IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Pacheco v. Dalhousie University, 2005 NSSC 222

Date: 20050817
Docket: SH 234292
Registry: Halifax

Between:

Jose Pacheco

Applicant

v.

Dalhousie University

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	February 23, 2005, in Halifax, Nova Scotia
Written Decision:	August 17, 2005
Counsel:	Anthony M. Brunt, for the applicant Cheryl Hodder, for the respondent

Robertson, J.:

[1] The applicant, Jose Pacheco, has filed an Originating Notice seeking an Order in the nature of Certiorari to quash the decision of the Dalhousie University Senate Discipline Appeal Board, (the "Board"), dated August 18, 2004, who upheld an earlier decision of the Senate Discipline Committee in circumstances where it was found that Mr. Pacheco had violated section B.1(b) of the Dalhousie University Code of Student Conduct.

[2] S. B.1(b) of the Code states:

> No student shall otherwise assault another person, threaten any other person with bodily harm, or cause any other person to fear bodily harm.

[3] An extensive record of all the materials placed before the Board is also before me.

Background:

[4] The facts that gave rise to this application are set out in the Board's decision. They are:

> **Facts:**
>
> Over a period of approximately two academic years, commencing in late 2001 and extending to mid-2003, the student who is the subject of these proceedings made a series of allegations against members of the University community that he had been assaulted in a number of ways. The student's accusations included the following purported incidents, as summarized by the University Legal Counsel in her submission to the Senate Discipline Appeal Board of July 21, 2004. The fact of these allegations having been made is uncontested.
>
> 1. An allegation by [the student] that on December 5, 2001 his coffee was poisoned at the Second Cup;
> 2. An allegation by [the student] that a faculty member had fired something into the side of his neck at a December 21, 2001 performance at the Rebecca Cohn Auditorium;
> 3. An allegation by [the student] that on January 11, 2002 [he] was stung in the nose, knee and back as we [sic, he] was coming down the stairs from the gym at Dalplex;

4. An allegation by [the student] that on May 21, 2002 a fellow student had placed poison in his hair;
5. An allegation by [the student] that on January 7, 2003 someone had maliciously used a laser/phaser type of device on him in connection with a class in the Weldon Law Building, plus concerns about his "identity".

This Board has examined the documentary evidence that relates to the charges made by the student and has concluded that the accusations are bizarre and wholly implausible. The student's description of the various supposed attacks indicates that he believes that he has been the victim of different types of assault in the classroom, in food service areas and in public sections of University buildings. Sometimes the alleged perpetrator was thought to be a fellow student, while on other occasions the assailant was described as a Faculty member or some other unknown attacker who was either trying to kill him or to ensure that he was academically unsuccessful.

It would appear that the student's conduct was tolerated for a considerable period and that some serious efforts were made by the Vice-President of Student Services, Eric McKee, and others, to encourage the student to seek appropriate medical assistance, which the student has consistently refused to do.

On June 7, 2003, the student sent a fax message to the Nova Scotia Minister of Education which reiterated some of his previous accusations, but added that:

> My Concern Is: Someone is going to be killed, or permanently injured, unless something is done to stop this "madness".

Vice-President McKee testified at the Senate Discipline Appeal Board that this latter message was forwarded to him by officials within the Department of Education who themselves had been concerned about its tenor. On July 25, 2003 Vice-President McKee notified the student that his "student privileges at Dalhousie University had been suspended", "because of threats made in your letter of June 7, 2003 to the Minister of Education." The letter of suspension noted that the latest incident had followed a number of previous similar instances over the previous 18 months, which "have generated concern among the Faculty and Staff you deal with and understandable apprehension about what you might do next." The interim suspension of July 25, 2003 could be removed by the University if certain conditions were met. The student was to be

> assessed by an approved psychiatrist who reported to the University and then the student has to follow up by participating in any recommended treatment. There would be an ongoing requirement of notification by the physician in the event that the student discontinued the therapy.
>
> There was no evidence of the student having made any attempt to satisfy these conditions at any time since the interim suspension was imposed.

[5] The majority decision of the Senate Discipline Committee was not unanimous. The Chair dissented finding that a violation of Section B.1(b) had not been made out on the evidence and in light of the seriousness of the allegation, he felt the matter best dealt with as a criminal proceeding and not by the Discipline Committee. The Board upheld the interim and long-term suspension of Mr. Pacheco as they found that the Committee's decision was not patently unreasonable.

[6] In its unanimous decision the Board stated:

> There is absolutely no basis here for the Senate Discipline Appeal Board to conclude that there was any error of jurisdiction on the part of the Senate Discipline Committee and the appeal is therefore denied.
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> This case is tragic in many ways. The student, by his extraordinary efforts to overturn the suspension which has been levied against him, has demonstrated a sincere dedication to pursuing his University studies. On the other hand, his pursuit of his goals will be interrupted until he demonstrates that he accepts that not only is he not under threat by others, but that his previous actions have caused other members of the University to reasonably fear him.
>
> The Senate Discipline Appeal Board hopes that the Appellant will somehow acquire the insight into his actions which will permit him to resume his studies at Dalhousie University. The Board believes, as he has apparently conceded, that he has been treated in a manner which is eminently fair from a procedural perspective. Moreover, the Board concludes that there is absolutely no basis for the contention that there was an excess of error of jurisdiction by the Senate Discipline Committee, in the fact of an overwhelming and conclusive body of evidence.

[7] Mr. Pacheco had argued before the Discipline Committee that none of his actions and, particularly, his letter to the Minister of Education of June 7, 2003, could

"reasonably be construed as a threat against anyone" and that their decision was therefore unfounded on the evidence and caused a jurisdictional error by the Committee. Mr. Pacheco sought to have the Board quash the decision of the Discipline Committee and allow Mr. Pacheco to resume his studies.

[8] Mr. Pacheco did not argue that any denial of natural justice had occurred. The Board's failure to overturn a decision of the Discipline Committee is at issue in this appeal.

[9] The position taken by Dalhousie University before the Board is outlined at pages 9 and 10 of the decision as follows:

> "In its Brief, the University argues that the powers on review of the Senate Discipline Appeal Board 'are clearly prescribed' and that it is 'only in exceptional circumstances' that the Appeal Board engage in consideration of the merits of the Discipline Committee decision'.
> Dalhousie University 'submits that these are not exceptional circumstances and that the Discipline Committee decision was not patently unreasonable'.
> The University maintains that:
> The question the Discipline Committee was required to ask itself was: Is it more likely than not that a reasonable person would conclude that in sending the letter [the Student] was expressing an intention to cause bodily harm to someone?
> The University states that the problem for the Appeal Board is:
> Was the Discipline Committee's conclusion so obviously wrong that it must be corrected?
> In summary, the contention of the University is that "the Discipline Committee came to a reasonable conclusion" and, "while the Student 'may disagree with this conclusion, there is nothing patently unreasonable about it'." [Emphasis added]

Standard of Review:

[10] The respondent asks this Court to confine its review to the "propriety of the process" which resulted in the decision under review citing:

> ...the decision of the Nova Scotia Supreme Court in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)*, where Glube C.J.S.C. (as she then was) held:
>
> > A *certiorari* application is not an appeal. The Court's role is very limited. It must be based upon jurisdictional error, denial of natural justice or error of law in the face of the record and the Court must exercise judicial discretion and practice curial deference. The review encompasses the propriety of the process resulting in the decision, not the appropriateness of the result.

[11] The applicant argues that the standard of review in this matter should be determined by the "pragmatic and functional approach", **Pushpanathan** v. **Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982. The applicant also submits that the lowest form of defence possible should be applied to the Board's decision that of "simple correctness".

[12] In **Pushpanathan**, *supra*, the Supreme Court of Canada set out the appropriate standards of judicial review, more recently affirmed in **Dr. Q.** v. **College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226.

[13] Factors to be considered under the pragmatic and functional approach are:

(1) the presence or absence of a private clause, or a statutory right of appeal;

(2) the relative expertise of the administrative decision-maker vis-à-vis the expertise of court, with regard to the specific issue in question;

(3) the purpose of the statute as a whole and of the provision in particular; and

(4) the nature of the problem, i.e. whether it is a question of fact, law, or mixed fact and law (**Dr. Q.**, *supra*, p. 8, para. 26).

Existence of a Privative Clause:

[14] The respondent has outlined in its brief the statutory regime underpinning discipline procedures at the University, also found at Tab C, p. 82 and 83 of the

Record and the Senate Constitutional provisions set out at Tab 3, page 39 of the Record.

The Senate of Dalhousie University was given the power to discipline students in the Statute that created Dalhousie University. In particular, Section 7 of Chapter 24 of the *Acts of 1863*, an *Act for the Registration and Support of Dalhousie College*, as amended by Chapter 18 of the *Acts of 1969* and Chapter 74 of the *Acts of 1998*, gives Senate the following broad powers:

> 7(1) The internal regulation of Dalhousie College and University is committed to the University Senate, but any such internal regulation is subject to the approval of the Board.
>
> (1A) The membership of the University Senate shall be constituted in such manner as is determined from time to time by the University Senate and approved by the Board.
>
> (2) Without restricting the generality of Subsection (2), "Internal regulation" includes power to exercise disciplinary jurisdiction over students attending the University, in particular power:
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> (a) To fine students;
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> (b) To suspend the rights of students to attend the University or to participate in any student activities, or both;
>
> (c) To expel students from the University.
>
> (3) The University Senate is empowered to delegate its disciplinary jurisdiction in any particular case or generally to any person or body of persons, subject to such condition with respect to the exercise of any delegated power as it considers proper.

In accordance with the power granted by statute, the Senate created a Constitution governing its activities, including those relating to student discipline. In the Constitution, the jurisdiction and powers of the Discipline Committee and the Appeal Board are clearly set out in Chapter 10. A privative clause, limiting the grounds for review of both the Discipline Committee and the Appeal Board, is set out under the heading "Appeals". The portion dealing with appeals from the Discipline Committee is set out as follows:

> "Appeals from decisions of the Senate Discipline Committee may be made to a Senate Discipline Appeal Board, but only on the grounds defined under 'Function' of a Senate Discipline Appeal

> Board. **Decisions of a Senate Discipline Appeal Board are final and binding on all parties.**" [Emphasis added]
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> Under the heading "Function" in the section entitled "Discipline Appeal Board", the Constitution states in relation to its powers on appeal:
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> A Senate Discipline Appeal Board shall:
>
> 1. Hear appeals from decisions of the Senate Discipline Committee on the following grounds:
>   (a) Denial of natural justice;
>   (b) Disputed jurisdiction of the Senate Discipline Committee.

[15] Clearly this statutory and constitutional scheme demonstrates the presence of a privative clause "final and binding on all the parties".

[16] Accordingly, deference should be paid to the Board.

[17] In **Dr. Q.**, *supra*, McLachlin, C.J. stated at page 9, para. 27:

> "A statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due."

[18] The respondent relies on **Mohl** v. **University of British Columbia**, [2001] B.C.J. No. 2685, **Wojtaszyk** v. **The University of Toronto**, [2004] O.J. No. 1303 and **Healey** v. **Memorial University of Newfoundland**, [1993] N.J. No. 61, authorities supportive of the position that the courts generally show deference to Universities in the areas of student conduct and discipline.

Relative Expertise of the Discipline Committee and the Board:

[19] In **Dr. Q.**, *supra*, at p. 28 and 29 the Supreme Court addressed relative expertise.

> ¶ 28 The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the

> decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise: see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 50. Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise": *Pushpanathan, supra*, at para. 33.
>
> ¶ 29 Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone. The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92. For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development: *Mattel, supra*, at paras. 28-31. Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise: e.g., *Canada [page240] (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. Simply put, 'whether because of a specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference: *Pushpanathan, supra*, at para. 32.

[20] Student discipline and student affairs generally are within the unique ambit of expertise exercised by University bodies. As pointed out by the respondent, procedural fairness is a significant consideration in these proceedings and the University has ensured that the membership of both the Discipline Committee and the Board contain members of the Faculty of Law. I accept that a considerable degree of deference should be shown to the Board and the Discipline Committee in matters of student conduct and discipline.

The Purpose of the Statute:

[21] The statute provides considerable discretion to the Senate in relation to the administrative structure of the University and more specifically in the area of student discipline. The respondent submits that when this is considered in relation to the various interests which necessarily had to be balanced in this case, the Board, with the delegated authority of Senate was in the best position to decide whether the decision of the Discipline Committee was appropriate. The respondent therefore submits that a less searching standard of review is appropriate.

[22] The respondent cites the preamble to the Code of Student Conduct as a relevant "regulation" that is a proper adjunct to the governing statute of Dalhousie University.

[23] The preamble to the Code reads as follows:

> **Commentary**
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> 1. Dalhousie University is a community of faculty, support staff and students, involved in teaching, research, learning and other activities. Students are members of the University for the period of their registration in the academic programme to which they have been admitted and as such assume the responsibilities that such registration entails.
> 2. The University does not stand in loco parentis to its student members, that is, it has no general responsibility for the moral and social behaviour of its students, as if they were its wards. In the exercise of its disciplinary authority and responsibility, the University treats students as free to organize their own personal lives, behaviour and associations subject only to the law and to University regulations that are necessary to protect the integrity of University activities, the peaceful and safe enjoyment of University facilities by other members of the University and public, the freedom of members of the University to participate reasonably in the programs of the University and in activities in or on the University's premises or the property of the University or its members.
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>   Strict regulation of such activities by Dalhousie University is otherwise neither necessary nor appropriate.
> 3. University members are not, as such, immune from the criminal and civil laws of the wider political units to which they belong. Provisions for non-academic discipline should not attempt to shelter students from their civic responsibilities nor add

> unnecessarily to these responsibilities. Conduct that constitutes a breach of the Criminal Code or other statute, or that would give rise to a civil claim or action, should ordinarily be dealt with by the appropriate Criminal or Civil Court. In cases, however, in which criminal or civil proceedings have not been taken or would not adequately protect the University's interest and responsibilities as defined below, proceedings may be brought under a Discipline Code of the University.
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> 4. The University must define standards of student behaviour and make provisions for student discipline with respect to conduct that jeopardizes the good order and proper functioning of the academic and non-academic programs and activities of the University or its faculties, schools or departments, or that endangers the health, safety, rights or property of the University or tis members or visitors.
> 5. The University may also define standards of professional conduct for students in programmes where these are appropriate, and this Code is not intended to replace or supercede such standards.

[24] I agree with the respondent that the University has a right to exert control over the non-academic behaviour of its students. The University also plays a greater role in the community at large. It has the duty to protect its students, faculty, members of the administration, staff and, indeed, members of the public who may be affected by the conduct of any member of the University community. In this case while criminal proceedings were not commenced with respect to the letter sent to the Minister of Education, the University properly retained the right to commence proceedings under a Discipline Code. Indeed I believe this was the correct forum in which Mr. Pacheco's conduct could best be dealt with in a remedial fashion.

[25] The law supports the University's statutory authority in this regard. At p. 30 of **Dr. Q.**, *supra*, the Court stated:

> ¶ 30 The third factor is the purpose of the statute. Since the conceptual focus of the pragmatic and functional approach is upon discerning the intent of the legislature, it is fitting that reviewing courts are called upon to consider the general purpose of the statutory scheme within which the administrative decision is taking place. If the question before the administrative body is one of law or engages a particular aspect of the legislation, the analysis under this factor must also consider the specific

> legislative purpose of the provision(s) implicated in the review. As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interest of various constituencies: see *Pushpanathan*, *supra*, at para. 36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.
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> ¶ 31 A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court.

[26] In **Pushpanathan**, *supra*, at para. 36 Bastarache, J. states:

> The purpose of a statue is often indicated by the specialized nature of the legislative structure and dispute settlement mechanism, and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.

And dealing with the concept of "polycentric" issues to describe legislative characteristics he stated:

> A "polycentric issue is one which involves a large number of interlocking and interacting interests and considerations" (P. Cane, An Introduction to Administrative Law (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interest simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the "statutory purpose".

[27] As a matter of statutory intent and in the drafting of the Senate Constitution and accompanying regulatory documents such as the Student Code of Conduct, it is clear

that the University intended to have the right to exercise control over the conduct of its students, with a view to protecting all members of the University Community. Accordingly, a higher degree of deference should be paid to these administrative structures.

The Nature of the Problem:

[28] The parties agree that the nature of the problem is of mixed fact and law although they disagree as to the degree to which the matter is fact intensive. In the applicant's analysis, Mr. Brunt argues for the lowest form of deference, that of simple correctness because:

1. With respect to the privative clause the intent must only have been to delegate authority to the Discipline Committee "to establish a process for the normal and routine control of the student body" versus these serious allegations against Mr. Pacheco which he argues should be properly left to the Provincial and Superior Courts.

2. That the Board's expertise is demonstrably low because the Board consists of a member of the faculty, a student representative and only one legally trained member.

3. That the legislative intent could not have been to leave such criminal questions exclusively to the hands of a delegated Board.

4. That the nature of the problem, although one of mixed fact and law, is more law intensive and, therefore, deserving of less deference.

[29] The applicant cites **Canada (*Director of Investigation and Research, Competition Act*)** v. **Southam Inc.**, [1997] 1 S.C.R. 748, to support its view that the Board made an unreasonable decision.

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion, on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that

> had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

[30] The applicant urges the Court to find that the Board's decision, applying the standard of simple correctness, constituted an error sufficient to remove its jurisdiction.

[31] Mr. Brunt says that on a balance of probabilities it was never proved that the applicant assaulted any person, threatened any person with bodily harm or caused any other person to fear bodily harm.

[32] He also says that the Board wrongly considered the broader body of evidence dealing with his past conduct and alleged stated of mind.

[33] He says that the Board made its decision not to overturn the Discipline Committee despite the lack of evidentiary foundation and fell into assumption and unfounded speculation.

[34] Mr. Brunt argues that the Board's determination that the Committee had not been "patently unreasonable" is a sufficient error to removed jurisdiction from a decision-making Board.

[35] With respect, I disagree. Using the pragmatic and functional approach as the applicant urges, has led me to the conclusion that the Board has not fallen into error or lost jurisdiction. For the reasons earlier stated, I find that this Court should show considerable deference to the Board in matters of student conduct and that the correct standard of review is mich higher than that of "simple correctness".

[36] From its examination of the record and the decision of the Committee, I find that there was ample evidence to support, on a balance of probabilities, the Board's decision to uphold the suspensions levied against Mr. Pacheco. The Committee's finding that there was "cause to fear bodily harm" was properly upheld by the Board, upon the standard of "not patently unreasonable".

[37] The Board provided clear and cogent reasons why the Discipline Committee was in fact compelled to act and issue an interim and then long-term suspension, in

the interests of the safety of the applicant himself and the wider University Community.

[38] I do not find it improper that the Board reviewed the record, including a comprehensive review of Mr. Pacheco's conduct over the two years preceding his letter director to the Minister of Education.

[39] The Board rightly concluded at p. 16 of its decision:

> ...where the conduct of a student is not in the harmless category, some intervention may be required to ensure that the University is not disrupted and that the members of the community are protected. Here, the University was entirely correct in its determination to use its exceptional authority to exclude a student pending receipt of some expert reassurance that he or she does not pose an ongoing threat.
>
> This student was not alleging a simple academic or interpersonal injustice, which would not raise the spectre of harm to him or others. Instead, he pointed to the perpetration of several crimes of violence having been committed against him over an extended period. His actions had quite understandably caused fear and apprehension for those who were aware of the extent and character of his apparently delusional beliefs.
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> There is absolutely no basis here for the Senate Discipline Appeal Board to conclude that there was any error of jurisdiction on the part of the Senate Discipline Committee and the appeal is therefore denied.

[40] Contrary to the views expressed by Mr. Brunt that there was no evidentiary foundation upon which the finding could be make, I believe that the University had ample evidence of the seriousness of Mr. Pacheco's conduct and reasonably apprehended an escalation of this conduct.

[41] The University addressed the matter in a procedurally fair and compassionate way. The interim and then long-term suspension were designed to help Mr. Pacheco come to terms with his problems and also to ensure his safety and that of the wider University Community.

[42] The request for an Order to quash the decision of the Dalhousie University Senate Discipline Appeal Board is denied.

J.