



**DECISION OF THE ADJUDICATOR
STUDENT NON-ACADEMIC MISCONDUCT**

BETWEEN

**[STUDENT A]
APPELLANT**

AND

**RYAN FLANNAGAN
ASSOCIATE VICE-PRESIDENT STUDENT EXPERIENCE
RESPONDENT**

AND

**[STUDENT B]
RESPONDENT**

June 10th, 2020

Adjudicator: Bruce P. Elman
Appellant: Self-represented
Respondent [Student B]: Did not participate
Respondent AVP-SE: Self-represented

IN THE MATTER OF AN APPEAL BY [STUDENT A], COMPLAINANT, AGAINST A DECISION BY THE ASSOCIATE VICE-PRESIDENT, STUDENT EXPERIENCE TO DISMISS A COMPLAINT AGAINST [STUDENT B], STUDENT, PURSUANT TO THE *PROCEDURES FOR ADDRESSING STUDENT NON-ACADEMIC MISCONDUCT*, EFFECTIVE 15 SEPTEMBER 2016 AS REVISED 23 MARCH 2018, 26 OCTOBER 2018

DECISION

I. BACKGROUND – THE TIMELINE:

1. This matter began with an altercation between the Appellant/Complainant, [Student A], and a fellow student, [Student B] on February 14th, 2019.

2. Shortly after the altercation, [Student B] went to the Campus Community Police (CCP) and reported the incident, although he could not identify the other student, i.e. [Student A].
3. The CCP contacted the Windsor Police Service (WPS) who attended at the Campus Police Office and took some information from [Student B]. As I understand it, [Student B] declined to press charges at this time but did so sometime later.
4. The next day, [Student A], himself, voluntarily attended at the office of Campus Community Police. He asked whether there was a warrant out for his arrest. He was told there was not. He, subsequently, decided not to make a statement to the CCP at that time.
5. On March 6th, Dr. Danieli Arbex, the University's Academic Integrity and Student Conduct Officer, interviewed [Student B] and an investigation was commenced. However, to the extent that I can discern, the University's Complaint Form for Non-Academic Misconduct (NA Form 1.1) was never completed nor filed.
6. As I understand it, on March 14th, based solely upon Dr. Arbex's interview with [Student B], an order was issued by the Office of Student Experience which restricted [Student A]'s movements on Campus. He was to be permitted to enter the Odette Building for the purpose of attending class but was required to leave the Building following the completion of his class.
7. On March 26th, [Student A], with his counsel present, met with Dr. Arbex. [Student A] related his version of the facts to Dr. Arbex. It should be noted that [Student A] was not provided with a copy of [Student B]'s Complaint Form in advance because, as noted above, [Student B] was never asked to fill out a formal Complaint. Based upon [Student A]'s version of the facts, Dr. Arbex might have thought that [Student B] was the aggressor in this confrontation and that it might have been appropriate for [Student A] to file a Complaint against [Student B]. However, [Student A] was not given a copy of NA Form 1.1 in order to register a Complaint regarding [Student B]'s conduct. I will come back to this issue later.
8. By March 28th, [Student A]'s exclusion order had been extended to the entire Campus. From the materials, it appears that this was not an Order of Exclusion pursuant to the *Procedures for Addressing Student Non-Academic Misconduct*. Rather, it seems to be an Order that was issued under the Policy dealing with *Behavioural Intervention Plans*.
9. The consequences of this were dramatic: not only could [Student A] not attend class or write tests with his cohort, he could not visit his doctor who was treating him at the time for an unknown illness nor could he not see his chiropractor who was

important for treatment of the back injury he seemed to have suffered. He was unable to consult with his student counselor who might have helped him with issues associated with his courses, or even visit the Office of Student Experience to discuss his case.

10. It should be noted here that [Student A], at this time and throughout the succeeding months, suffered from a great deal of stress. His academic goal was to gain admission to Law school – in particular, Windsor Law – and, as time went on, he began to see this altercation and his subsequent interactions with the Office of Student Experience (OSE), Dr. Arbex, and the Associate Vice President, Student Experience (AVP-SE) as, potentially, derailing his plans to attend Law school here.
11. The Exclusion Order seems to have caused a confrontation with Dr. Arbex. At this point, the AVP-SE, Mr. Ryan Flannagan, determined that the University should hire outside counsel as the Investigator in the matter. Ms. Nancy Jammu-Taylor of the McTagues Law Firm was retained to conduct the investigation.
12. In early April, [Student A] had emergency surgery for a burst appendix. He was required to recuperate for two weeks at a time when he had assignments to complete and examinations to write.
13. [Student B] met with the Investigator on April 12th; [Student A] met with her on June 12th.
14. On June 19th, [Student A] delivered a 23-page “Omnibus Complaint” to the OSE. This included a Complaint – still not in the prescribed Form – regarding what [Student A] considered [Student B]’s aggression.
15. The Investigator, Ms. Nancy Jammu-Taylor delivered her Report to the Associate Vice President, Student Experience on June 20th. Her findings of fact will be detailed in a subsequent section.
16. On July 23rd, the Associate Vice President, Student Experience issued letters to both [Student B] and [Student A] indicating that, based upon the Report of the Investigator, he was dismissing the Complaint against [Student A] on the basis that [Student B] had been the aggressor and that [Student A]’s response was justified in the circumstances of the case. Thus, he exonerated [Student A] of any violation of the **Student Code of Conduct**.
17. This did not put an end to the matter, however. [Student A] insisted that his Complaint under the **Student Code of Conduct** against [Student B] be investigated and adjudicated.

18. On November 8th, the Associate Vice President, Student Experience issued a decision on [Student A]'s Complaint against [Student B] stating that no further action would be taken.
19. On November 25th, [Student A] appealed this decision. The appeal would normally have been heard by the Provost as Adjudicator but, in this case, the Provost asked me to serve as the Adjudicator as his designate.
20. On December 4th, I issued a decision allowing the student leave to appeal and setting out the procedures that would be followed: [Student A] would have an opportunity to formalize his appeal; the Associate Vice President, Student Experience and [Student B] would then be given an opportunity to file a Response. At that point, [Student A] would be provided an opportunity to Reply.
21. All of the documents were filed on time. [Student B] did not respond to the invitation to file a Response, nor was he required to do so. I want to thank the Associate Vice President, Student Experience and [Student A] for their co-operation in this matter.

II. BACKGROUND – MATERIALS REVIEWED:

22. In considering this appeal, I have reviewed numerous materials including the **Student Code of Conduct** and, in particular, section 3(B) on “Non-Academic Rights and Responsibilities”, the *Procedures for Addressing Student Non-Academic Misconduct*, NA Form 1.1 - Report of Non-Academic Misconduct, NA Form 1.2 – Decision of the Associate Vice President – Student Experience, NA Form 1.3 - (Request for Appeal of Decision of AVP, Student Experience. Further, I examined NA Form 2 - Order of Suspension or Exclusion from Campus.
23. I, also, examined the notes of the Meetings that Dr. Danieli Arbex held with [Student B] and [Student A] and any attachments to those notes. In addition, I examined numerous emails to and from the AVP-SE and Dr. Arbex. I examined incident reports from both CCP and WPS.
24. Finally, I read the voluminous Submissions of the Associate Vice President, Student Experience and [Student A] and appended material. When [Student A] filed his appeal, it was approximately four pages. When, in my decision of December 4th, 2019, I invited him to formalize his appeal, the submission grew to slightly over 12 pages of tightly written, single spaced text without margins that I estimate to be well over 6000 words. The AVP-SE's Response was 16 pages or approximately 5000 words. Finally, [Student A]'s Reply was 52½ pages long, once again tightly written,

single spaced text without margins that I estimate to be well over 30,000 words with some attachments. (It should be noted in fairness that [Student A] reproduced the AVP-SE's entire Response within his Reply.)

III. BACKGROUND – WHAT THIS IS NOT:

25. I want to be clear about what this is not. First and foremost, this is not a legal trial nor is it even an appeal on a legal matter. As Adjudicator, I did not take "evidence" in this matter. I received submissions from the Parties – the Associate Vice President, Student Experience and [Student A]. No testimony was given; none of the submissions were under oath; no one was cross-examined; no exclusionary rules were applied. I did not consider rules regarding hearsay evidence, character evidence, opinion evidence, or similar fact evidence – all of which were, arguably included in the submissions. Indeed, some of the individuals associated with the file did not even provide statements to me. These included Dr. Arbex and other staff at the OSE or [Student B].
26. I am not giving a legal judgment here; nor am I engaging in forensic analysis. I am simply trying to determine whether the AVP-SE acted appropriately in deciding that there would be no further action taken on [Student A]'s Complaint against [Student B] in the circumstances of this case.
27. As noted in the *Procedures for Addressing Student Non-Academic Misconduct*, "The Adjudicator is not bound by the rules of evidence applicable to judicial proceedings but will be guided by **the principles of fairness and natural justice** and will adhere to the rules of privilege and privacy."
28. As noted above, [Student B] did not participate in this Appeal. He was invited to make submissions, but he never responded to those invitations.
29. Finally, and crucially, it should be remembered that [Student A] is **NOT** appealing the decision in the Complaint against him. It has already been determined that he was justified in using force to repel the assault upon him. He has already been **exonerated** in that matter by the Associate Vice-President, Student Experience.

IV. BACKGROUND – THE FACTS AS FOUND BY THE INVESTIGATOR:

30. The Investigator, Nancy Jammu-Taylor, found the following facts as detailed in her Report:

- [Student A] struck [Student B] in the shoulder with the exterior door as he was heading into the Odette building through the east side entrance.
- After striking [Student B] with the door, [Student B] questioned [Student A]. While I cannot conclusively determine what was said, I find that the questioning was likely rhetorical and to the effect of why [Student A] had hit him with the door.
- In response, [Student A] said words to the following effect, “Don’t fuck with me. I don’t have time for this today.”
- After making the statement referenced in the previous bullet, [Student B] pushed [Student A]. Accordingly, I find that [Student B] initiated physical contact toward [Student A].
- After being pushed, [Student A] punched [Student B] in the face two times.
- [Student A] was suffering with a back injury at the time of the incident. In light of this, I find it is more likely than not that he reacted to [Student B]’s aggression with a view to protecting his back to avoid further injury.
- After being punched twice, [Student B] approached [Student A] again and in response, [Student A] punched [Student B] two more times.
- The altercation moved into the interior of the Odette building where there were other students present. There were no further punches thrown at this point.
- Accordingly, I find that four punches were thrown by [Student A], the first two after [Student B] pushed [Student A] and the next two after [Student B] came close to [Student A] again, but did not make contact.

31. In his letters of July 23rd, the Associate Vice President, Student Experience provided additional “insights” as follows:

- The area where the altercation took place (between the outer and inner doors on the east side of the Odette building) is a confined space where there is little room to maneuver, retreat or otherwise. While there is a lack of complete clarity that the entire exchange took place in this one location, there is no doubt that some of the exchange did take place in this confined space.
- Relative to the general population, the Complainant and the Respondent are large men and having seen both individuals, I would say that the Complainant is larger than the Respondent. In my mind, it is almost certain that the Respondent could have seen the Complainant as a serious physical threat in the event of a confrontation. It is also the case that the Complainant could have seen the Respondent as a genuine physical threat.
- Based on the investigation, no threats were made by the involved parties in reference to the use of any weapons and at no time were any bystanders in danger.

- Regretfully, beyond the one witness mentioned above, there are no other persons who witnessed the confrontation between the Complainant and the Respondent and there are no cameras in the area of the Odette building, so there is no video evidence that could be considered regarding the matter.

32. Some may question whether the facts found by the Investigator are entirely accurate – [Student A] does so – or whether she has drawn the correct inferences from those facts but we are not going to re-open the factual question in this appeal. Everyone has been operating on this “statement of facts” and I will do so as well.

V. [STUDENT A]’S ARGUMENT:

33. [Student A]’s Appeal rests on three grounds: (1) There was a serious procedural error in the processing of the Complaint which was prejudicial to the appellant; (2) There is new evidence not available at the time of the earlier decision, which casts doubt on the correctness of that decision; and (3) The Associate Vice President, Student Experience’s decision is clearly unreasonable or unsupportable by the evidence.

34. On the 1st Ground – “There was a serious procedural error on the processing of the complaint which was prejudicial to the appellant” – [Student A] notes that the *Procedures for Addressing Student Non-Academic Misconduct* were not followed properly. His Complaint was not investigated according to the Procedures; the other student – [Student B] – was not contacted; and there were major timeline irregularities, resulting in 142 days having elapsed before the decision was rendered.

35. On the 2nd Ground – “There is new evidence not available at the time of the earlier decision, which casts doubt on the correctness of that decision” – [Student A] puts forth evidence of what he calls “Confessions and Bias” on the part of the AVP-SE. This evidence consists of conversations between [Student A] and the AVP-SE that take place on July 24th, 2019, July 26th, 2019, September 13th, 2019, September 18th, 2019 and so forth – long after the altercation which forms the basis of the Complaint. [Student A] also offers his analysis of what he refers to as a “demonstrated racial double standard exhibited by the OSE towards students of colour”. The analysis of the disciplinary work of the OSE is interesting but it would require an expert in the area of statistical analysis to validate [Student A]’s assertions in this part of his submission. I am not that expert. This might, however, be a line of inquiry that the Provost’s Office would consider investigating.

36. On the 3rd Ground – “The Associate Vice President, Student Experience’s decision is clearly unreasonable or unsupportable by the evidence” – [Student A] points specifically to the Investigator’s finding that “[Student B] initiated physical contact” and that [Student A] “reacted to [Student B]’s aggression with a view to protecting his back to avoid further injury”. He essentially is arguing that the failure to prosecute [Student B] under the **Student Code of Conduct** demonstrated racial discrimination and bias in favour of white students over Black students and that the AVP-SE has no discretion to not prosecute if the facts disclose an assault.
37. It must be said that [Student A] sees the actions of the Dr. Arbex, Mr. Flannagan, and the OSE as being based primarily upon racial discrimination and bias against Black students – in his case a Black man – and other racialized minorities.

VI. THE AVP-SE’S RESPONSE:

38. In his submission, the AVP-SE offers four Preliminary Objections”: (1) As [Student B] withdrew on May 4th, he was not a “current registered student” and, therefore, not subject to the *Procedures for Addressing Student Non-Academic Misconduct*; (2) The recordings that [Student A] has offered as part of his submission are covered under the “settlement privilege”; (3) The Recordings are incomplete and inaccessible; and (4) [Student A]’s submission contains inadmissible Opinion evidence.
39. Further, the AVP-SE submits that there was no serious procedural error that was prejudicial to [Student A]. Here the AVP-SE acknowledges that there were irregularities but blames this, in part, on the way the Complaint came to him, i.e. as part of an “overarching omnibus complaint”. He, also, points to the fact that a 3rd Party investigation was already going on into the underlying incident. Finally, he suggests that the delay in making the decision did not prejudice the Appellant.
40. Regarding the 2nd Ground of Appeal, the AVP-SE argues (1) that there is no “new evidence” as contemplated by the *Procedures for Addressing Student Non-Academic Misconduct*. He states that this ground of appeal in the *Procedures for Addressing Student Non-Academic Misconduct* is intended to address new evidence with respect to the alleged misconduct, not the AVP- SE’s decision-making (which would instead be addressed by contesting the reasonableness of the underlying decision) and, further, that the implications that the Appellant has drawn from this evidence are inaccurate.
41. Finally, the AVP-SE denies that his decision is clearly unreasonable or unsupportable on the evidence. He points out that the *Procedures for Addressing Student Non-Academic*

Misconduct vest him with considerable discretion, both during the investigation and decision-making stage. This includes the ability to pursue a “teachable moment” rather than formal sanctions.

42. The AVP-SE notes that, as the student is no longer enrolled in the University, at least partly due to this incident, the University sees no benefit in pursuing this matter any further. The AVP-SE submits that it was reasonable for him to consider the “physical harm and emotional toll” on [Student B] as well as the “subsequent rebuke” he suffered when the AVP-SE found the Appellant’s actions lawful and determined that no further sanction was necessary.

VII. [Student A]’s Reply:

43. As I noted above, [Student A]’s Reply to the AVP-SE’s Response runs to more than 52 pages, single-spaced, without margins. It is in many respects a *tour de force*, especially for a student who is just applying to Law school. It attempts to meet the arguments of the AVP-SE virtually on a paragraph-by-paragraph basis. It is wide-ranging, covering the facts of the incident, the interactions between [Student A] and the AVP-SE, Dr. Arbex, and other staff of the OSE, the implications of the provisions of the **Student Code of Conduct** and *Procedures for Addressing Student Non-Academic Misconduct*, statute law, legal precedent, and material on racial profiling and Anti-Black Racism. It is, however, quite dense and, at times, polemical. It is also somewhat repetitive of what was more succinctly put in the formal Appeal document itself. Consequently, it would be extraordinarily difficult to summarize this submission in a few paragraphs. I will, instead, note a few sections that I find particularly relevant and material.
44. The first point to note is [Student A]’s discussion of the date on which his Complaint was made. He argues that the Complaint was actually made to a professor in the Odette Building, I believe, on the 14th of February; that he went to see the Campus Community Police on the 15th of February; and that he told Dr. Arbex about his concerns on the 26th of March. All of these dates are well before the so called “Omnibus Complaint” on June 19th – the date on which the AVP-SE claims the Complaint was filed with his office.
45. Further, [Student A] asserts that the AVP-SE’s actions have been very prejudicial to him. He no longer has trust in the fair administration of justice on this campus. He states: “The AVP-SE’s actions could not have made it any clearer to me that as a black man, I am considered a second-class citizen on this campus.” He further states that this appeal has come at great personal sacrifice and cost. That personal cost is outline in various other parts of [Student A]’s Reply.

46. [Student A] argues that the prejudicial effects that flowed from the Procedural Irregularities included the following: (1) A negative impact on [Student A]’s academic performance; (2) Delay of his law school application; (3) The emotional impact on [Student A] including the fear of losing his academic future and “dream of law school”, the stigma he faced from professors during the investigation, the embarrassment he faced by being absent from his group projects, the combined effect of these emotions with the fear related to his health. This became a reality toward the end of 2019, when [Student A] was diagnosed with a depressive disorder; (4) Emotional trauma and despair for his family and friends; and (5) The financial impact of having to secure legal counsel.
47. [Student A], also, raises a significant point regarding a perceived or, perhaps, potential issue of conflict of interest and bias. [Student A]’s relationship with the OSE and the AVP-SE has, over the past year to 16 months, been one of confrontation and conflict. It is unnecessary to document all of these conflicts, but they include numerous complaints about Dr. Arbex, FIPPA requests, FIPPA and PHIPPA complaints, appeals to the IPC, and a complaint to the Interim President about the AVP-SE himself. These conflicting interests between [Student A] and the AVP-SE that ensued during his adjudication of this matter might have led the AVP-SE to recuse himself from adjudicating [Student A]’s Complaint. Indeed, this can be seen in the context of the AVP-SE’s decision to retain outside counsel to act as Investigator, after initially assigning the investigation to Dr. Arbex, because Dr. Arbex’s relationship with [Student A] had become so adversarial.
48. It is clear that [Student A] feels that he has been treated very badly by the OSE, Dr. Arbex, and the Associate Vice President, Student Experience. He believes that he has been badly treated because he is a Black man – that anti-Black racism and racial profiling have operated to deprive him of equal respect and treatment in matters emanating from the events of the 14th of February 2019.

VIII. DECISION:

49. **Preliminary Point:** In my view, [Student A] made his Complaint to the Office of Student Experience on March 26th when he met with Dr. Arbex. At the time of the Complaint and from then until May 4th, [Student B] was a “current registered student” and the AVP-SE had an obligation to address the Complaint in a timely fashion.
50. A further point: This Complaint was not made in writing in accordance with section 4 of the *Procedures for Addressing Non-Academic Misconduct* and NA Form 1.1 but neither was [Student B]’s Complaint which was made orally to Dr. Arbex on March 6th and then

to the Investigator, Ms. Nancy Jammu-Taylor on April 12th. The same leeway needs to be granted to [Student A] as was granted to [Student B].

51. Finally, the decision on [Student A]’s Complaint was rendered by the Associate Vice-President, Student Experience on November 8th.
52. **Procedural Irregularities:** I have concluded that there were serious procedural errors in the processing of the Complaint which were prejudicial to [Student A].
53. First, the number of days between the oral filing of the Complaint (March 26th) and the Decision to not pursue the matter further (November 8th) was 227 days. There is no doubt that there were factors which made it difficult to conclude the Investigation within 28 days and deliver the Decision within 35 days of the Complaint. However, even providing some latitude for these factors, 227 days is an unacceptable amount of time.
54. Second, as noted above, the *Procedures for Addressing Student Non-Academic Misconduct* require that Complaint be delivered in writing to the AVP-SE. NA Form 1.1 is provided for this purpose. This was not done in regard to this Complaint or [Student B]’s Complaint.
55. Third, the process outlined in section 5.1.1 of the *Procedures for Addressing Student Non-Academic Misconduct* were not followed in regard to [Student A]’s Complaint or, for that matter, [Student B]’s Complaint. Minimally, the AVP-SE or the Investigator should meet with the Student – that is the respondent. Further, the Student must be provided with a copy of the Complaint (NA Form 1.1) in advance of that meeting. The Procedures empower the AVP-SE to consider whether a “Teachable moment” might be considered in lieu of a sanction. The AVP-SE is also empowered to consider whether restorative justice might serve in lieu of a sanction. Neither of these options can be truly considered unless the AVP-SE (or the Investigator) meets not only with Complainant but also with the Student (Respondent). This was not done in either case.
56. **What should have happened in this case?** When Dr. Arbex interviewed [Student B], she should have required him to complete NA Form 1.1. She could have attached his CCP Incident Report as an Appendix. She should then have sent the Complaint Form to [Student A] and arranged to meet with him. When she heard his version of the fact, Dr. Arbex should have been immediately alerted to the fact that [Student A] was alleging an entirely different version of the facts, namely that [Student B] was the aggressor and that it was [Student B] who had violated the **Student Code of Conduct**. [Student A] should then have been asked to complete NA Form 1.1 which, in accordance with the *Procedures for Addressing Student Non-Academic Misconduct*, would have been delivered to [Student B]. Subsequent interviews may have been necessary with each

student for Dr. Arbex to sort out the facts and make some determinations or recommendations as to responsibility under the **Student Code of Conduct**. If the matter was to be handed over to an independent Investigator, both Complaints could have been examined in a coordinated fashion. I point out that a single or uni-directional investigation targeting one student only – such as what took place here – is not necessarily adequate when there are adversaries in an assault offering different versions of the facts of the incident. Indeed, it is possible that Ms. Jammu-Taylor’s finding of facts would have been different if she understood that she was investigating these competing claims.

57. It is difficult to over-emphasize the importance of following procedure as stringently as possible. These procedures are designed to ensure that the process is objective, fair, and free from bias. Not following them can lead to subjectivity, injustice, and prejudice.
58. Finally, on this point, it cannot be reasonably argued that these Procedural Irregularities did not have some prejudicial effects on [Student A]. These are noted in Paragraph 45 and include (1) A negative impact on [Student A]’s academic performance; (2) Delay of his law school application; (3) The emotional impact on [Student A] including the fear of losing his academic future and “dream of law school”, the stigma he faced from professors during the investigation, the embarrassment he faced by being absent from his group projects, the combined effect of these emotions with the fear related to his health; (4) Emotional trauma and despair for his family and friends; (5) The financial impact of having to secure legal counsel; and I would add, should [Student A] be admitted into Law school and successfully complete his Law degree, (6) The possible effect that both a disciplinary decision and an arrest might have on his application for admission to the Law Society of Ontario.
59. One further point needs to be stated: In the Preamble to the *Procedures for Addressing Non-Academic Misconduct*, section 1.1 provides: “It is the purpose of these procedures to set out a fair and equitable process by which these standards are upheld.” In my opinion, one impediment to a fair and equitable process is the inherent conflict in roles which the *Procedures for Addressing Student Non-Academic Misconduct* place upon the Associate Vice President, Student Experience and the OSE. They are counsellors; they are investigators; they prosecute complaints; and they make decisions on those complaints. It is untenable to hold all of these roles at once. Even if the AVP-SE does not counsel the students directly, it is done by someone in the OSE who reports directly to the AVP-SE. Similarly, even if someone else in the Office does the investigation, that person still reports directly to the AVP-SE. And on top of that, the AVP-SE decides whether to prosecute and what decision should be rendered. It does not provide due process to the students and it is not fair and equitable.

60. [Student A]’s argument at Paragraph 46 has particular relevance here. As stated earlier, [Student A]’s relationship with the OSE and the AVP-SE had seriously deteriorated over the past 12 to 16 months. It had become one of confrontation and conflict due, in no small measure, to the delay in resolving this matter. These conflicting interests, engendered in part by the multiple roles assigned to the AVP-SE, raise questions of a reasonable apprehension of bias due to the animosity that, seemingly, has developed between [Student A] and the AVP-SE. If the various roles of the AVP-SE are separated, inherent conflict would be less likely to occur.
61. Given my decision on the 1st Ground of Appeal, it is unnecessary for me to resolve the 2nd and 3rd Grounds put forward by the Appellant, [Student A]. However, I would make two observations on those grounds of appeal.
62. **Second Ground of Appeal:** The 2nd Ground of Appeal was that there was “new evidence, not available at the time of the earlier decision, which casts doubt on the correctness of the decision.” I agree with the AVP-SE’s submission that this ground of appeal in *Procedures for Addressing Student Non-Academic Misconduct* is intended to address new evidence with respect to the **alleged misconduct**, not new evidence regarding the AVP- SE’s decision-making discretion on the prosecution of a **Student Code of Conduct** offence. I would have found that the Appellant’s argument on this ground failed.
63. **Third Ground of Appeal:** As noted in Paragraph 57, one problem with the *Procedures* is the multitude of simultaneous conflicting roles that the AVP-SE and the OSE exercise. Section 5.2.1 of the *Procedures for Addressing Student Non-Academic Misconduct* exacerbates this problem. It states: “A Student or Complainant may appeal a Decision of the Associate Vice-President, Student Experience.” One can see the validity and merit of a right of appeal from a decision of the AVP-SE to dismiss the appeal or impose a sanction, but I do not think that this provision, in spite of its wording, was meant to allow for appeals from a decision of the AVP-SE not to prosecute a student under the **Student Code of Conduct**. In the criminal courts, for example, very wide discretion is given to a prosecutor to decide whether to prosecute, which charges to prosecute on, whether to go by indictment or summary conviction, and so forth. The AVP-SE must consider many factors when deciding whether to prosecute and, as a result he or she is given wide discretionary power to act on behalf of the University. That discretion should not be fettered as in circumstances such as these. It would be difficult to assert or prove that his decision not to prosecute was “unreasonable” and “unsupportable” on the evidence.
64. I cannot conclude this judgment without acknowledging the existence of racial profiling and anti-Black racism and the role it may have sub-consciously played in the treatment of [Student A]. It is a fact of our existence. As Justice David Doherty, speaking for

Justices Horace Krever and Rosalie Abella JJ.A., stated in *R. v. Parks* (1993), 15 O.R. (3d) 324:

The existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts. . . There is, however, an ever-growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society. Many deal with racism in general, others with racism directed at black persons. Those materials lend support to counsel's submission that widespread anti-black racism is a grim reality in Canada and in particular in Metropolitan Toronto.

65. Justice Doherty continued:

That racism is manifested in three ways. There are those who expressly espouse racist views as part of a personal credo. There are others who subconsciously hold negative attitudes towards black persons based on stereotypical assumptions concerning persons of colour. Finally, and perhaps most pervasively, racism exists within the interstices of our institutions. This systemic racism is a product of individual attitudes and beliefs concerning blacks and it fosters and legitimizes those assumptions and stereotypes.

66. The 1989 *Report Eliminating Racial Discrimination in Canada* addressed these three facets of racism in Canada:

Racism and racial discrimination are facts of life in Canada. They exist openly and blatantly in attitudes and actions of individuals. They exist privately in the fears, in the prejudices and stereotypes held by many people, and in plain ignorance. And they exist in our institutions.

67. It is beyond my expertise to determine whether the treatment of [Student A] in this matter was the result of racial profiling and/or anti-Black racism nor does this process, as described earlier, lend itself to this type of analysis. (Nor is it necessary for a decision in this matter.) Such decisions fall to the Office of Human Rights, Equity and Accessibility (OHREA) on our Campus and the Ontario Human Rights Commission for our Province.

68. One cannot help but be concerned, however, when one examines, even in a cursory fashion, the Orders of Exclusion against [Student A] which were handed down between March 14th and March 28th. They escalated dramatically from, essentially “you can go to your classes in Odette but don’t loiter around” on March 14th to “you must not enter Odette or any other building where the other student has classes. . . you are banned

from your classes for the rest of the term” on March 26th to “you are banned from Campus entirely”; “you may not contact Dr. Arbex”; “you may not drop off documents to her” on March 28th. This is in stark contrast to the deep concern expressed for [Student B]. This deviation in response may be attributable to a sincere concern for someone who has been physically injured – our empathy naturally flows to them – or it may be product of sub-conscious racial profiling and stereotyping.

69. Although it is not germane to this decision, there seems to be some disjunction between the requirements for an Exclusion Order under the *Procedures for Addressing Non-Academic Misconduct* and the, so-called, Restrictions on on-campus activities or mobility, under the policy of *Behavioural Intervention Plans*. A cursory look at these policies seems to indicate that students have more protection under the former Policy than under the latter, but this deserves further analysis.
70. The simple fact is that the Office of Student Experience must serve all students of the University equally. Some students have physical injuries and physical challenges. With others it is not so obvious what those challenges are: for example, it might be a lost academic term or the fear that their academic career and professional ambitions may be unattainable. It is our mission in the University to help our students – all our students -- achieve their goals and realize their aspirations.

IX. CONCLUSION:

71. I have decided to allow this appeal on the 1st Ground, namely that there were procedural errors in the processing of the Complaint that prejudiced [Student A].
72. The University should send a letter of apology to [Student A] expressing its regret for the lengthy delay in handing the Complaint and for the procedural error that, in all likelihood, prejudiced the Appellant.
73. Further, [Student A] should be given a letter, or a notation should be put on his file, indicating that these Complaints and Appeals have taken a significant amount of time and may have affected his grades in the relevant Academic terms.
74. Finally, although it was my finding that [Student B] was a “current registered student” when the Complaint was filed, he is not one now. Therefore, the University has lost the jurisdiction to discipline him. As an alternative, a notation should be placed on his record for an appropriate period of time indicating that there was a Non-Academic Misconduct Complaint against him at the time he withdrew.

X. A FINAL NOTE:

75. What is striking about this case is how unnecessary all of this was. After all, this is an institution of higher learning – a community of scholars and students. It should not have happened here. This is what should have happened: [X], rushing to class, open the door and accidentally strikes [Y]. [X] says “Gee, I’m really sorry. I’m late for class and Professor [Z] is a real stickler for being on time.” [Y] says “No problem. I’m fine. Don’t worry about it. I know that Prof – she is really demanding. Go to class.” [X] rushes off to class; [Y] goes to get coffee.” That’s the end.

SIGNED AT WINDSOR, ONTARIO, ON THE 10TH DAY OF JUNE, 2020.



BRUCE P. ELMAN
ADJUDICATOR