where articulated and therefore was not prohibited conduct.

I In support of their submissions, both counsel reviewed the history of the underlying public statute, The University of Toronto Act, both vintages 1947 and 1971, and their amendments.

Mr. Carr argued that the underlying legislation did not specifically entrust matters of discipline to the Governing Council; that under the 1947 Act, jurisdiction over discipline was specifically vested in the Councils of certain faculties and schools, and in the Caput (see The University of Toronto Act, 1947, Subsections 71, 72, 79 to 82); and that by virtue of Section 9(1) of the Act of 1971, the powers of the Councils and the Caput were continued in those bodies.

In dealing with the general delegation of power to the Governing Council in Section 2 (14) and particularly S.2(14)(o) of the 1971 Act, he argues that that section, broad in scope, is not appropriate to confer the power upon the Governing Council to discipline or to empower the Governing Council to further delegate that power by domestic legislation. In support of this proposition, he cites the decision of the Court of Queen's Bench in Saskatchewan in Frobisher Ltd. v. Oak, Canadian Pipelines (1956) 20 W.W.R. 345. In that case, the enabling Statute delegated to the Lieutenant Governor in Council broad powers to regulate to carry out the intention of the Act. The particular regulation in that case was struck down on the ground that the Statute did not empower the Lieutenant Governor in Council "to formulate and enact substantive law"(see p.348). At p. 349, these cautionary words appear:

> "Provisions of a Statute purporting to delegate authority should be construed in this light and construed restrictively. In the absence of express language to the contrary, it must not be assumed that the legislature intended to delegate more than the right to provide the machinery necessary to administer the Act.".

In response Mrs. Feldman advanced an analysis of

the enabling legislation which I prefer and respectfully adopt. I shall attempt to set forth that analysis with appropriate apologies to Mrs. Feldman for any deviation.

It was agreed the Enactment, the Code of Behaviour and the Rules of Procedure were enacted by the Governing Council of the University and constitute a delegation of the power to discipline for certain academic offences. Whether the Governing Council has a residuary power over discipline remains moot (see Section 6(a) of The Enactment). The structures and procedures are elaborate and no precis will be attempted here. If the Governing Council did not derive the authority from the enabling legislation then there would be serious doubt that it had the power to create this Tribunal and confer its jurisdiction.

The analysis of the enabling legislation must start with Section 2(14) of the 1971 Act:

> "The government, management and control of the University and of University College, and of the property, revenues, business and affairs thereof, and the powers and duties of The Governors of the University of Toronto and of the Senate of the University under The University of Toronto Act, 1947, as amended are vested in the Governing Council...".

It is to be observed that by this section, the Governing Council of the University has inherited all the powers and duties vested in the Governors and the Senate of the University under the 1947 Act, as well as whatever new powers and duties are bestowed upon it by the opening words in that subsection.

From a reading of the 1947 Act as a whole and particularly sections 16, 29, 32 and 41, it is clear that the Board (which by definition means Governors of the University) was given general, specific and residuary powers and duties. However, certain disciplinary powers are given to the Senate (see Section 48(c)). By sections 79 to 82, as previously observed disciplinary jurisdiction is conferred upon the Councils and Caput and by Section 79(3) provision was made for delegation of these powers from Caput to the councils or other governing body. The crucial sections which bear quoting for emphasis are:

Section 83

> "As respects the conduct and discipline as students of the University of all students registered in the University to whatsoever federated university, federated college, college, faculty or school they belong and as respects all students enrolled in

University College the provisions of sections 79 to 82 may be abrogated or changed by the Board.";

Section 33

"The Board may modify, alter and change the constitution of any body constituted or continued by this Act, except the Senate and the Committee of Election, and create such new bodies as may be deemed necessary for the purpose of carrying out the objects and provisions of this Act, and also confer upon the bodies constituted or continued by this Act, or any of them, and upon any new body hereafter constituted, such powers as to the Board may seem meet, but nothing herein shall authorize any abridgement of the powers conferred upon the Senate by section 48 or the powers conferred upon the Committee of Election by sections 62 to 67.".

Between these two sections, the Board had a clear statutory mandate to create a new body or tribunal and to confer upon it jurisdiction over discipline. That power has been carried forward by Section 2(14) of the 1971 Act and was vested in the Governing Council. Between 1971 and the date of the present Enactment (Oct. 1, 1975), jurisdiction over discipline

remained where it had been -- with the councils and Caput. This too is statutorily recognized by Section 9(1) of the 1971 Act. From this analysis, it appears clear to me that whatever powers over discipline were vested in the councils or Caput could only be re-assigned by the Governing Council.

I therefore conclude that the Governing Council had the statutory authority to create this Tribunal and to confer upon it jurisdiction over discipline and that the Enactment, the Code of Behaviour and the Rules of Procedure are valid domestic legislation.

II Mr. Carr's next submission was that the Code of Behaviour by its terms didn't apply to former students (i.e. the accused); or in the alternative, the domestic legislation was so contradictory as to be unclear and ambiguous. If the latter was the case, then the doubt should be resolved in favour of the accused (bearing in mind the criminal law analogy). Mr. Carr points to the Introduction to the Code of Behaviour to demonstrate his point. While he concedes that Section E-2 of the Code of Behaviour must contemplate someone who has graduated by the time a charge has been laid, he argues this provision contradicts the introductory words and is demonstrative of the legislation's fuzziness. He also points to the definition of student in Section 1(1) of the 1971 Act which he

says demonstrates that the term must be given a "present tense connotation".

While I do not pretend to understand the whole of this domestic legislation, I am quite comfortable with the conclusion that the Code and Enactment were intended to include a person who was a student at the time of the alleged offence. To accept Mr. Carr's submission on this point would render nugatory the whole thrust of Section E-2 of the Code of Behaviour and would make the application of the whole legislation seasonal. I therefore respectfully reject this objection to jurisdiction.

III Mr. Carr's third objection to jurisdiction gives me much more difficulty: retrospectivity. It is conceded by Mrs. Feldman that the acts which form the subject of this charge occurred sometime in 1974 and that the domestic legislation came into force the year following namely October 1, 1975.

In support of his position that this Tribunal cannot have jurisdiction over a person whose impugned acts occurred prior to the Enactment, etc., Mr. Carr cites two authorities The first is Dr. Yat Tung Tse v. The College of Physicians and Surgeons of Ontario released February 21, 1978 (as yet

unreported). This decision of the Ontario Divisional Court (Reasons of Grange, J.) as I understand it, stands for the proposition that a factual situation crystallized and concluded before the enactment of a Statute or Regulation which prohibits it cannot be the subject of prosecution under that Statute or Regulation. There was discussion in that case of the Interpretation Act of Ontario and whether that Statute assisted the prosecution. The learned jurist took refuge in the decision of Laskin, J.A. (as he then was) in Regina v. Coles, [1970] 1 O.R. 570 from which decision he quotes as follows:

> "The present case represents a third situation on its facts but the applicable law is, in my opinion, the same. Here, no prosecution was launched during what I may call the natural life of the old Act; and when it was launched during the artificially extended life of the old Act, the new Act was already in force. There could not be, of course, any charge of an offence under the new Act; the Interpretation Act does not make legislation retrospective to catch factual situations which had crystallized and were concluded before the legislation became operative. Despite the repeal of the old Act and the currency of the new substituted Act, offences which had been committed during the natural life of the old Act could still be prosecuted, if brought within the limitation period, as was the case here.".

Mrs. Feldman argues that these decisions are not applicable and draws the distinction on the ground that in the instant case, the domestic legislation purports to be retrospective by express language.

The particular section of the Enactment reads as follows:

Section 4(1):

> "The University Tribunal is hereby established and constituted in the University for the purpose of administering and enforcing the Code of Behaviour.".

Section 4(2):

> "The University Tribunal shall consist of the divisions described in section 9 and shall have the disciplinary and other jurisdiction, power and authority specified herein and in the Code of Behaviour and such further power and authority as are or may be conferred upon it by or under any Act of the Legislature of Ontario or otherwise by law, and except as otherwise provided herein or in the Rules of Procedure, shall have, in its said divisions, exclusive jurisdiction in all matters of discipline within and over the members of the University with respect to

> any act or conduct in the nature of or which may constitute an academic offence (hereinafter called "academic misconduct") occurring or committed either before or after the date of the coming into force hereof except academic misconduct in respect of which proceedings before the Caput or the council of a faculty or school have been instituted before such date.".

Mrs. Feldman argues that this express language is sufficient to confer jurisdiction upon this Tribunal to adjudicate upon conduct which admittedly occurred before the domestic legislation was in place.

It is urged by Mrs. Feldman that the presumption against retrospectivity is rebuttable and where the legislation specifically addresses itself to that issue, it should be given full force and effect. My difficulty with that proposition is that this legislation is domestic and cannot be given the same accord as public legislation. I know of no authority which suggests that the supremacy of Parliament concept is applicable to an enactment of the Governing Council of the University of Toronto. It is not suggested that the enabling legislation (The University of Toronto Act, 1971) empowers the Governing Council to legislate retrospectively. In my view, Section 9(1) of the 1971 Act makes it clear that until "otherwise

provided" by the Governing Council (which did not occur until 1975) the powers to deal with discipline was reposed in those bodies referred to in the 1947 Act, Subsection 79 to 83. If, for example, discipline was a matter for Caput in 1974, I do not see how the Governing Council in October 1975 can convert that subject to a new Code and body in respect of conduct which occurred in 1974.

If I were to view the Enactment as purely procedural the conclusion might be different. The Enactment creates the Tribunal but as well, it gives it "exclusive jurisdiction in all matters of discipline within and over the members of the University with respect to any act or conduct in the nature or which may constitute an academic offence...". Academic offence is a defined term (see Section 3(b) of the Enactment) which by reference means that conduct which is specifically prohibited in the Code of Behaviour. Indeed the specific charge before me is the offence prohibited by the Code of Behaviour at Section E-1(a)(ii). I emphasize this point because it was my initial reaction to treat the Enactment as procedural only. But on reflection, it is clear to me the Enactment and the Code of Behaviour are substantive as well as procedural. The accused is not charged with any academic misconduct. His is charged with a specific offence which is spelled out in the Code.

As an alternative argument, Mrs. Feldman urged me to analogize the situation spelled out in the Interpretation Act of Canada, R.S.C. 1970, Chapter 1-23, Section 36(f) and to find that this domestic legislation merely constituted a substitution for the prior practice and that the offences were in substance the same as those under the prior practice. She argues that on this view of the domestic legislation, it is merely a consolidation or declaratory of the expected behaviour before the Enactment. When invited to demonstrate to me where I might find that prior enactment or accepted community standard Mrs. Feldman urged two propositions:

(1) one could take judicial notice of the fact that plagiarism is notoriously unacceptable conduct within a University Community, and,

(2) if there be any doubt one could look to prior disciplinary proceedings and to university calendars to see that the alleged offensive conduct here impugned would have been prohibited.

Both of these propositions would require me to find that the Code of Behaviour did nothing but codify practices which were always prohibited in the University Community.

Tempting as this is, I have decided to resist.

I return to the admonition with which I started, namely the criminal law analogy referred to in the Rules of Procedure which form part of this legislation.

In my view, the Code of Behaviour together with the rest of this domestic legislation creates a new starting point. It defines specific offences, creates tribunals for adjudication, defines sanctions and prescribes procedures.

It is suggested that Section 5 of the Enactment demonstrates an intention to remove jurisdiction over all disciplinary matters from other bodies and to place them with the University Tribunal. That section read literally removes jurisdiction from Caput and the councils "in matters of discipline for academic misconduct". If I am right, that conduct falling outside the Code of Behaviour is not within the jurisdiction of this tribunal then it may well be that there is residual jurisdiction for Caput and the councils under the 1971 Act, Section 9(1) and the pre-October 1, 1975 "offences" whatever they might be can be dealt with under the pre-October 1, 1975 apparatus.

I therefore conclude that this Tribunal is without jurisdiction to try this accused and the charge laid pursuant to this Enactment must be quashed.

Because of the importance of this matter, I will re-convene the hearing at the request of either counsel to permit any submissions to be made on anything which I may have overlooked.

S. G. Fisher, Q.C.
Chairman.

Released: March 16, 1979.