

# ZARNETT ZONE

By MARTIN ZARNETT

If you are a student, you know that your Faculty rules govern your academic conduct. In addition, college rules, residence rules, pub rules, etc., also have a say in your life. In some instances, decisions that have been made by York University are challenged by students in the Courts. This fall two major decisions that involved students, one academic in nature, the other non-academic,

were handed down by the Courts. In recent months the Supreme Court of Ontario has been asked to consider a number of matters with respect to York University. In *Re Y.B. and York University et. al.* (Unreported-High Court No. 29090/85 Released October 24, 1985) and in *Re Bashir Hajee and York University* (Unreported Divisional Court No. 1305/85-Released September 27, 1985) the Supreme Court of Ontario was asked to

decide the basis and the legality of academic and non-academic decision making powers.

The *York University Act* S.O. 1965, C. 143, s. 12 provides that, "The Senate of the University . . . and may enact by-laws, rules and regulations for the conduct of its affairs." The question faced by the three-member Divisional Court panel in *Hajee* was whether the applicant-student was entitled to cross-examine adverse witnesses in an academic dishonesty appeal conducted by the York University Committee on Examinations and Academic Standards (CEAS).

A major point not decided by Mr. Justice Horace Krever in speaking for the Court was whether the *Statutory Powers Procedure Act* R.S.O. 1980, c. 488 (*SPPA*) applied to these hearings conducted by Senate CEAS. If the *SPPA* did apply, procedural

safeguards such as the right to cross-examine witnesses and a statutory right of appeal among others would be available to Mr. Hajee.

Without citing precedent, Krever J. in an oral judgement stated that a charge of academic dishonesty laid by a university,

creates a concomitant duty to give a person accused of dishonesty the benefit of reasonable safeguards to enable him or her to meet the serious accusations that it entails.

However, his Lordship went on, We are quick to acknowledge that natural justice or the requirements of fairness do not always require adherence to what has become known as the *audi alteram partem* principle or even to an absolute right to cross-examine.

This much larger question of the application of the *SPPA* was dealt with earlier by the Divisional Court

in *Re Polten and the Governing Council of the University of Toronto et. al.* (1975) 8. O.R. (2d) 749. On an application to quash a decision of the University academic appeals committee, Mr. Justice Francis S. Weatherston speaking for the three member panel of the Divisional Court examined the legal basis for judicial intervention in University affairs.

Weatherston J. correctly pointed out that, "the distinction between administrative and domestic tribunals is important not only as to the extent of judicial control, but also as to the remedies available to the aggrieved person." Judges characterizing the University tribunal as administrative would have the wide range of prerogative powers which would allow them to intervene in University affairs at earlier and more frequent intervals. It is the student that attempts to characterize the University tribunal as an administrative one and the University, attempting to isolate itself from the *SPPA* and the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224 (*JRPA*) speaks of its decision making bodies as domestic or private tribunals.

In deciding that the prerogative writs of *certiorari* and *mandamus* were available to students who had been denied natural justice in respect of their examinations, Mr. Justice Weatherston stated,

The University has been entrusted with the higher education of a large number of the citizens of this province. This is a public responsibility that should be subject to some measure of judicial control.

This judicial control however, would be procedural and the minimum rules prescribed by the *SPPA* would be applicable only where the tribunal was required by an Act to hold or to afford to the party (i.e. student) an opportunity for a hearing.

The fodder for the legal cannon is whether the *Charter of Rights* would protect a student in cases where the President expels a student for a non-academic offense such as in *Y.B.* Had the facts in *Y.B.* not been so extreme this would have been an excellent line of argument. What was made clear by Rosenberg J. was the President of York University is entitled to consider the conduct of students both on and off campus. If for example the woman harassed had attended the University of Toronto instead of York, the issue would be the legality of the President in interposing himself in the affairs of otherwise private individuals. All of these questions were not carefully considered in the *Y.B.* case due to, as stated above, the facts of the case.

The question that still remains to be answered is whether the *SPPA* applies to academic tribunals established by the Senate pursuant to s. 12 as opposed to Presidential tribunals authorized under the general Presidential powers in s. 13 of the *York University Act*. It is remembered that the University, specifically the Provost, was not exercising a statutory power of decision as conferred by statute in s. 13. However, there being a difference in the language, there is the same difference in the treatment of an academic and non-academic tribunal.

It can be argued that the more specific powers conferred on the Senate to establish regulations are subject to the *SPPA*. However, a strong argument in the alternative can be made for the University in that legislation should articulate that decisions made by the University Senate are statutory powers of decision or subject to the *SPPA*. However, because students' livelihoods are ever increasingly tied to their educations the primary argument for the adoption of the procedural safeguards of the *SPPA*, that being the protection of academic careers, must be conceded.

Whatever the outcome, the judiciary is sure to see more and more students in its courts as competition in the Province's schools becomes more intense.



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