

applicant is under an obligation to commence and perfect an application for judicial review in a timely manner. Failure to do so is an independent basis for the denial of the application, regardless of the merits of the case: *Balanyk v. Greater Niagara General Hospital*, [2008] OLRB REP. March/April 287 (Ont. Div. Ct.)

[3] A delay exceeding 6 months constitutes grounds for refusing the remedy sought: *Jeremiah v. Ontario (Human Rights Commission)* (2008) 83 Admin. L.R. (4th) 126 (Ont. Div. Ct.) at 142.

[4] In unexplained circumstances such as these, the appeal should be dismissed.

[5] Independent of the finding that the appeal must be dismissed for delay, we are persuaded that the appeal is without merit.

[6] The applicant was a first year law student at the University of Western Ontario. In the fall of 2007 complaints from students and professors regarding his in class behaviour came to the attention of the Dean of the Faculty of Law, Mr. Ian Holloway. They were concerned about Mr. Zhang's conduct which included asking questions which were characterized by some as "unduly gruesome", "macabre", "frightening" and "graphic", including highly inappropriate references to individual students. One such example involved a hypothetical question posed to a professor by Mr. Zhang in a criminal law class regarding a fellow female student becoming intoxicated and passing out, with Mr. Zhang positioning her in a way that made it very likely she would vomit, choke and die. Mr. Zhang asked the professor if this would amount to murder or manslaughter. Other students complained that while in the classroom, the applicant was watching videos posted on YouTube depicting terrorist activity and suicide bombings, including recommended methods to strap suicide bombs to one's person. Also, while in class, he read texts about suicide bombings.

[7] Mr. Zhang also controlled a Facebook page referring to himself as "Dr. Frank N. Stein". He had 22 friends on Facebook. A number of his postings are disturbing, including references to "Dr. is eating babies", "Go on a killing spree", "Dr. is free to observe torture without criminal liability", and "Dr. is learning how to get away with murder in his criminal law class".

[8] At all times, the applicant was subject to the University of Western Ontario Code of Student Conduct. The purpose of the Code “is to define the general standard of conduct expected of students, provide examples of conduct that may be subject to disciplinary action by the University, provide examples of sanctions that may be imposed, and set out the disciplinary procedures that the University will follow.”

[9] Part I, s. 7 of the code provides that the Code applies to “off-campus conduct that has, or might reasonably be seen to have an adverse effect on the proper functioning of the University or the rights of a member of the University community to use and enjoy the University’s learning and working environments”.

[10] Part I, s. 6 provides that “Nothing in this Code shall be construed to prohibit peaceful assemblies and demonstrations, lawful picketing, or to inhibit free speech as guaranteed by law”.

[11] Part V of the Code provides for rules of student conduct. These rules stress that “membership in the University community implies acceptance by every student of the principle of mutual respect for the rights, responsibilities, dignity and well-being of others and a readiness to support an environment conducive to the intellectual and personal growth of all who study, work and live within it.” Any conduct on the part of the student “that has, or might reasonably be seen to have, an adverse effect on the reputation or the proper functioning of the University, or the health, safety, rights or property of the University, its members or visitors, is subject to discipline under the Code.” Examples of misconduct are listed, including the prohibition of any assault, harassment, intimidation, threats or coercion and conduct that threatens or endangers the health or safety of any person.

[12] Part VI of the Code sets out sanctions which include verbal warnings, exclusion from classes, formal reprimands, prohibition of access to any academic facility, suspension from the University for a specified time period or expulsion from the University. Interim prohibitions pending investigations are specifically provided for.

[13] Exercising the powers authorized by the Code, the Dean issued an interim order dated November 1, 2007, prohibiting the applicant from being present on campus pending

investigation. Specifically, the applicant was required to undergo a psychiatric evaluation with which he complied.

[14] The psychiatric report notes that as a child and young adolescent Mr. Zhang set bonfires “but he has always kept them under control and managed to extinguish them when finished.” Around the time of the Columbine tragedy, the applicant “would dress in black, wear a black trench coat, and had long dark hair.” While in high school, “he wrote a story about a boy who stalked a girl.” He stated that his teacher encouraged him to become a writer. He was directly questioned about his intention to carry out suicide attacks. He told the psychiatrist that “there are no metal detectors in the law school and it is easy to move around, which creates an accessible environment for a shooting”. Moreover, “he identified himself with some traits that school shooters had but he was adamant about the value he placed in education and his distance from criminal intention”. Notwithstanding the concerns raised by these personality traits, the psychiatrist concluded that Mr. Zhang “could meet some criteria for schizoid personality, but at this point he does not qualify for a disorder as he maintains a very high level of functioning and adaptation” and that Mr. Zhang “possessed little, if any, risk to the safety of University student and academic body.” He noted that there were “a few issues in his personality that merited follow-up” to eliminate the possibility that they would eventually “develop a higher risk for violent acts.”

[15] Mr. Zhang met and had several conversations with the Dean and Director of Campus Community Police Services. It was made clear to the applicant by both the Dean and the Director of Police that Facebook postings were part of the behaviour that gave rise to the suspension by the Dean. He also exchanged emails with the Dean.

[16] The most significant email from the Dean to Mr. Zhang is dated November 29, 2007, wherein the Dean confirmed his discussions with Mr. Zhang and stated, among other things:

If there is any repetition whatever of the sort of behaviour that gave rise to my decision to suspend you in the first place, you will be immediately expelled from law school. If you have any doubt at all about the terms of our agreement, PLEASE LET ME KNOW WITHOUT DELAY for it will affect my decision to lift your suspension. [emphasis in original]

[17] By reply email the applicant indicated that he had received the Dean's email and that he was "willing to satisfy whatever prerequisites there are to satisfy to earn that allowance" (namely, to return to law school).

[18] After considering the contents of the psychiatric report, and after consulting with the Chief of Campus Police, Dean Holloway permitted Mr. Zhang to return to law school at the end of November upon the strict conditions set out in the emails.

[19] On March 3, 2008, a fresh complaint was made about Mr. Zhang's behaviour. This complaint involved a posting to his Facebook page which was originally posted in English and subsequently removed, then reposted in the German language. The translated posting by Mr. Zhang reads:

I have no tolerance for subhuman filth. Their days are numbered and they will be shown no mercy, because they are worth nothing.

[20] Beside the posting is a photograph of a young soldier holding a machine gun.

[21] This posting came shortly after a heated argument between Mr. Zhang and a fellow law student in which Mr. Zhang referred to his fellow law student as "subhuman". Mr. Zhang strongly believes that white people who engage in sexual relations with people of colour are "subhuman". The student was a friend of Mr. Zhang's, who, to Mr. Zhang's knowledge, understood the German language. The student was frightened by the posting, and complained to the authorities.

[22] On March 20, 2008, the Dean informed Mr. Zhang in writing that he was expelled from the Faculty of Law. Mr. Zhang appealed the decision on April 2, 2008 and was granted the right to an oral hearing by the University Discipline Appeal Committee. Appeals under the Code of Student Conduct at the University of Western Ontario are heard by a Chair who is appointed by the Board of Governors annually, a faculty member and a student member. He was informed that in accordance with the appeal procedures established in Part X of the Code of Student Conduct, he was permitted to make written submissions, had the right to be represented by counsel, would be able to call witnesses, and cross-examine the Dean's witnesses.

[23] One week prior to the first scheduled day of the hearing, the applicant's counsel made a request for the disclosure of a number of documents. Certain aspects of this request were opposed by counsel for the Dean. The parties agreed to argue the disclosure request on the first scheduled date of the hearing. After hearing oral argument from the parties on the disclosure request, the committee issued a two page decision ordering the disclosure of some of the requested materials, including the psychiatric report prepared for the Dean and all written complaints provided to the Dean from the applicant's professors and fellow students, with any identifying information being redacted, absent consent of the complainant. Videotapes of conversations between Mr. Zhang and the Dean and Mr. Zhang and campus police were not disclosed to the parties as they were deemed irrelevant to the issue to be determined by the Appeal Committee.

[24] The Appeal Committee held a one-day hearing on October 1, 2008. Mr. Zhang was represented by counsel, and in addition to providing evidence personally, he called as a witness the student who witnessed the altercation that preceded the March 2, 2008 Facebook posting. The Dean testified and called Mr. R., the student who had been in the altercation with Mr. Zhang that preceded the March 2, 2008 Facebook posting.

[25] Mr. Zhang submitted that the Dean lacked authority to make a finding of misconduct or impose a sanction against him and that the finding of misconduct and sanction imposed were unreasonable or unsupportable on the evidence. He submitted that his Facebook postings were off-campus and therefore, beyond the reach of the University's authority, and that in any event, his posting was protected by his right of free speech guaranteed by the *Canadian Charter of Rights and Freedoms*.

[26] The Appeal Committee issued a judgment denying Mr. Zhang's appeal on October 22, 2008. The decision comprises 7 pages of typed, single-spaced reasons.

[27] Among its findings, the committee concluded that "a reasonable person would find the message posted by Mr. Zhang disturbing and threatening and would cause fear and apprehension among his classmates, particularly in light of the incidents that occurred in the fall of 2007, which according to the testimony of the Dean, had created a "climate of fear" in the law school."

In addition, it was clear from Mr. Zhang's fellow classmate Mr. R. that the message "upset and shocked him." The committee found that the posting "did not amount to the intemperate remarks the first year law student posted in the heat of argument." The committee specifically found that the appellant, prior to posting his message, considered whether the message would violate the Dean's conditions and decided it would not. Then, after posting it in English, he translated it into German and posted it again. As the committee noted:

He told the panel that the message was directed specifically to Mr. R. The appellant told the appeal panel that he intended Mr. R. to understand that he viewed him as subhuman. He said that subhumans are a threat that is devastating to civilization and that they are at risk of eradication.

At a later point in his evidence, the appellant told the panel that he had been mistaken in calling Mr. R. subhuman because the latter did not actually engage in miscegenation; instead he was "morally degenerate".

The appellant also told the panel that he believes that there will be a "race war" in about 20 years and that Europeans will take drastic measures to preserve their race. Such measures will include the elimination or eradication of "race traitors" – those who "condone race mixing". In cross-examination he agreed that a "subhuman" was of a lesser status than a human and that Mr. R. would understand the historical connotations of the word "subhuman".

[28] The committee specifically found that the posting was not protected by Mr. Zhang's right to free speech as set out in Part I, s. 6 of the Code. The committee found that the section was not meant to permit the type of speech that a reasonable person would view as intimidating or threatening. The committee referred to Part V, section 2 of the Code which lists "any assault, harassment, intimidation, threats or coercion" and "knowingly creating a condition that endangers the health, safety or well-being of a person" as examples a prohibited conduct. The committee found that the right of free speech guaranteed by the *Charter* did not apply to the Facebook message.

[29] The committee found that Mr. Zhang understood the conditions upon which he was permitted to re-enter the Law School as set out in the Dean's email message. In cross-examination, Mr. Zhang agreed that as a condition of his return, he was not to engage in similar sorts of Facebook postings. He agreed that unlike previous postings that reflected what he

described as his “morbid sense of humour”, the posting in question was not meant to be humorous, but rather a political statement intended to be understood as such by Mr. R.

[30] The committee agreed with the Dean that Mr. Zhang was clearly aware that inappropriate postings on Facebook were part of the behaviour that gave rise to the original prohibition order and that the appellant had acknowledged that Facebook postings were covered by the conditions imposed by the Dean. The committee found that the words were “imbued with violence and a reasonable person would find them threatening and alarming. The appellant clearly and intentionally engaged in behaviour that would be viewed by any reasonable person as a repeat of the behaviour about which he had been warned”. The committee found that the finding of misconduct was appropriate.

[31] Before this court, Mr. Zhang submits:

- (1) that the decision of the appeal committee was in violation of his constitutional right to free speech as guaranteed by the Canadian *Charter of Rights and Freedoms*, and section 6 of the Code of Student Conduct;
- (2) that the University breached its duty of procedural fairness to Mr. Zhang with respect to the informal agreement into which he entered with the Dean;
- (3) that the University of Western Ontario breached its duty of procedural fairness to him with regard to his previous disciplinary record;
- (4) that the Code of Student Conduct did not extend to off-campus activity, and
- (5) that the University had not provided him with adequate disclosure in order to make the case against him.

[32] We conclude that the standard of review with respect to the first issue raised by the applicant involves a pure question of law and must be measured against a standard of correctness: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[33] With respect to the applicant's complaints about procedural unfairness raised as issues 2, 3 and 5, this court has stated in *Ontario (Commissioner, Provincial Police) v. MacDonald*, (2009) ONCA 805 at para. 37:

...that procedural fairness does not require an assessment of the appropriate standard of review. The proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met.

[34] Issue 4, namely whether the Code applies to off-campus activities, involves a question of mixed law and fact. The standard of review is one of reasonableness: *Dunsmuir, supra*.

[35] With respect to the first issue, namely Mr. Zhang's constitutional right to free speech, as afforded him by s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms* and Part I, s. 6 of the University of Western Ontario's Code of Student Conduct, we have no doubt whatever about the correctness of the decision of the appeal committee. This court is mindful of the historical importance of encouraging free speech on university campuses, and rigorously defending the right of students to debate difficult and often highly unpopular issues with passion. However, free speech has its limits, including the making of threats and defamation of character. Uttering threats is proscribed by the Canadian *Criminal Code*. Defamatory libel is a serious tort. In the instant case, the panel found after hearing *viva voce* testimony from Mr. R. that he felt personally threatened by the Facebook posting of Mr. Zhang. In so finding, the panel was right to conclude that the applicant was not protected by his professed right to free speech.

[36] Dealing with the applicant's second, third and fifth complaints with respect to procedural unfairness, this court is mindful of the decisions of the Court of Appeal in *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.) which held that "courts should be reluctant to intervene in University affairs" and should only interfere in cases of "manifest unfairness". The holding in *Paine* has recently been affirmed in *Hayat v. University of Toronto* (1999), 181 D.L.R. (4th) 496 (O.C.A.) at para. 14.

[37] The complaints of procedural unfairness cannot be sustained. Clearly, Mr. Zhang's previous disciplinary record was integral to the issue of whether Mr. Zhang had breached his

agreement with the Dean. With respect to the agreement itself and the fact that it was merely confirmed by emails, the record establishes that Mr. Zhang fully understood the terms upon which he was permitted to return to law school and those terms were clear and unambiguous. As to his complaints with respect to disclosure, Mr. Zhang was given a fair, effective and real opportunity to know the case against him: *Mikkelsen v. University of Saskatchewan*, [2000] S.K.K.Q.B. 45. We find that the procedures followed by the University throughout its dealings with Mr. Zhang were fair and reasonable. It could never be asserted that the procedures adopted were “manifestly unreasonable”; *Paine, supra*.

[38] Regarding Mr. Zhang’s complaint that the University should not have the authority to consider his off-campus activities, it has been held in *Pacheco v. Dalhousie University* (2005), N.S.S.C. 222 that Universities have the right to exert control over the non-academic behaviour of students because they have a duty to protect members of the University community. See also *Re: B. and W.* (1985), 52 O.R. (2d) 738 at 743 (H.C.J.). The Code of Student Conduct expressly states that it applies to off-campus conduct. The provision is neither vague nor over-broad. It places ascertainable limits on the University’s right to regulate off-campus conduct. In our view, the provisions contained in the Code are reasonable.

[39] The Code states that it applies to off-campus conduct if that conduct has, or is reasonably seen to have, an adverse effect on the rights of university members to “use and enjoy the University’s learning and working environments”. The applicant submits that the word “enjoy” is undefined, highly subjective and over-broad. We disagree. The word “enjoy” is easily understood and must include the prohibition of conduct that is threatening to the safety and security of a student, as directed against Mr. R.

[40] In sum, we find that the decision of the appeal committee was eminently reasonable and the procedures followed throughout were fair. We find that the decisions of University officials regarding Mr. Zhang’s conduct should be accorded a high degree of deference.

[41] For these reasons, the appeal is dismissed.

[42] In the event that counsel are unable to agree on costs, we shall entertain submissions to be made within 30 days on a schedule agreed to by counsel.

I agree

C. McKinnon, J.

I agree

Cunningham, ACJ.

Ferrier, J.

Released: December 10, 2010

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DIVISIONAL COURT FILE NO.: 1790
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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

**CUNNINGHAM, ACJ., FERRIER, C.
MCKINNON, JJ.**

BETWEEN:

FREDERICK ZHANG

Applicant

– and –

THE UNIVERSITY OF WESTERN ONTARIO

Respondent

**ON JUDICIAL REVIEW FROM THE DECISION
OF THE UNIVERSITY OF WESTERN ONTARIO
DISCIPLINE APPEAL COMMITTEE
DATED OCTOBER 22, 2008**

Cunningham ACJ.
Ferrier J.
C. McKinnon J.