NOVA SCOTIA COURT OF APPEAL
Citation: *Tapics v. Dalhousie University*, 2015 NSCA 72

Date: 20150722
Docket: CA 433549
Registry: Halifax

Between:

Tara Tapics

Appellant

v.

Dalhousie University, Dr. Christopher Taggart, and Dr. Marlon Lewis

Respondents

Judges:	Fichaud, Bryson and Scanlan, JJ.A.
Appeal Heard:	May 28, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed in part, without costs, per reasons for judgment of Fichaud, J.A.; Bryson and Scanlan, JJ.A. concurring
Counsel:	Blair Mitchell and Barbara Darby for the Appellant Rebecca Saturley and Scott R. Campbell, for the Respondents

Reasons for judgment:

[1] Ms. Tapics came to Dalhousie University for Ph.D. studies in Oceanography. A year and a half later, through no apparent fault of Ms. Tapics, her field supervisor left, taking the data that was essential to Ms. Tapics' research. Ms. Tapics started over with a new topic. Then her principal supervisor withdrew. The University notified her that nobody else could be found to supervise her research. Ms. Tapics hoped to continue her Ph.D. studies at Dalhousie. She appealed unsuccessfully to an *ad hoc* Appeal Committee of the Faculty of Graduate Studies, and then further to an Appeal Panel of the University Senate. The Senate's Appeal Panel remitted the matter back to the Faculty of Graduate Studies, with the direction that the Faculty and Ms. Tapics seek mediation to identify a new supervisor. The Faculty offered to meet, but Ms. Tapics didn't take up the offer.

[2] Instead she sued in the Supreme Court of Nova Scotia for an order that the University and its officials are liable in damages for breach of contract and tort. The judge of the Supreme Court dismissed her civil claim as an abuse of process.

[3] Ms. Tapics appeals. Did the judge commit an appealable error by ruling that her civil claim would abuse the court's process?

Background

[4] Ms. Tara Tapics has a Bachelor of Science in Earth and Atmospheric Sciences from the University of Alberta. In May 2009, she completed her Masters of Science in Oceanography from Dalhousie University.

[5] In January 2011, she entered Dalhousie's Ph.D. program in Oceanography. Her approved research topic involved sea turtles. Dr. Christopher Taggart was her faculty supervisor. Dr. Michael James controlled the data for Ms. Tapics' research and was her field supervisor.

[6] Dr. James' collaboration was problematic. Ms. Tapics deposed that:

> 7. …the University accepted me into the doctoral program on the basis of data sets that had not been secured, which ultimately delayed the progress of my Ph.D. between January 1, 2011 and June 8, 2012.

8. Dr. James was also in a conflict of interest, which put my studies in jeopardy and ultimately resulted in the termination of the first research project and a delay of my progress.

9. … Dr. James sought by approximately early to mid October 2011 to terminate my Ph.D. project, by threatening to withdraw project funding, after I appeared on an episode of CBC Radio's *Vinyl Café*, where I spoke about sea turtle research.

[7] Dr. Taggart's email to Dr. James, dated June 19, 2012, elaborated on the difficulties with Dr. James:

> Dr. Michael James,
>
> Despite many attempts to make the seaturtle research collaboration work over the last couple of years, I have reached the conclusion that I must terminate the research collaboration.
>
> The Internal Advisory Committee for the PhD Candidate Tara Tapics met on 12 June 2012 to discuss your response ("Tapics thesis MCJ comments.doc") to the thesis research outline provided to you by Ms Tapics. The Advisory Committee and Departmental Graduate Coordinator advised the Candidate not to accept the multiple of unconditional demands and retroactive denial of data access that you put forward in the above document [*sic*]. Furthermore, the Committee and the Coordinator, and the Graduate Coordinator in the Biology Dept., found the majority of unconditional demands to be unacceptable from a collaborative research perspective. In many respects the demands could be viewed as unethical, unprofessional, and un-collegial. They also appear to violate the accepted policies of the Faculty of Graduate Studies, especially for a researcher acting in an advisory capacity and holding an adjunct position at the University.
>
> I am now in the unfortunate position of having to return all unspent funds to the granting agencies that have supported the research up to and as of 12 June 2012, and to find a new and suitable PhD project for Tara, despite her having devoted 1.5 years of admirable effort and considerable intellect on this project.
>
> Sincerely,
>
> Prof. Christopher T. Taggart, PhD
>
> …

[8] Dr. Taggart later termed the situation at this moment a "debacle generated by an external collaborator in the sea turtle project" (below, para. 13).

[9] There is no evidence from Dr. James with his perspective.

[10] Ms. Tapics responded to Dr. James' exit by re-focussing her research on right whales. Her affidavit said:

> 14. I then was forced to start a different research project on right whales, and I was proceeding satisfactorily in that project. The external researcher associated with the right whale project was Dr. Mark Baumgartner.

Ms. Tapics' work would integrate data on right whale locations and habitat variables, to improve the modelling and prediction of right whale distributions.

[11] On December 19, 2012, Dr. Bernard Boudreau, Dean of Graduate Studies, wrote a letter that recommended Ms. Tapics for a post-graduate scholarship on the right whale research. His letter emitted optimism and noted that "Ms. Tapics has a GPA of 4/4.3 in her PhD and Master's programs which exceed the 3.7 minimum required to be eligible for an IPS scholarship".

[12] Ms. Tapics deposed that "[t]here was a disagreement between Dr. Taggart and me about including the description of additional data sets in the Baumgartner subcontract text, but it was all resolved" by the end of January, 2013. Ms. Tapics' affidavit attaches emails in January 2013 between Dr. Baumgartner and Dr. Taggart, copied to her, that indicate the research project was proceeding satisfactorily.

[13] But all was not well. On January 31, 2013, Dr. Taggart wrote to Dr. Marlon Lewis, Chair of Dalhousie's Oceanography Department:

> Dear Dr. Lewis,
>
> Unfortunately, I have become of mind that it is not possible for me to meet the expectations of Ms Tara Tapics (PhD candidate in my lab) of what a PhD advisor is, or should be, or could be. It is clear to me that I have failed to meet those expectations and that my advisory capacity has reached the limit of non-viable. I believe that Ms Tapics has reached a similar conclusion.
>
> I have done what I can to support Tara's interests, and to salvage what I can from the debacle generated by an external collaborator in the sea turtle project, and to help find a project that might be of interest and of meaningful scientific advance; one that has sufficient intellectual challenge and funding support deserving of Ms Tapics who has the intellectual capacity necessary to be successful. However, I don't think that I am too far off the mark in recognising that the entire process has been difficult and more often than not Tara and I simply do not see eye to eye. It has become too much conflict and somehow we are like oil and water. This being the case, I have concluded it is not in Tara's best interest, nor mine, nor that of

> others in my lab, to continue in a student-mentor relationship that has repeatedly failed.
>
> Yesterday, Tara and I met with her advisory committee (M. Dowd and D. Kelley; the latter serving also as Departmental Graduate Coordinator) to discuss the situation and the options that Tara might wish to pursue. I will do what I can to help find a situation wherein Tara's expectations of a mentor might be met. Tara needs an advisor with whom she can work – and it is clearly not me.
>
> I believe it would be appropriate for me to continue to use my NSERC Discovery Grant to support Tara's student stipend, at its current value, for a month or two and thus allow her sufficient time to determine how she might pursue her future interests.
>
> This is a very unfortunate situation. I had great hopes of success, but that hope has now faded. If you require any further insight, I am available at your convenience.
>
> Sincerely,
>
> Christopher T. Taggart
>
> cc: M.Dowd, D.Kelley, T.Tapics

[14] Dr. Boudreau's affidavit says "in error, this letter [of January 31, 2013] was not provided to Ms. Tapics and she did not receive a copy until February 20, 2013".

[15] Meanwhile, two days earlier, Dr. Lewis had written to Ms. Tapics on February 18, 2013:

> Dear Tara;
>
> I have reviewed the letter from Chris Taggart of 31 January subsequent to your last committee meeting, a copy of which has been provided to you. In this letter, Chris describes your mutual decision that he would no longer serve as your Ph.D. advisor. I have since spoken to the other members of your committee who confirm that this was the outcome from the meeting.
>
> Chris has agreed to continue to provide funding for your scholarship until the end of March, 2013. At that time, you will need to have an advisor who is willing to support you both academically and financially to continue with your Ph.D. program. If you so advise, I will endeavor to find a suitable advisor.
>
> Please contact me at your earliest convenience to discuss your options for the future.
>
> Yours truly,
>
> Marlon R. Lewis,

Chair/Department of Oceanography

[16] Ms. Tapics' affidavit says, of Dr. Lewis' letter of February 18:

> 21. The correspondence from Dr. Lewis to me (attached as Exhibit "E" to Dr. Boudreau's affidavit) does not indicate any process for me to contact the Faculty and no person from the Department of Oceanography contacted me. I was advised only that a supervisor could not be found. It also describes the decision to terminate the relationship as "mutual", which was not the case.

[17] Dr. Boudreau's affidavit continues the chronology:

> 12. I am informed by Dr. Lewis and do verily believe that on March 5, 2013, Dr. Lewis advised that he had been unable to find an advisor in the Department of Oceanography to supervise her PhD program. Ms. Tapics was asked to contact the Faculty of Graduate Studies to discuss future options. …

Dr. Boudreau's affidavit attaches a letter of March 5, 2013, ostensibly from Dr. Lewis to Ms. Tapics:

> Further to my letter of 18 February, 2013, I wish to inform you that I have been unable to find an advisor in the Department of Oceanography to supervise your Ph.D. program. Funding for your scholarship will continue until the end of March, 2013.
>
> Please contact the Faculty of Graduate Studies to discuss your options for the future.

[18] Ms. Tapics' affidavit attaches another version of Dr. Lewis' letter of March 5. That version omits the last paragraph, with the invitation to discuss options for the future. Ms. Tapics' affidavit says that this abridged version is the one that she received from Dr. Lewis in March 2013. Her affidavit explains that, through the Freedom of Information process, Ms. Tapics obtained a string of emails showing that Dr. Lewis' final sentence was removed from the final draft, on the advice of Dalhousie's legal counsel. The email string is attached to Ms. Tapics' affidavit.

[19] Ms. Tapics' affidavit explains her reaction to the March 5 letter:

> 20. … when I was advised on March 5, 2013 by Dr. Lewis that no supervisor could be located, I concluded that I had been *de facto* dismissed from the University as there was no mechanism for me to continue my Ph.D. studies.
>
> …

> 22. As I was neither advised nor informed at any time that I had breached any rules or regulations, I concluded that the constructive dismissal was through no fault of my own, and I began the appeal process with the Faculty of Graduate Studies.
>
> …
>
> 25. I remained enrolled, and paid tuition, but I had no way to continue my Ph.D. because I had no supervisor, no laboratory privileges, no field work facilities, and no access to data.
>
> 26. The University accepted my payments of tuition until April 2014, but failed to provide me with instruction or supervision from February 1, 2013 forward. Attached hereto as **Exhibit "C"** is a **true copy of a screen capture dated June 24, 2014 of my account balance** showing a zero balance owing on regular term tuition of approximately $2,800. [bolding in original]

[20] On April 25, 2013, Ms. Tapics appealed the Department's Decision that supervision was not forthcoming. Her appeal was to an *ad hoc* committee of the Faculty of Graduate Studies ("FGS Committee"). On that Committee were representatives of Dalhousie's Departments of Business Administration, Classics and Biochemistry & Molecular Biology, and the Dalhousie Association of Graduate Students. On June 28, 2013, the FGS Committee heard Ms. Tapics, with her student advocate, and the Department of Oceanography, represented by counsel for the University.

[21] On July 12, 2013, the FGS Committee issued a Decision. The points that were decided by the FGS Committee will pertain to the legal issues in this appeal. So I will quote the Committee's Decision at some length. The Committee began by reciting Ms. Tapics' claims, that I have bolded:

> **The Allegation**
>
> Ms. Tapics entered the PhD program in Oceanography in January 2011, under the research supervision of Dr. Christopher Taggart. There were several false starts in the identification of a suitable line of research for her. In one case these concerns were related to the terms of a research arrangement with a researcher outside of the Department of Oceanography. There were also disagreements with respect to another line of investigation, which were unable to be resolved by Ms. Tapics and Dr. Taggart. **Ms. Tapics claims that Dr. Taggart then, in unilateral fashion, ended his supervisory relationship with her in late January 2013, 25 months into her PhD program.**
>
> In response to learning from the Department Head, Dr. Marlon Lewis, that she could no longer continue in the graduate program without a research supervisor, Ms. Tapics, in a meeting with Dr. Kelley (Graduate Coordinator) agreed with Dr.

Lewis' suggestion that the Department endeavor to identify another supervisor for her. However, in late March 2013, she was informed that a supervisor had not been identified, and that as a consequence she would have to leave the graduate program**. Ms. Tapics claims that the Department failed to give adequate notice for the termination of her supervisory relationship with Dr. Taggart, and furthermore did not provide reasons for ending this relationship. Ms. Tapics argues that these omissions amounted to procedural unfairness.**

Ms. Tapics further holds that Dr. Taggart breached a supervisor's responsibilities, as outlined in Section 9.4 of FGS Regulations, by preventing agreement on the second potential line of investigation referred to above and by unilaterally ending his supervisory relationship with her. Along these same lines, **Ms. Tapics alleges that, upon the withdrawal of Dr. Taggart as supervisor, the Department of Oceanography failed to meet its responsibilities** under Section 9.4.6 of FGS Regulations by failing to provide necessary facilities and supervisory support to her graduate studies.

As a remedy for these shortcomings, Ms. Tapics requests that she be reinstated as a full-time doctoral student in the Oceanography graduate program, and that the Department identify a suitable line of investigation, source of funding, and research supervisor for her. **Alternatively, she requests** that the University undertake to find funding and a suitable line of research to accompany her in **a transfer to the Interdisciplinary PhD program**, to allow additional supervisory options.

[bolding added]

[22] The FGS Committee's Decision dismissed Ms. Tapics' claims as follows:

The Arguments

The specific Arguments in Ms. Tapics' appeal, plus her suggested remedies, are evaluated below.

Argument 1. The Department of Oceanography did not provide adequate notice or properly give reasons for ending the supervisory relationship between the appellant and Dr. Taggart, and these shortcomings amounted to procedural unfairness.

Decision. [The Committee's decision on a preliminary procedural objection is omitted]

…

While there is much disagreement over certain facts of the matter, it is clear that the decision to end the supervisory relationship was Dr. Taggart's. Ms. Tapics was formally notified of his decision at a special supervisory committee meeting on January 30, 2013. In fact, difficulties in the student-supervisor relationship had been apparent for a long time. Furthermore, in a January 28, 2013, meeting

between Ms. Tapics and Dr. Taggart it was evident that the two parties continued to be unable to agree on many important aspects related to graduate supervision, that the supervisory relationship was therefore in jeopardy, and that a special meeting of Ms. Tapics' supervisory committee was needed to discuss the future of the supervisory relationship. At that supervisory committee meeting on January 30, which was attended by Ms. Tapics and Drs. Taggart, Dan Kelley and Mike Dowd, Dr. Taggart read from a prepared statement to inform Ms. Tapics and the supervisory committee that he could no longer serve as supervisor, and specified some of the reasons for this break. It is not clear whether the reasons provided by Dr. Taggart comprised a comprehensive list; indeed, it may be considered heartless had a long list of reasons been enumerated. We note that the FGS Regulation 9.4.4 explicitly gives a supervisor the right to terminate supervision and advise the student to find another supervisor in situations such as this one. …

Argument 2. Dr. Taggart's decision to abandon pursuit of a collaborative research project with the Woods Hole Oceanographic Institution unfairly prejudiced Ms. Tapics and amounted to irregularity in procedure.

Decision. Decisions concerning specific research investigations and overall research directions for a graduate student are the purview of the research supervisor and graduate student, acting collectively. Despite this shared nature, however, it is ultimately the prerogative of the supervisor to approve research activities. It is not within the scope of this appeal hearing to adjudge the merits of research decisions such as that specified in Argument 2. This Argument is therefore dismissed.

Argument 3. In contravention of FGS Regulation 9.4.6 (Responsibilities of the Department), the Department of Oceanography failed to provide necessary facilities and supervision for each graduate student admitted into its graduate program, specifically Ms. Tapics.

Decision. FGS Regulation 9.4.6 allows a student to change supervisors, "if the change can be reasonably accommodated by the department." The Department of Oceanography, through its Chair, did indeed make reasonable attempts to identify a new graduate supervisor for Ms. Tapics. The department has many faculty members, grouped into four sub-specialties of oceanography based on expertise and research interests. Dr. Lewis canvassed virtually all faculty members in Dr. Taggart's and Ms. Tapics' sub-specialty, biological oceanography, but found no one willing to take on a supervisory role for Ms. Tapics. Several faculty members in sub-specialties other than biological oceanography were also approached to take on the supervisory role but all declined, pointing out that Ms. Tapics has an academic background inappropriate for their sub-specialty. Nor was Ms. Tapics herself able to find another supervisor during this time period. While the search for a new supervisor was undertaken Dr. Taggart continued to provide Ms. Tapics' student stipend, for two months after the supervisory breakdown. In our view, therefore, the Department of Oceanography took all reasonable steps to

> allow Ms. Tapics to continue in the graduate program. This Argument is therefore dismissed.
>
> **Ms. Tapics' Remedies.** Ms. Tapics suggests two alternative remedies to her situation. Neither is possible. The first remedy would be for her to be reinstated as a full-time doctoral student in the Oceanography graduate program, with the Department identifying a suitable line of investigation, source of funding, and research supervisor for her. As described above, this remedy is not open to her. Her alternative remedy is to be transferred to the Interdisciplinary (ID) PhD program to allow additional supervisory options, with the University identifying funding and a suitable line of research to accompany this transfer. This remedy is also not viable: a student cannot simply transfer from one PhD program to another, and acceptance as a new student into the ID PhD program depends on recommendation by the ID PhD program itself, and cannot be engineered by an appeal committee such as this one.

[23] On July 12, 2013, Dr. Boudreau wrote to Ms. Tapics, informing her of the FGS Committee's Decision, and stating:

> Consequently, FGS will accept the Department's recommendation of your dismissal from the PhD program in Oceanography.

[24] On August 13, 2013, Ms. Tapics appealed further to a Panel of the Appeals Committee of Dalhousie's Senate ("Senate Panel"). Her Notice of Academic Appeal described her position:

> See attached. The FGS Committee determined the Appellant by implication was academically dismissed with notice and reasons and that the Department made reasonable accommodation of the Appellant in seeking a new supervisor.

The attachment prefaced Ms. Tapics' specific arguments with:

> The Appellant disputes that this matter is properly considered an academic appeal, as she appeals the finding by implication that she was academically dismissed. …

Following this were itemized submissions that addressed what Ms. Tapics alleged to be Dr. Taggart's unwarranted withdrawal in January 2013, and the Department's inadequate effort thereafter to replace Dr. Taggart with another supervisor.

[25] The Senate Panel heard the matter on November 21, 2013. On the Senate Panel were representatives of Dalhousie's Faculties of Computer Science, Science, Dentistry and Management, and a representative of Dalhousie's Student Union.

[26] On December 11, 2013, the Senate Panel issued its Decision.

[27] The Panel's Decision described its jurisdiction:

> **Jurisdiction**
>
> The terms of reference include that the Senate Academic Appeals Committee shall hear appeals where the student alleges that there were irregularities or unfairness in the application of the regulations in question or a denial of natural justice in the previous appeals proceedings. These were the provisions under which this appeal was argued.
>
> The Senate Academic Appeals Committee is not an investigative body. Specifically, the committee does not determine whether the decision made by a lower panel is correct, but whether it was made correctly. That is, that the rules and regulations were applied in a fair and unbiased manner and that there was no denial of natural justice.
>
> **Grounds of Appeal**
>
> The Senate Appeals Committee Terms of Reference states that
>
> > *An appeal may be initiated on the following grounds:*
> >
> > *a. the decision under appeal was made without jurisdiction,*
> >
> > *b. a denial of natural justice, or*
> >
> > *c. unfairness in the application of the relevant regulations regarding academic standards, academic evaluation, academic progression, academic advancement, or other University or Faculty academic regulations.*
>
> [italics in Panel's Decision]

[28] As noted above, on July 12, 2013, Dr. Boudreau wrote to Ms. Tapics that the "FGS will accept the Department's recommendation of your dismissal from the PhD program in Oceanography". The Panel's Decision said, of Ms. Tapics' "dismissal":

> **Grounds Pertaining to Dismissal from the University**
>
> In the written submission of the respondent and at the hearing before this panel, it was ascertained that the appellant is not dismissed from the University. Consequently, any arguments pertaining to dismissal are considered moot and not discussed. …

[29] The Panel's Decision then disposed of Ms. Tapics' submissions as follows:

1. As to whether Ms. Tapics received notice that her disagreements with Dr. Taggart were jeopardizing her progress, the Panel said:

> … This is a question of reasonableness. That is, would a reasonable person be aware that their behaviour is negatively affecting the supervisory relationship. In this instance, the Panel concluded that a reasonable person should be aware of their actions and that written notice was not required. …

2. As to bias by the Department of Oceanography or the Faculty of Graduate Studies Appeals Committee, the Panel found:

> … With respect, the appellant has submitted no evidence that the search process or the person conducting it was biased. The fact that some of the faculty answered emphatically in the negative to the Chair's request, does not, in itself, constitute bias on the part of the Department. Thus, in this instance there is no evidence of bias in the search process for a new supervisor.
>
> The appellant also claims that there was a reasonable apprehension of bias with respect to the FGS Appeals Committee hearing: Specifically, Chair of the FGS Appeals Committee permitted the submission by the Department of evidence pertaining to the appellant's academic past. … [I]t is typically accepted to be liberal with regards to permitting the submission of evidence, while reserving judgment on the applicability of the evidence until later in the process. In this case, the FGS Appeals Committee permitted the submission of evidence by the Department, but as is clear from their decision, took pains to discount or exclude the evidence in the course of their considerations. Thus, this Panel must conclude that in this instance bias on the part of the FGS Appeals Committee is not evident.

3. University Regulation 9.4.4(2) permits a supervisor to terminate the relationship with a student when "the student does not heed advice and ignores recommendations for changes in the research and thesis, or if the student is not putting forth a reasonable effort". Ms. Tapics submitted that the Faculty of Graduate Studies incorrectly applied Regulation 9.4.4(2) in her case. The Panel found:

> In the appellant's own submission, there is an admission of disagreement with the supervisor over the inclusion of specific data sets in her current project. The FGS Appeals Committee made a finding of fact that such disagreements were sufficient in this instance to apply Regulation 9.4.4(2).
>
> …
>
> Consequently, Regulation 9.4.4(2) is applicable in this case.

4. Ms. Tapics submitted that the Faculty of Graduate Studies terminated her supervision immediately, without sufficient notice. The Panel found that the continuation of her stipend to March 31 effectively was a notice period that sufficed to find a new supervisor.

5. Ms. Tapics submitted that Dr. Taggart's withdrawal and the University's failure to replace him infringed its responsibility under University Regulations 9.4.6(1) and (3) "to provide necessary facilities and supervision for each student admitted" and "to provide adequate supervision at all times, so that, when a supervisor leaves the University for another permanent position, substitute arrangements are made as soon as possible". The Panel said:

> … Furthermore, there is an implicit assumption in this Regulation that the student is not, in part or whole, culpable in the dissolution of supervisory relationship. Since the FGS Appeals Committee found the appellant, at least in part, culpable, Regulation 9.4.6 is not applicable in this case.

6. The Panel determined that the applicable regulation was Regulation 9.4.5(4):

> Students have the following rights:
>
> …
>
> 4. to be allowed to have a new supervisor when they can offer convincing reasons to the department for the change and the change can be reasonably accommodated by the department;
>
> ...
>
> [italics in Panel's Decision]

The Panel found that this Regulation:

> is applicable because the appellant, without question, had a convincing reason for needing a new supervisor. However, Regulation 9.4.5(4) has the same caveat as 9.4.6(4), i.e., "*the change can be reasonably accommodated by the department*". The FGS Appeals Committee made a finding of fact that
>
> *In our view, therefore, the Department of Oceanography took all reasonable steps to allow Ms. Tapics to continue in the graduate program.*
>
> Consequently, while the FGS Appeals Committee did apply the incorrect regulation, the error is insubstantial because the same

> decision would have been reached if Regulation 9.4.5(4) had been applied.
>
> [italics in Panel's Decision]

7. Ms. Tapics submitted that the onus should not have been on her to find a new supervisor. The Panel said:

> With respect, in the instances where a department is required to make a reasonable effort to find a supervisor and no supervisor is forthcoming, the onus is on the student to find a supervisor. This is implicit in the FGS Regulation 9.4.5(4).

8. Ms. Tapics submitted that the Department took insufficient steps to find another supervisor, by simply acquiescing to faculty unwillingness. The Panel said:

> Regulation 9.4.5(4) does not require the Department to make these considerations. The FGS decision made a finding of fact, based on the evidence presented, that the Department made a reasonable effort in locating a supervisor. The fact that the Department did not explore all possible avenues does not vacate this finding.
>
> With respect, the willingness or unwillingness of faculty members to take on supervision is perhaps the defining criteria for what constitutes a reasonable effort. Requiring a faculty member to take on supervision of a student that they do not wish to supervise would constitute an effort that is beyond reasonable. Such a requirement infringes on that faculty member's academic freedom and should only be considered in cases where the *"reasonable effort"* caveat is not present.
>
> [italics in Panel's Decision]

9. Ms. Tapics claimed that the Dean failed to comply with Procedure IV.9.1(b), which says:

> *Within five working days from receiving the written appeal, the Dean contacts the student or his/her representative, and the unit to explore the possibility of an informal settlement.*
>
> [italics in Panel's Decision]

On this point, the Panel agreed with Ms. Tapics. The Panel said:

> There is no evidence that FGS contacted the appellant to explore the possibility of mediation, which was confirmed at the Panel hearing. Thus, in this instance FGS did not follow its own procedures. …

10. The Panel concluded:

> This panel finds that evidence does not establish that there was a denial of justice but that there was an unfair application of regulations. Therefore, the appeal is granted.
>
> First, as agreed by all parties, the appellant is not dismissed from the University and therefore has an opportunity to find a supervisor and proceed in her program.
>
> Second, the Panel refers this issue back to the Faculty of Graduate Studies. In accordance with procedures, the Dean of the Faculty of Graduate Studies must explore the possibility of mediation between the Department and the Appellant. To facilitate this process, the Panel orders a minimum six-month moratorium on any procedures to dismiss the appellant.
>
> Third, it should be noted that the onus is on the appellant as much as the Department to find a settlement. If after six months the appellant does not have a supervisor, and hence, not making progress in her program, the Faculty of Graduate Studies can initiate dismissal procedures against the appellant due to lack of progress.

11. Under "Recommendations", the Panel noted that "Regulation 9.4.6 is silent on the question of what happens when a supervisor abdicates, with or without cause" and said "we recommend that Regulation 9.4.6 be amended to specify a department's responsibilities in such instances". Finally, the Panel said:

> This case has revealed that a student should receive feedback not only on academic matters but also on behavioural ones. While most students can take social cues when their behaviour has crossed the line, others require a more formal process. … FGS should consider augmenting these processes and procedures with additional criteria to provide students with assessment of their behaviour and prevent situations such as the one in this appeal.

[30] On January 21, 2014, Dr. Boudreau wrote to Ms. Tapics. He offered to meet Ms. Tapics "to explore whether an informal resolution may be possible". But the letter expressed pessimism:

> Regarding the possibility of co-supervision, as you'll recall from our submissions to the SAC, Dr. Lewis did canvass all possible faculty members within the Department of Oceanography. There was no one who would agree to act as your supervisor. The FGS and Department of Oceanography rules regarding co-supervision do require that there also be a supervisor with an appointment in the

> Department who takes on substantive and significant supervisory responsibilities. It is not simply an administrative role. While not ruling anything out, you do need to understand that co-supervision within the Department of Oceanography may simply not be possible in this case.
>
> …
>
> For the purpose of clarity, I will also consider the date of this letter to begin the 6-month moratorium on commencing dismissal proceedings if you are unable to secure supervision.

[31] Ms. Tapics did not reply to Dr. Boudreau's letter. She chose another course.

[32] On March 27, 2014, Ms. Tapics filed a Notice of Application in the Supreme Court of Nova Scotia, naming Dalhousie University, Dr. Taggart and Dr. Lewis as Respondents. She claimed that the Respondents breached their contract to provide supervision, breached their duty of care by not securing the specified dataset for the sea turtle research and by engaging the supervisory functions of Dr. James, and that Dr. Lewis committed slander. She sought damages.

[33] On April 17, 2014, the Respondents filed a motion for dismissal of Ms. Tapics' application on the bases that the court had no jurisdiction, the application was an abuse of process further to Rule 88, and that the application failed to disclose a cause of action further to Rule 13.03.

[34] On September 4, 2014, Justice Pickup of the Supreme Court of Nova Scotia heard the Respondents' motion to dismiss. The parties filed affidavits. There was no oral testimony or cross-examination. On October 21, 2014, Justice Pickup issued his written decision (2014 NSSC 379). The Decision struck Ms. Tapics' claim for slander because of deficient pleading, dismissed the rest of her claims as an abuse of process and, in the alternative, dismissed her claims against Drs. Taggart and Lewis because the pleadings did not disclose sufficient material facts to support liability. I will quote the judge's reasons in the Analysis.

[35] On November 20, 2014, Ms. Tapics appealed to the Court of Appeal.

Issues

[36] Ms. Tapics' submissions focus on the judge's dismissal of her claim as an abuse of process. She says that the judge erred in law and in the exercise of his discretion.

[37] The appeal does not challenge the judge's rulings that her claims against Drs. Taggart and Lewis were insufficiently pleaded. There is no cross-appeal or notice of contention to uphold the ruling on grounds other than abuse of process.

Standard of Review

[38] The standard is correctness for issues of law and palpable and overriding error for issues of fact. For the exercise of judicial discretion, it is whether the judge erred in principle or whether the judge's ruling would cause a patent injustice: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 16-29, reviewing the authorities in Nova Scotia. As it is presumed that a judge should not use a discretion to cause a patent injustice, causing "patent injustice" is an implied legal error.

The Legal Principles

[39] I will start with the Supreme Court of Canada's statements on abuse of process by relitigation.

[40] In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, Justice Arbour for the majority framed the principles:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > … abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of

> the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> …
>
> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). …

Justice Arbour (para. 37) emphasized Goudge, J.A.'s reasons in *Canam*:

> … It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. …
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
>
> [Justice Arbour's underlining]

[41] Justice Arbour then expanded on the category at play in Ms. Tapics' appeal - abuse of process by relitigation:

> 38 … The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange [Lange, Donald J., *The Doctrine of Res Judicata in Canada*, Markham, Ont.: Butterworths, 2000], at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
> >
> > …
>
> 42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. …
>
> 44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A.. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> …
>
> 46 … A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. … What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. …

[42] Justice Arbour gave examples of when relitigation would not be an abuse of process:

> 52 … There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
>
> 53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision [citations omitted].

[43] In this passage, Justice Arbour explicitly applied, to abuse of process, the discretionary criteria to prevent injustice that *Danyluk v. Ainsworth Technologies*

Inc., [2001] 2 S.C.R. 460 had assigned to issue estoppel. In *Danyluk*, Justice Binnie for the Court said, of that topic:

> 62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.
>
> …
>
> 67 The list of factors is open. … The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.
>
> …
>
> (g) *The Potential Injustice*
>
> 80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.
> …
>
> Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

[44] In *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, Justice Abella (paras. 30-33) reiterated Justice Arbour's reasoning in *Toronto v. C.U.P.E.*. She then summarized the principles from the Supreme Court's jurisprudence:

> [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland* [*Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629], at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher* [*Boucher v. Stelco. Inc.*, [2005] 3 S.C.R. 279], at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone* [*Canada (Attorney General v. TeleZone Inc.*, [2010] 3 S.C.R. 585], at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[45] In *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, the issue was whether a civil action against police should be struck, based on issue estoppel, because a police disciplinary tribunal had already dismissed the plaintiff's complaint of police misconduct arising from the same facts. Justices Cromwell and Karakatsanis, for the majority, concluded that the civil action should not be struck. Their reasons included:

> [36] We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.
>
> …
>
> [38] The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in mechanical analysis.
>
> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

…

> [42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* [Supreme Court's italics] to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. …
>
> …
>
> [45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. …
>
> …
>
> [49] In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

[46] In *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, Justice LeBel for the Court (para. 39) reiterated Justice Arbour's reasons in *Toronto v. C.U.P.E.*. Justice LeBel continued:

> [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. …
>
> [Justice LeBel's underlining]
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. …

[47] Turning to Nova Scotia, in *Wright v. Nova Scotia (Public Service Long Term Disability Plan Trust Fund)*, 2006 NSCA 101, a medical board had decided not to continue disability benefits. This Court, applying *Danyluk*, held that the administrative ruling did not preclude the subsequent action in court. Justice Cromwell discussed "potential injustice" as governing the residual discretion for issue estoppel:

> [105] This factor requires "…the Court … [to] stand back and, taking into account the entirety of the circumstances, consider whether the application of issue estoppel in the particular case would work an injustice": **Danyluk** at para. 80.
>
> [106] So far as one can tell from the record, there has never been any proper consideration by a neutral party of whether Mr. Wright was disabled within the meaning of the "any occupation" definition in the Plan. It appears that his court action was the only way that could occur. The matter did not fall squarely within either the expertise or the terms of reference of the medical appeal board and, in the circumstances of this case, there was no other adequate remedy. …
>
> [108] In my view, this is a case in which the court's discretion should be exercised to disallow the plea of issue estoppel. …

[48] The Ontario Court of Appeal has issued a series of decisions on whether a student's civil claim against a university should be struck on jurisdictional grounds, or for failure to disclose a cause of action, or as an abuse of process.

[49] In *Gauthier v. Saint-Germain*, 2010 ONCA 309 (unofficial translation), Justice Rouleau for the Court reviewed Ontario's authorities to date and said:

> [33] The respondents, on the other hand, claim that this court's decisions in *Wong v. University of Toronto* (1992), 4 Admin. L.R. (2d) 95, *Dawson v. University of Toronto*, 2007 ONCA 875, and *Zabo v. University of Ottawa*, [2005] O.J. No. 2664, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 354, support the notion that the Superior Court would not have jurisdiction over a cause of action against a university if it involves issues of an academic nature.

Thus, if the core of the dispute concerns a school matter, the court has not jurisdiction, even if the underlying cause of action is based on tort and breach of contract and the remedy sought aims to recover damages.

[34] In my opinion, the above-mentioned cases do not establish such a broad principle.

…

[45] It would therefore appears that no precedent dictates that the court does not have jurisdiction to hear cases for the sole reason that the tort or related breach of contract arises from a scholastic dispute.

[46] In my opinion, in order to determine whether the court has jurisdiction, it is more helpful to focus on the remedy being claimed by the plaintiff. When a party seeks to overturn an internal academic decision made by a university, the appropriate route is judicial review. However, if the plaintiff alleges the constituent elements of a cause of action based in tort or breach of contract, while claiming damages, the court will have jurisdiction even if the dispute stems from the scholastic or academic activities of the university in question.

[47] Moreover, when a student enrols in a university, it is understood that the student will be subject to the discretion of that institution when it comes to resolving academic issues, whether in the evaluation of the quality of the student's work, the structure and implementation of university programs, or the identification of the skills required to serve as a professor or thesis supervisor. This discretion is very broad. Thus, claiming that a grade is incorrect or that a professor is incompetent, without more, will not normally be sufficient grounds on which to base a cause of action in breach of contract or tort.

[48] In order to establish a cause of action for breach of contract, the student must demonstrate that the university failed to fulfil an express or tacit obligation to which this institution had committed by accepting the student's registration. …

[49] In regard to allegations of negligence, *Young* [*Young v. Bella*, [2006] 1 S.C.R. 108] confirms that a university indeed owes a duty of care to its students. Nonetheless, in order to establish a cause of action based on negligence, the student must do more than merely state that a professor was too exacting in his evaluations or demonstrate his or her incompetence. In order to establish that the university breached its duty of care, the student must plead specific facts tending to show that the conduct of the university or professor in question constituted an intentional tort, as in *Zabo*, or was outside the broad margin of discretion that the university and its professors enjoy.

[50] Thus, even if the court has jurisdiction, *Dawson* and *Zabo* nonetheless demonstrate that it is prepared to strike out the cause of action under of rule 21.01(1) or, in exceptional circumstances, under rule 25.11 when it appears that the cause of action is untenable or could not succeed. The circumstances in which the court will exercise its discretion to strike a cause of action fall into one of two

> categories. First, if the action in tort or breach of contract is but an indirect attempt to appeal an internal academic decision when the appropriate approach would be judicial review (for example, the decision to give a certain grade, to require certain work, to refuse admission to a program or to not award a diploma), the court can strike it out. Second, if the pleadings do not provide the necessary information to demonstrate that the university or its employees have exceeded their broad discretion, the court could also strike out the cause of action.
>
> …
>
> [65] For these reasons, I would overturn the decision striking out the appellant's statement of claim, and would replace it with an order striking out paragraphs 6 to 141, with leave to amend them. …

[50] *Jaffer v. York University*, 2010 ONCA 654 reiterated *Gauthier*'s approach. Justice Karakatsanis for the Court said:

> [21] In *Gauthier*, Rouleau J.A., at para. 29 started from the proposition that the Superior Court of Justice is a court of inherent jurisdiction. Its jurisdiction is therefore limited only by express language in a statute or a contractual provision. After analyzing the case law related to academic questions, he determined at para. 45 that the jurisprudence did not stand for the broad proposition that the court lacks jurisdiction solely because a breach of contract or negligence claim arises out of a dispute of an academic nature. At para. 46, Rouleau J.A. found that where the elements of a breach of contract or negligence are properly pleaded, the Superior Court will have jurisdiction to hear a claim even if the dispute is academic in nature and arises out of the academic activities of the university.
>
> [22] I do not accept York's submission that *Gauthier* was wrongly decided or that there are conflicting cases of this court. …
>
> [26] After reviewing the cases, Rouleau J.A. concluded at para. 46 of *Gauthier* that it is the remedy sought that is indicative of jurisdiction. Judicial review is the proper procedure when seeking to reverse an internal academic decision. However, if a plaintiff alleges the basis for a cause of action in tort or contract and claims damages, then the court will have jurisdiction even if the dispute arises out of an academic matter …
>
> [27] At para. 47, Rouleau J.A. noted that by enrolling at the university, it is understood that the student agrees to be subject to the institution's discretion in resolving academic matters, including the assessment of the quality of the student's work and the organization and implementation of university programs. As a result, a student will usually have to do more than simply argue that an academic result is wrong or a professor is incompetent in order to make out a cause of action in breach of contract or a duty of care.
>
> [28] Thus, although the court has jurisdiction to hear such claims, Rouleau J.A. noted at para. 50 that the court may strike a claim under r. 21.01(1), or in

> exceptional circumstances r. 25.11, when it appears that the cause of action is untenable or unlikely to succeed. This will occur if, for example, an action is simply an indirect attempt to appeal an academic decision and the appropriate remedy would be judicial review, or if the pleadings do not disclose details necessary to establish that the university's actions go beyond the broad discretion that it enjoys.
>
> [29] The Superior Court's jurisdiction over the action in this case is thus not ousted by the raising of issues relating to the university's academic function. As in *Gauthier*, the action is not simply an indirect attempt at judicial review, as the appellant does not seek to reverse decisions with respect to his grades or compel the university to readmit him. His claim is that the university owed him various obligations in both contract and in tort, and that its failure to meet those obligations has caused him pecuniary and non-pecuniary damages. Such claims fall within the jurisdiction of the Superior Court and may proceed if they are properly pleaded and tenable in law and disclose a reasonable cause of action.
>
> [30] There is no dispute that the relationship between a student and a university has a contractual foundation, giving rise to duties in both contract and tort: *Young v. Bella*, [2006] 1 S.C.R. 108, at para. 31.
>
> …
>
> [46] The pleadings in the present case contain a bald statement that it was an implied term of the contract between the parties that the university would accommodate Jaffer's disability. It does not identify the nature or source of the term requiring accommodation in the contract between Jaffer and York, nor does it plead the circumstances to support such a conclusion.
>
> …
>
> [48] In my view, this claim does not have the specificity called for in *Gauthier*.
> …
>
> [51] Accordingly, I conclude that the motion judge did not err in dismissing the claim for breach of contract as pleaded, although I do so for different reasons. I would vary his order, however, to strike the pleadings with respect to breach of contract and duty of good faith and permit an amendment to the pleadings (if available on the facts) to plead the specific term of the agreement that was allegedly breached and the supporting circumstances, as indicated above. …

[51] Neither *Gauthier* nor *Jaffer* involved an internal appeal process. So it was unnecessary to consider the principles of abuse of process or issue estoppel. Nonetheless, Justices Rouleau (*Gauthier*, para. 46 and 50) and Karakatsanis (*Jaffer*, para. 28) noted that an attempt to reverse an internal university body's academic decision should be framed as judicial review, not as a civil claim.

[52] In *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633, a student sued the University over a matter that had been determined by the University's internal academic discipline procedure. The motions judge struck the statement of claim as an abuse of process. The Court of Appeal dismissed the student's appeal. The *per curiam* decision (paras. 7-8) cited *Penner* and *Behn*, noted that both issue estoppel and abuse of process were based on perspectives of fairness, and said:

> [9] … the whole purpose of the University academic discipline procedure in which the appellants engaged was to determine the academic consequences for the appellants and the ramifications for their careers as specialist physicians. The process and the remedies it provides directly affected the appellants. In our view, there is no basis upon which one could say in these circumstances that it would be unfair to use the results of the discipline proceedings to preclude a civil suit in which the same conduct is in issue, even though a different remedy is now being sought.

[53] In the argument of this appeal, these authorities' strands of reasoning at times became intertwined. In my view, the principles may be arranged as follows:

1. A university may be liable to a student for either breach of contract, if the university failed to meet its expressed or implied obligations to which it committed by approving the student's registration, or the tort of negligence, as explained in *Young v. Bella*, [2006] 1 S.C.R. 108, *Gauthier*, paras. 48-49 and *Jaffer*, para. 30. By this I mean that the causes of action are known to the law.

2. The court has jurisdiction to hear such a claim even on academic matters (*Gauthier*, paras. 33-34, 45-46; *Jaffer*, paras. 21-22, 26, 28-29).

3. The terms and accepted standards of conduct between the university and student usually allow the university considerable latitude in academics, programming and evaluation. To prove such a claim, the student will have to show that the university overstepped any permitted discretionary perimeter. (*Young v. Bella*; *Gauthier*, paras. 47-49; *Jaffer*, para. 47). Inability to show this means the claim will fail on its merits, and has nothing to do with abuse of process.

4. An insufficiently pleaded claim may be struck for not disclosing a cause of action. This is not the same as an abuse of process [see Rule 88.03(1)]. To disclose a cause of action, bald assertions of liability are insufficient. They should be supplemented with essential facts as

discussed in *Gauthier*, paras. 46-50, and *Jaffer*, paras. 28-29, 46-48. Nova Scotia's *Civil Procedure Rules* 38 (Pleading) and 13.03 (Summary judgment on pleadings) would apply.

5. If a claim is insufficiently pleaded, the court may give leave to amend so that the claim is properly pleaded (*Gauthier*, para. 65 and *Jaffer*, para. 51). Nova Scotia's Rule 13.03(4) permits the judge to adjourn a motion for summary judgment on the pleadings to accommodate the responding party's motion to amend.

6. An attempt to overturn a decision of an internal university tribunal should be brought as a judicial review. A civil claim that is just an indirect attempt at judicial review may be struck. (*Gauthier*, paras. 46, 50 and *Jaffer*, para. 28). The principles that would govern such an application engage either *res judicata*, particularly issue estoppel, or abuse of process.

7. Issue estoppel applies when the earlier proceeding was judicial (which may include a proceeding before an administrative tribunal), and the earlier decision was final and involved both the same question and the same parties or their privies. When these preconditions exist, the court must exercise its discretion whether or not to preclude the subsequent proceeding. The discretionary factors embody fairness or avoidance of injustice, as explained in *Danyluk*, *Penner* and *Wright*.

8. Abuse of process does not require that the earlier decision be between the same parties or their privies. Abuse of process is based on fairness, avoidance of injustice and the maintaining integrity in the administration of justice. It is "characterized by its flexibility", and prevents proceedings that are "unfair to the point that they are contrary to the interest of justice". The fairness assessment may consider factors similar to those at play in the residual discretion for issue estoppel. The abuse of process doctrine aims "to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute". One instance is "where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined". (*Behn*, para. 40; *Figliola*, para. 34; *Toronto v. C.U.P.E.*, paras. 35, 37, 38, 42-46).

> Conversely, where a bar against relitigation "would create unfairness" the doctrine should not preclude the subsequent proceeding. (*Toronto v. C.U.P.E.*, paras. 35, 52-53).
>
> The principle applies to "[t]he adjudicative process in its various manifestations", meaning it protects administrative decisions from relitigation except by judicial review (*Toronto v. C.U.P.E.*, para. 44, 46; *Figliola*, para. 34). One such administrative decision, to which the doctrine applies, is a ruling by a university's internal appeal tribunal (*Aba-Alkhail*; *Gauthier*, paras. 46, 50; *Jaffer*, para. 28).

Application of Principles

[54] Ms. Tapics has not appealed Justice Pickup's rulings that the individual claims against Drs. Taggart and Lewis were insufficiently pleaded. Rather, Ms. Tapics' appeal challenges the judge's ruling that the claim against Dalhousie should be struck as an abuse of process. The judge did not rely on issue estoppel. Neither did he strike Ms. Tapics' claim against Dalhousie as insufficiently pleaded. Dalhousie has neither cross appealed nor filed a notice of contention to seek a dismissal of the appeal based on these other grounds.

[55] Consequently, the principles of abuse of process govern this appeal.

[56] Justice Pickup reviewed Ms. Tapics' pleading and (para. 35) said he was "satisfied that the majority of the allegations contained in the notice of application have been dealt with by the FGS and/or SAC". In particular, the judge said:

> [36] Paragraphs 1, 2 and 5 of the application in court contain allegations of a failure by the respondents to provide adequate supervision and necessary datasets:
> …
>
> [37] These allegations were raised before the FGS: …
>
> [38] The FGS and the SAC concluded that these allegations had no merit. In order for Ms. Tapics to be successful in her application, the court would have to reconsider these issues on the same evidence and arrive at a different conclusion. If Ms. Tapics was dissatisfied with the interpretation of the Regulations by the FGS or the SAC, her proper recourse would have been judicial review.
>
> [39] Paragraph 3 states:
>
> > The Respondents failed to provide the student with procedures to assist her to complete her thesis.

> [40] This pleading is extremely vague, and appears to be merely a restatement or consequence of the other allegations. If the issue was not raised with the FGS and Senate alongside the other complaints, it presumably should have been. …

[57] To assess the judge's reasoning, one must bear in mind what was at issue in Ms. Tapics' internal university appeals. In late January 2013, Dr. Taggart withdrew as her supervisor. Dr. Lewis' letter of February 18, 2013 officially notified Ms. Tapics of Dr. Taggart's withdrawal, but said the Department would try to find a replacement. Dr. Lewis' letter of March 5, 2013 notified Ms. Tapics that no replacement supervisor could be found. Ms. Tapics concluded that, without a replacement supervisor, her degree program would be over. At this point her aim was to resuscitate her Ph.D. program. Her appeals focussed on whether the University should or could find a replacement for Dr. Taggart. The FGS Committee and Senate Panel dwelt on the feasibility of picking up the pieces that were strewn in January 2013, regenerating her program and moving forward.

[58] Much of Ms. Tapics' civil claim in the Supreme Court is founded on the same facts that underscored her internal appeals: Dr. Taggart's withdrawal in January 2013 that Ms. Tapics says was precipitous, and Dalhousie's effort to replace him that Ms. Tapics says was inadequate. Her internal appeals sought a functional remedy, while her civil claim says the same conduct breached duties in contract and tort, and claims damages. But the University's appeal tribunals have ruled on the underlying controversy. They have determined that Dr. Taggart's withdrawal was not precipitous and the Department's efforts to replace him were not inadequate.

[59] I agree with Justice Pickup that those aspects of Ms. Tapics' claim would relitigate matters that were squarely before the University's internal appeal tribunals. Ms. Tapics' course, to challenge those rulings, was an application for judicial review. As in *Aba-Alkhail*, a civil claim in court for the same matter would abuse the court's process under the principles set out in *Toronto v. C.U.P.E.*, *Figliola* and *Behn*. I would dismiss this aspect of Ms. Tapics' appeal.

[60] But that isn't the end of it. Ms. Tapics' situation is unusual. There is a second factual foundation to her claim – *i.e.* the "debacle generated by an external collaborator [Dr. James] in the sea turtle project", as Dr. Taggart characterized it, and Ms. Tapics' consequential loss of her efforts from January 2011 to summer 2012.

[61] Ms. Tapics' civil claim covers that topic. The Notice of Application in Court includes:

> 2. The Respondents breached their contract to provide the Applicant with adequate supervision from January 1, 2011 to January 21, 2014, which included the failure by the Respondent Dr. Taggart to complete the Applicant's annual report in 2012 confirming her academic progress.
>
> …
>
> 5. The Respondents breached their duty of care to the Applicant in accepting her to a program and field of study without securing the specified dataset that had been represented to her as part of her program, and which was required to allow the Applicant to progress in her studies, from the period January 1, 2011 to June 8, 2012.
>
> 6. The Respondents breached their duty of care to the Applicant by entering into a supervisory relationship with a supervisor Dr. Michael James, who was in a conflict of interest at the material times.

[62] The record for the motion to Justice Pickup, and for the appeal to this Court, has scanty evidence respecting Dr. James' activity, and the reasons for his departure. Ms. Tapics filed two affidavits with her perspective. Dalhousie's affidavit was sworn by Dr. Bernard Boudreau, Dean of Graduate Studies. Neither deponent was cross-examined. Those affidavits attach exhibits with some hearsay on the chain of events. The supervisors or advisors with personal knowledge (Drs. Taggart and James), members of Ms. Tapics' academic advisory committee (Michael Dowd and Daniel Kelley), and the Oceanography Departmental Chair, Dr. Lewis, did not file affidavits. We have, as hearsay, Dr. Taggart's memo of June 19, 2012 to Dr. James (above para. 7). Dr. Taggart's memo, on its face, excoriates Dr. James and vindicates Ms. Tapics. If there is more to the story, it isn't before the Court.

[63] Justice Pickup's Decision gave no separate recognition to Ms. Tapics' allegations involving Dr. James' participation, up to June 2012. The judge treated all Ms. Tapics' allegations as a unit, and assumed they were all litigated before the FGS Committee and Senate Panel. Paragraph 2 of Ms. Tapics' pleading, in her civil claim, alleged inadequate supervision from January 1, 2011 to January 21, 2014. That would include the period of Dr. James' involvement to June 2012. The judge said, of this pleading:

> [37] These allegations were raised before the FGS:

> Argument 3. In contravention of FGS Regulation 9.4.6 (Responsibilities of the Department), the Department of Oceanography failed to provide necessary facilities and supervision for each graduate student admitted into its graduate program, specifically Ms. Tapics.

[64] In *Ahmed v. Dalhousie University*, 2014 NSSC 330, Justice Moir declined to strike, as an abuse of process, the student's claim against the University. That was because the student's claim extended beyond the issue heard by the University's internal tribunal. In Ms. Tapics' case, Justice Pickup (para. 49) distinguished *Ahmed* because Ms. Tapics' pleadings "reflect the same complaints that were before the FGS and SAC".

[65] I respectfully disagree that Ms. Tapics' allegations, in the lawsuit, about Dr. James' activity were complaints before the FGS Committee.

[66] Justice Pickup quoted the FGS Committee's recital of Ms. Tapics' Argument 3. The Decision of the FGS Committee, in response to Argument 3, is quoted above (para. 22). The Decision addresses only Dr. Taggart's withdrawal in January 2013 and the effort to replace him, not Dr. James and the sea turtle project.

[67] Earlier I quoted Ms. Tapics' claims to the FGS Committee and the issues determined by that Committee. The preface to the FGS Committee's Decision recites Ms. Tapics' "Allegation" (above para. 21). I have bolded the FGS Committee's recital of Ms. Tapics' claims. The claims relate to Dr. Taggart's withdrawal and the University's attempt to replace him. The only reference to Dr. James' tenure was an introductory allusion to "several false starts in the identification of a suitable line of research for her".

[68] The Senate Panel was appellate. Its Decision noted it was not an investigative tribunal of first instance. The Panel characterized its jurisdiction as whether the FGS Committee had correctly decided the issues that had been before the FGS Committee. (above para. 27) The Senate Panel then deferred to the FGS Committee's findings that had focussed on Dr. Taggart (above para. 29).

[69] Dr. James' conduct with the sea turtle project, and the University's responsibility for it, were not live issues in Ms. Tapics' university appeal. After Dr. James was dispatched in June 2012, Ms. Tapics moved on. She changed her topic to right whales, with Dr. Baumgartner as the new external collaborator. Ms. Tapics' internal university appeals targeted Dr. Taggart's departure in January 2013, during the right whales project. She wanted a replacement for Dr. Taggart.

Dr. James already had been replaced, that project had washed with the tides and the sea turtles were far adrift.

[70] Abuse of process principles prevent the "misuse of [the court's] procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute", such as "where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined". (above paras. 40-42, 46)

[71] Ms. Tapics' civil claim alleges that Dalhousie bears some contractual and tortious responsibility for her loss of over one and a half years of effort on the forgone sea turtle project. Those allegations have not been already determined. Their hearing, for the first time, in a court would not be manifestly unfair to Dalhousie. Dalhousie will have the opportunity to defend. Nor would it bring the administration of justice into disrepute. To the contrary, the preclusion of Ms. Tapics' opportunity to have that matter determined, for the first and only time, would "create unfairness" (*Toronto v. C.U.P.E.*, paras. 35, 52-53). Justice Binnie's comments in *Danyluk* (para. 80) and those of Justices Cromwell and Karakatsanis in *Penner* (paras. 42, 45, 49) and Justice Cromwell in *Wright* are apposite. Counsel for Dalhousie correctly points out that *Danyluk* and *Penner* involved issue estoppel, while Ms. Tapics' appeal focusses on abuse of process. But kindred principles of fairness govern both doctrines, as noted by Justice Arbour in *Toronto v. C.U.P.E.*, paras. 52-53. [passages quoted above paras. 42, 43, 45].

[72] Referring to Ms. Tapics' allegation of insufficient assistance from Dalhousie, Justice Pickup also said:

> [40] … If the issue was not raised with the FGS and Senate alongside the other complaints, it presumably should have been. …

[73] The judge didn't say whether he had Dr. James' activity in mind. If that was the judge's intent then, with respect, his ruling misses the mark. Ms. Tapics' internal university appeal aimed to secure a replacement for Dr. Taggart, so she could complete her Ph.D. program. She sought salvage and repair, not bridge burning and compensation for past faults. Dr. James was out of the picture. Except as contextual background, his activity and the sea turtle project did not pertain to Ms. Tapics' agenda for her university appeal. Ms. Tapics was entitled to frame her university appeal to promote her objective. She wasn't required to saddle it with a dissonant point that would distract the tribunal's attention.

[74] The University's internal tribunals were suited for functional redress, but not structured to adjudicate a fault-based claim for damages against the University itself. A civil damages claim against the University would be outside the mandate of an *ad hoc* faculty committee and would challenge an internal committee's institutional objectivity. In *Gauthier*, para. 46, and *Jaffer*, para. 26, the Ontario Court of Appeal noted that the nature of the cause of action and remedy affects the court's jurisdiction. In *Penner*, paras. 64-68, the majority considered institutional objectivity (of a police chief) in the fairness assessment for issue estoppel.

[75] When the underlying controversy has been determined against the student by the university tribunal – as it was for Dr. Taggart's withdrawal from the right whales project and the aftermath – then the student's lawsuit for damages is relitigation abuse. For the sea turtle project, the underlying controversy was not adjudicated by the university tribunal, was extraneous to Ms. Tapics' objective with her university appeal, and a damages claim against the University would lie outside the tribunal's mandate. In those circumstances, I do not accept the proposition, urged by counsel for Dalhousie on this appeal, that Ms. Tapics' civil damages claim "presumably should have been" brought to the university's tribunal.

[76] In my respectful view, the judge committed appealable errors under the standard of review. If the judge held the view that Ms. Tapics' claim respecting Dr. James' activity had been adjudicated by the FGS Committee and Senate Panel, then he committed a palpable and overriding error of fact. If he presumed that Ms. Tapics' internal university appeal should have included inapposite issues involving Dr. James and the expired sea turtle project, then he erred in principle in the application of the test for determining whether there was an abuse of process. Insofar as he exercised a discretion to preclude Ms. Tapics' civil claim for a matter that had not been litigated in other tribunals, the result of his Decision is a patent injustice.

[77] I would allow the appeal with respect to Ms. Tapics' allegations involving Dr. James' role and the sea turtle research, and the University's responsibility (if any) for that matter.

[78] The appeal to this Court involves only whether the judge erred by ruling there was an abuse of process. That is the extent of my reasoning. I should not be taken as commenting on the merits. For instance, Dalhousie may allege that, by replacing Dr. James after June 2012, the University did all that was required. Ms. Tapics, on the other hand, may cite Dr. Taggart's letter of January 31, 2013 to Dr.

Lewis (above para. 13), that says "I have done what I can to support Tara's interests, and to salvage what I can from the debacle generated by an external collaborator in the sea turtle project" but "the entire process has been difficult…" From this, Ms. Tapics may allege that the effects lingered on. This and other aspects of the merits would be for the hearing judge to consider afresh. There is no implicit direction in my reasons.

[79] Neither was the Court of Appeal asked to strike because of insufficiently pleaded particulars. Rule 88.02(1)(a) permits the Court to issue an order to control an abuse of process, by including provision for striking or amending a pleading. I would allow Ms. Tapics thirty days from the Order of this Court to amend her pleadings consistently with this Decision. The amendment should delete the abusive claim and give sufficient particulars of the non-abusive claim.

Conclusion

[80] Insofar as Ms. Tapics' claim involves her initial sea turtle project, Dr. James' involvement, and the University's responsibility (if any) for those matters, I would allow the appeal against Dalhousie, on the basis that her claim is not an abuse of process. In all other respects, I would dismiss the appeal. Ms. Tapics should have thirty days from this Court's Order to amend her pleading, consistently with this Decision.

[81] As success was divided, the parties should bear their own costs.

Fichaud, J.A.

Concurred: Bryson, J.A.

Scanlan, J.A.