SUPREME COURT OF NOVA SCOTIA
Citation: *Student X v. Acadia University*, 2018 NSSC 70

Date: 2018-03-28
Docket: Ken No 468259
Registry: Kentville

Between:

Student "X"

Applicant

v.

Governors of Acadia University

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 11, 2018, in Kentville, Nova Scotia
Final Written Submissions:	January 25, 2018
Counsel:	Zeb Brown, counsel for the applicant Jack Graham Q.C., counsel for the respondent

By the Court:

The Issues

[1] Student X seeks an injunction against an investigation of Student Y's complaint of sexual harassment (non-consensual intercourse), filed with the Equity Officer under Acadia University's "Discrimination and Harassment Policy" ("Equity Policy") following the dismissal of Student Y's complaint filed, heard, determined and appealed under Acadia University's "Non-Academic Judicial Policy" ("Judicial Policy").

[2] The issue is issue estoppel - whether the same issue was determined in the Judicial Policy proceeding and, if so, whether, as a matter of discretion, relitigation should be enjoined.

[3] Alternately, Student X seeks an injunction to stop the investigation under the Equity Policy as an abuse of process. For this analysis, *Toronto v. CUPE*, 2003 SCC 63 ("*Toronto v CUPE*"), is the leading authority.

[4] Student Y first complained to Acadia University pursuant to its Judicial Policy. Pursuant to the Judicial Policy, the complaint was determined on its merits at a full evidentiary hearing before the five-person Judicial Board in Student Y's favour, but on appeal by Student X, a rehearing before the four-person University Disciplinary Appeals Committee (the "UDAC") was ordered, held, and determined in Student X's favour.

[5] The issue is whether, applying the two-step analysis in *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44 ("*Danyluk*"), Acadia University is estopped from dealing with Student Y's complaint pursuant to the Equity Policy considering the prior concluded proceeding under the Judicial Policy.

Factual Matrix

[6] Student X and Student Y are, as students at Acadia University, subject to its policies, all of which have been developed pursuant to its statutory authority under an *Act Respecting Acadia University*, SNS 1891, c. 134, s. 8.

[7] Student Y filed two complaints against Student X pursuant to these internal policies.

[8] Both claims arise out of Student Y's allegation that she had been sexually assaulted by Student X at his off-campus residence on November 19, 2016.

[9] The first complaint ("Disciplinary Complaint") began on January 19, 2017. Student Y's complaint was filed pursuant to the provisions of the Non-Academic Judicial Policy, which document contains a comprehensive code of conduct setting out categories of non-academic offences, sanctions for offences, and the processes by which complaints are made, investigated, and adjudicated.

[10] Student X reported to the Safety and Security (Student Services) Office of Acadia University that she had been sexually assaulted. The director of the department interviewed and obtained written statements from both Student Y and Student X, and prepared an incident report. The complaint was then referred to the Judicial Board.

[11] On March 2, 2017, the five-person Judicial Board conducted a hearing respecting Student Y's complaint. Both students attended the hearing with advisors and, in Student X's case, a lawyer. Evidence was produced and witnesses were examined.

[12] On March 6th, the Judicial Board rendered a written decision with reasons. It found Student X guilty of sexual assault (non-consensual sexual intercourse). As for sanctions, it recommended Student X be dismissed from Acadia University, be banned from attendance on campus, and have no contact with Student Y.

[13] On March 9th, Student X, through his lawyer, filed an appeal to the UDAC on the grounds of prejudice and improper procedure by the Judicial Board. On March 15th, Student X's new lawyer wrote to the UDAC with further particulars of his grounds for appeal.

[14] On March 17th, the UDAC agreed to rehear the complaint on the basis that there was no indication whether the complaint had been filed within the time limit in the Judicial Policy.

[15] On May 3rd, the four-person UDAC reheard the complaint.

[16] On May 8th, it rendered a "not guilty" verdict, with a three-line statement of its reasons:

> Based on the information presented on May 3rd at the hearing, the UDAC had determined that there was insufficient evidence to confirm guilt. The UDAC therefore finds Student X not guilty.

[17] On May 10th, based on the fact that Student X had admitted to providing alcohol to Student Y (a minor), the Executive Director purported to impose restrictions on Student X's contact with Student Y as well as attendance at student residences or events where liquor was served. On May 22nd, Acadia University rescinded these restrictions.

[18] On June 1st, Student Y contacted the Equity Office of Acadia University to request a meeting regarding her allegation of sexual harassment.

[19] On June 6th, the Equity Officer met with Student Y. Student Y provided a written complaint and requested that a formal complaint process be commenced under Acadia University's Equity Policy.

[20] Student X was notified of the complaint and his counsel advised that Student X would not participate on the basis that the investigation was *res judicata.* After further exchanges, Acadia University agreed to suspend the investigation by the Equity Officer under the Equity Policy until this proceeding was determined.

[21] Student X commenced this proceeding on September 13, 2017, seeking to permanently enjoin Acadia University from imposing any further investigative or disciplinary processes on Student X in respect of the matters determined by the UDAC pursuant to the Judicial Policy.

Description of the Non-Academic Judicial Process and Equity Process

[22] Acadia University was created by statute in the 1880s. By Section 8 of Chapter 135, in an *Act Respecting Acadia University*, SNS 1891, the Board of Governors was granted "power to adopt and carry into effect bylaws, resolutions and regulations touching and concerning the instructions, care, government and discipline of the students of the said University …"

[23] The rights and responsibility of students concerning violation of rules and regulations, as well as discipline, relevant to this proceeding fall under two policies.

[24] The Judicial Policy describes the non-academic judicial process that governs the conduct and discipline of all students. It sets out in detail:

a) in Section A, Acadia University's philosophy respecting discipline and the Judicial Process, general guidelines and a statement of principles;

b) in Section B, the jurisdiction and composition of the judicial bodies - the Judicial Board; on appeal, the UDAC; and, on further appeal, the Board of Governors;

c) in Section C, the "Sequence of Events and Time Limits" for pre-hearing settlement, the Judicial Board, and the two appeal bodies;

d) in Section D, the twelve categories of offences, types of sanctions and guidelines respecting sanctions;

e) in Section E, a summary of the steps in each process; and

f) in Section F, the expectations, training and responsibilities of members of the Judicial Board, Judicial Advisors and UDAC members.

[25] The Judicial Policy process always begins with a complaint. It is investigated by staff of the Safety and Security Office of Acadia University. The process provides for certain complaints to be settled between the complainant and the 'accused' through mediation. If this fails, the complaint is forwarded to a hearing before a Judicial Board. Knowledgeable 'Judicial Advisors' are made available to the parties to assist in the Judicial Process and at the hearing. The parties are permitted to be represented by lawyers. The parties to the complaint appear before the Judicial Board where a full hearing is conducted, and evidence called.

[26] The Judicial Board consists of one university staff person, three 'upper class' students, and either a member of the Student Union Management or a faculty member, appointed jointly by the Student Union and the Department of Student Services. The Judicial Board consists of five persons. A quorum of three is required for any hearing. The Judicial Board determines whether the accused is guilty of an offence and, if so, the appropriate sanction(s).

[27] Either party may appeal from the Judicial Board to the UDAC on one of three grounds:

1. New evidence or new developments;

2. Alleged prejudice arising from a Judicial Board member or a failure to follow Judicial Board procedure properly; or

3. Imposition of a disproportionate sanction.

[28] If the UDAC agrees with either ground 1 or 2, it rehears the complaint. With respect to ground 3, it has the authority to change any sanction imposed by the Judicial Board.

[29] The UDAC consists of two 'upper class' students, a faculty member and a student services department staff member. Its complement is four. A quorum for any hearing is three. Members are required to have experience in the Judicial Policy process.

[30] The Judicial Policy provides for an appeal from the UDAC to the Board of Governors.

[31] There are time limits for all steps in the Judicial Policy process.

[32] The Judicial Policy relates to all non-academic student conduct. Of the twelve categories of offences, the third category, "**Physical Violence against Persons**", provides that:

1. Anyone who actually or threatens to physically assault … any other member of Acadia University community may be found guilty of an offence.

2. Anyone who encourages or engages in any form of assault, violence or threats to any person on Acadia University campus, or any other member of Acadia University community off campus may be guilty of an offence.

3. Any student who sexually assaults or threatens sexual assault on any person on University campus or any other person of Acadia University community off campus may be guilty of an offence.

(a) Assault: The act of physically touching or striking a person against their will.

> (b) [Physical abuse is defined flexibly; it includes conduct that may not amount to an assault.] (Court's summary)

[33] The Judicial Board may impose any of eleven types of sanctions from suspension of any penalty, conditionally or otherwise, to monetary fines or community service penalties, to bans and partial bans, to recommending to Acadia University that the student be dismissed or expelled.

[34] Separate from the Judicial Policy, Acadia University has the Equity Policy. The purpose of this policy is to provide and maintain a learning and work environment free from discrimination, sexual harassment and personal harassment. The Equity Policy applies to all members of Acadia University community (not just students).

[35] The Equity Policy provides a comprehensive process for resolving complaints of discriminatory and harassing conduct that are contrary to the Nova Scotia *Human Rights Act*. Harassment includes sexual harassment.

[36] Sections A.5 and E.8.3 read as follows:

> Nothing in this policy shall be construed to remove any rights that members of Acadia University community have independently of this policy. Neither does the Equity Policy remove any rights to take action against Acadia University or members of Acadia University community in other processes within or outside of Acadia University.

[37] Section A.6 provides that Acadia University will take steps to protect members of Acadia University community in respect of the Equity Policy through the Equity Officer.

[38] The Equity Policy provides that the process for dealing with harassment and discrimination is complaint-driven. A complaint may be lodged with the Equity Officer by the person affected or by a third party.

[39] Policy D.3 expressly provides:

> In a case involving students, the Equity Officer may direct individuals to Acadia University Non-Academic Judicial system for resolution.

[40] The filing of a complaint commences one of three processes:

1. an informal resolution process, in which the complainant may remain anonymous;

2. mediation; and

3. a formal complaint process.

[41] The first process is a voluntary process to quickly resolve an issue in private. The second process is a formal, but still confidential and "without prejudice", process by which the involved parties may resolve the matter through an appointed mediator (not the Equity Officer).

[42] The third process starts with a written request to the Equity Officer with details of the complained of conduct. The Equity Officer reviews the detailed complaint and, if he or she determines the complaint comes within the definition of personal or sexual harassment and/or discrimination, he or she delivers the complaint to the 'respondent' and the respondent may reply in writing. The response is forwarded to the complainant.

[43] The Equity Officer may investigate and conduct confidential interviews "within the framework of procedural fairness"; that is, each party is permitted to know, understand and respond to the information gathered by the Equity Officer respecting any complaint.

[44] As an investigator, the Equity Officer prepares a final report, which is provided to the parties and a senior administrative officer of Acadia University who, based on the Equity Officer's report, makes a final decision respecting the complaint, and if relevant, the imposition of sanctions or remedial actions, which actions may range from counselling or seeking an apology to dismissal or expulsion.

[45] Section E.8.1 of the Equity Policy provides that a complainant or respondent who disagrees with the decision, the investigative procedure followed or the sanction or remedial action imposed, has a right of appeal. The appeal process differs depending of whether the complainant or respondent are students, student union, non-union staff or unionized faculty and staff. When the parties are students, the appeal is conducted in accordance with the Judicial Policy; that is, to the UDAC.

[46] This Equity Policy contains timelines, and all persons are expected to maintain the confidentiality of the process.

Submissions

Submissions by Student X

[47] Universities are subject to public law remedies and their decisions subject to review by courts: *Ward v University of Prince Edward Island*, 1997 CarswellPEI 82 (PEISC), and *Pacheco v Dalhousie University*, 2005 SSC 222.

[48] An issue, once decided, should not be relitigated. Duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings are to be avoided (*Danyluk*).

[49] Three principles promote the finality of any decision: issue estoppel (*Danyluk*, para 54); abuse of process (*Toronto v CUPE*, para 37), and collateral attack. The principles surrounding issue estoppel and abuse of process apply to the facts of this case. They support the granting of a permanent injunction in respect of the Equity Policy complaint.

Submissions by Acadia University

[50] Respecting the issue of the Equity Officer's jurisdiction to deal with the complaint, absent exceptional circumstances, parties to administrative proceedings are required to exhaust the administrative process before turning to the courts. (*Canada v CB Powell Ltd*, 2010 FCA 61; *Nadler v College of Medicine*, 2017 SKCA 89; *Pridgeon v University of Calgary*, 2012 ABCA 139, and *Spence v University of Toronto*, 2017 ONSC 3803).

[51] Acadia University disputes Student X's claim that the Equity Officer did not have jurisdiction with respect to this complaint on the basis that it was between two Acadia students.

[52] Acadia University submits that, while both complaints were made on the same facts and there is some overlap, the two processes do not involve the same question nor lead to the same result. The Equity Policy is narrower in scope. Its purpose is to maintain a learning environment free from sexual harassment. Under the Judicial Policy, neither the Judicial Board nor the UDAC considered whether the alleged conduct constituted discrimination or harassment under the Equity Policy. For this reason, the doctrine of issue estoppel does not apply.

[53] Acadia University does not contest that the second and third *Danyluk* preconditions are met. They acknowledge that the UDAC decision was a judicial decision and involved the same two parties. It denies that Acadia University itself was a party to either complaint.

[54] If, alternatively, the two processes do involve the same question, the respondent argues that, at the discretionary stage, the court should reject the plea of issue estoppel for four reasons:

1. The wording of the Judicial Policy (p. 10) and Equity Policy (para. A.5) contemplate that two processes may occur in parallel, and that neither is an exclusive process.

2. The purposes of the two processes are fundamentally distinct, even if they deal with similar misconduct; the human rights concerns were not dealt within the Judicial Policy, and the decision makers in the disciplinary proceeding were not trained in the law respecting the Equity Policy.

3. Student X has a right of appeal under the Equity Policy to the UDAC and Board of Governors.

4. There would be a potential injustice (*Danyluk*, para. 80) to Student Y, not a party to this proceeding, in preventing the Equity Officer from taking any further steps to investigate the human rights aspect of her complaint. Human rights concerns were not raised or addressed in the disciplinary process.

[55] The respondent argues that neither the Equity Officer nor Acadia University has the authority to stop the equity process once it has commenced without considering the merits of the complaint.

[56] With respect to Student X's reliance upon the principle of abuse of process, the respondent refers the court to *Tapics v Dalhousie University*, 2015 NSCA 72 ("*Tapics*"), and *Ahmed v Dalhousie University*, 2014 NSSC 330.

[57] In *Tapics*, the Nova Scotia Court of Appeal allowed a civil action in tort and contract to proceed only in respect of the part of the claim not determined by the various administrative processes pursued by the plaintiff. The respondent submits that there is insufficient factual basis upon which to conclude that the equity complaint necessarily involves relitigating of all claims heard in the disciplinary complaint process.

Reply Submissions of Student X

[58] Student X submits that there is no basis for submitting that the Judicial Policy process did not consider whether Student X's conduct constituted discrimination or harassment. Student Y's complaint under both processes were identical and the factual issue in both processes was whether, *on a balance of probabilities*, the alleged sexual assault occurred.

[59] Responding to Acadia University's argument that this application is premature and Student X should complete the internal processes before turning to the court, Student X says that the doctrine of finality and issue estoppel infer proactive prevention of inappropriate relitigation.

[60] Student X notes that the Equity Policy does not involve a hearing, but an unusual process whereby the investigator (Equity Officer) also determines whether the allegations are proven and recommends consequences. The Senior University Administrator, who makes the final decision, makes it based solely on the Equity Officer's report, without receiving independent evidence or submissions. The Equity Policy processes, which are adjudicative in nature, are effectively less procedurally fair because the Equity Officer acts as both investigator and decision maker.

[61] On the issue of jurisdiction, and in reply to the submission that the two processes are intended to work in parallel, Student X submits that the issue is not whether there is concurrent jurisdiction in both the disciplinary and equity processes but whether the matter before them should not be relitigated based upon the principles of issue estoppel and abuse of process.

The Law

[62] The case law cited by counsel deal with situations where either:

(1) both first and second proceedings were court proceedings, or

(2) where the first proceeding was an administrative tribunal proceeding and the second was a court proceeding.

This case involves a scenario where the first proceeding involves an administrative judicial tribunal hearing and appeal and the second proceeding involves another administrative quasi-judicial process of the same institution.

[63] This court relies upon a modification of the *Danyluk* analytical approach – an approach made in the context of a tribunal-to-court matrix. I could find no reported authoritative analytical approach for the tribunal-to-tribunal matrix.

[64] I have relied for overarching principles and practical guidance upon the following sources:

1. Donald J. Lange, **The Doctrine of Res Judicata in Canada, Fourth Edition**, (Markham: LexisNexis, 2015), particularly ch. 1, 2 and 5 with respect to issue estoppel and ch. 4 for the abuse of process issue;

2. *Copage v Annapolis Valley Band*, 2004 NSCA 147, for guidance in the exercise of discretion at step two of the *Danyluk* analysis; and

3. *Kasperson v Halifax*, 2002 NSCA 110, paras 57 to 66.

[65] *Res judicata* is a fundamental doctrine in all societies governed by the rule of law. It has been part of the common law in Canada since at least 1820.

[66] It has two branches – issue estoppel and cause of action estoppel. The former precludes in certain circumstances relitigation by a party of an issue clearly decided in a previous proceeding between the same parties. The latter precludes a person from bringing an action when the same cause of action has been (or could have been) adjudicated between the same parties in a previous proceeding.

[67] Issue estoppel is founded on several policy considerations.

[68] In *Danyluk*, at paras 18 to 20, Justice Binnie wrote:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken

> in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: ... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): …

[69] These policy concerns are explained further by Donald Lange in his text at pp. 4 to 9 and, in the criminal context by analogy, in *R v Mahalingan*, 2008 SCC 63, paras. 38 to 46.

[70] Lange writes that recent Supreme Court decisions demonstrate uncertainty as to which policy consideration – finality or fairness, is paramount. I conclude that this uncertainty simply reflects that the discretionary step two analysis is case specific.

[71] Lange notes that the policy concerns supporting issue estoppel and cause of action estoppel focus on the interests of the litigants.

[72] The doctrines of abuse of process by relitigation and collateral attack focus on the justice system itself.

[73] *Res judicata* is a rule of evidence. If the prerequisites are met, a party against whom the issue is decided earlier cannot proffer evidence to challenge the earlier result. The earlier determination is not only admissible, but conclusive evidence with respect to that issue.

[74] The burden is on the moving party to prove *res judicata*. (*Braithwaite v Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 1999 NSCA 77)

[75] Issue estoppel originated as a doctrine in the context of successive court proceedings. The Supreme Court has long held that the three pre-conditions to the operation of issue estoppel are:

1. the same question has been decided;

2. the judicial decision, which is said to create the estoppel, was final; and

3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[76] In the context of a tribunal-to-court matrix, the Supreme Court in *Danyluk*, at para. 25, adopted the existing preconditions, and at para 35, appears to have added this consideration relevant to the first precondition:

> A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. … there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

[77] As Lange writes, beginning at p. 33, issue estoppel applies to separate and distinct causes of action. Where a separate cause of action is different, but involves issues of fact or law which were decided as an essential and fundamental step in the logic of the prior decision, issue estoppel may apply. When the issue is decided, that issue merges by the decision and cannot be revived in a second action, even based on a separate and distinct cause of action.

[78] Application of issue estoppel to a question in an action does not necessarily terminate the cause of action, unless disposing of the question determined in the prior proceeding is the foundation of the second action.

[79] The court in *Danyluk* held that the rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance finality with fairness. The court stated that the first step is to determine whether the moving party has established the preconditions of the operation of issue estoppel. The second step requires the court to determine, whether as a matter of discretion in balancing finality and fairness, issue estoppel ought to be applied.

[80] Where the first and second proceedings are both court proceedings, the court has very limited discretion to refuse its application if the pre-conditions are met. (*General Motors of Canada v Naken*, [1983] 1 SCR 72, and Lange, pp. 227 and 288).

[81] When the first proceeding is a tribunal proceeding and the second proceeding is a court proceeding, the court's discretion is governed by a flexible approach described by *Danyluk*:

> 21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications,

> to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.
>
> …
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> 62 … 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.

[82] In *Danyluk*, the court adopted prior case law to the effect that the exercise of discretion is necessarily case specific and depends entirely upon the realities of each case. The court stated that the list of factors is open. In the *Danyluk* matrix, the court considered seven factors.

[83] When the first proceeding is a judicial tribunal proceeding, and the second is another quasi-judicial administrative proceeding by the same institution, the balancing of the two public interests – finality and fairness to the parties, necessitates additional considerations.

[84] One such additional consideration is the extent to which the administrative processes, that is, evidentiary and truth-finding procedures and standards, differ.

Application of a modified *Danyluk* analysis

[85] The second *Danyluk* precondition - a final judicial decision, simply means that the decision must be rendered in a contentious matter; the first proceeding must be adversarial in nature and not inquisitorial in nature (Lange, p. 89). A decision is final, notwithstanding that it may be appealed or subject to review (Lange, p. 95). Acadia University acknowledges that this precondition is met.

[86] The third precondition - the parties to the first judicial decision were the same persons as the parties to the proceedings in issue, simply means there must be at least two parties with adverse interests to meet the test that the decision is made in a contentious matter. Acadia University does not dispute that this precondition has been met.

[87] It is the first precondition – that the same question in issue under the Equity Policy was decided in the Judicial Policy disciplinary proceeding, that is contested by Acadia University. It acknowledges that both complaints arose from the same set of facts. It submits, however, that it is not clear what questions will arise in the Equity Policy investigation. It writes:

> the purposes and impact of the Non-Academic Judicial Process and the Harassment and Discrimination Policy are different in that the differences of the policy are more narrowly circumscribed … while there may be some overlap in the types of issues … the processes are separate, independent and distinct … neither the Judicial Board nor the Discipline Appeals Committee were asked to consider whether Student X's alleged conduct constitutes discrimination or harassment contrary to the policy.

[88] The court in *Danyluk* made these relevant statements regarding the first (or same question) precondition:

> 20 … The bar extends both to the cause of action thus adjudicated … as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): …
>
> …
>
> 24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact <u>distinctly put in issue and directly determined</u> by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, <u>once determined</u>, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In

> other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> …
>
> 54 … Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[89] Lange makes the following additional observations:

> What compromises the subject matter fundamental to the question is, therefore, a twofold investigation to determine the nature of the question. Firstly, it compromises the express question that was actually decided. … Secondly, it compromises the latent structure supporting the express question by virtue of an implied, inferred or assumed recognition of that structure. (page 48)
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> …
>
> Another way of describing the implied fundamental nature of the question is that it includes all subject matter that was a "necessary logical consequence" of the question expressly decided in the first proceeding. (page 49)
>
> …
>
> The fundamental nature of the question cannot be changed by advancing it in a different fashion. Where different legal consequences flow from the same factual question, or the same factual question can be cloaked in different legal classifications or categorizations, the question is estopped since "re-engineering" a claim and the "never-ending ingenuity of counsel to create new formulations and characterizations cannot displace" issue estoppel. (page 56)

[90] Lange reviews some caselaw respecting the effect of different burdens of proof on the same question precondition. At page 67 he writes:

> The burden of proof in civil proceedings is on a balance of probabilities. This standard, however, does not apply to the same question test. The same question test is a stringent test and must be determined by a fastidious approach …
>
> In *Angle*, the same question test arose where the first and second proceedings were both court proceedings with the same burden of proof and, therefore, no issue arose

> whether the same question test involves the consideration of different burdens of proof. That issue arose in *Alderman v North Short Studio Management Ltd.*, where Burnyeat J. held that the same question test is affected by the burden of proof when the first proceeding is a tribunal proceeding and the second proceeding is a court proceeding. Burnyeat J. stated the principle:
>
> > As to the first test set by Lord Guest [*Angle*], I am satisfied that the Board of Referees under the *Unemployment Insurance Act* is not called upon to answer the same question as must be decided by a court in a wrongful dismissal action. While some decisions of Canadian courts dealing with the first test of Lord Guest have concentrated on whether the factual base of the decisions are the same or similar in order to decide whether the first test has been met, these decisions appear to ignore the use of the words "the same question has been decided". I take those words to mean that, even if the factual base is the same, for issue estoppel to apply, the burden of proof must be the same and the quantum must be the same or substantially the same.
>
> Burnyeat J. held among other things, that the same question test had not been met because the onus to decide the question in the tribunal proceeding was less than the onus to decide the question in the court proceeding.

[91] I have significant misgivings that the first precondition to issue estoppel (same question in issue) has been met. If I am wrong as to whether the precondition was met in the step one analysis, I would decline to apply issue estoppel at the discretionary step two analysis.

<u>Step One Analysis: Preconditions to Estoppel</u>

[92] My concern with the first precondition is whether the question that was determined in the Judicial Policy proceeding is the same question to be decided under the Equity Policy proceeding.

[93] In the Judicial Policy, the Judicial Board Hearing Report and UDAC report, it appears that the determination of the factual issue was made on the basis of criminal standard of proof beyond a reasonable doubt, not the civil standard of proof on a balance of probabilities.

[94] In his December 15 brief, Student X's counsel states at p. 6:

> The Applicant's acquittal by the Appeals Committee necessarily resolved a distinct and well-defined factual issue. He said there was no significant sexual contact, whereas the Complainant alleged intercourse without consent. His acquittal, meaning that the allegation as not proved on the civil standard, is determinative of

> the sexual harassment complaint that is now before the Equity Officer. There is no dispute that the complaint was thoroughly and diligently prosecuted under the ***Non-Academic Judicial Policy***. There were three hearings, including a complete airing of *viva voce* evidence before the original Judicial Board and again before the Appeals Committee.

[95] This submission is repeated in his rebuttal brief of December 28:

> At each of the three proceedings conducted under the ***Non-Academic Judicial Policy*** – the Judicial Board hearing on March 2, 2017, the Appeals Committee appeal hearing on April 12, 2017, and the Appeals Committee re-hearing of the evidence on May 4, 2017 – the factual issue squarely in dispute was whether or not sexual intercourse occurred. There was no middle ground offered by Student X, such as mistaken belief in consent; or by Student Y, such as consent vitiated by intimidation or intoxication. The Appeals Committee's decision that there was "insufficient evidence to confirm guilt" (Affidavit of Student X, Ex. "J") must have, in the words of *Danyluk v. Ainsworth Technologies Inc.*, at para 20, "necessarily embraced" a determination that the allegation that sexual intercourse occurred was not proved on a balance of probabilities.

[96] I disagree. My reading of the Judicial Policy, the Judicial Board Hearing Report and the UDAC Report (respectively Ex A, D and J in Student X's affidavit) cause me to conclude that the determination of the factual issue in dispute was made on the criminal standard of proof beyond a reasonable doubt.

[97] In contrast, the Equity Policy offers alternative methods for resolving complaints of harassment and discrimination between complainants and 'respondents' from informal resolution to mediation and, at the most serious end of the spectrum, by 'Formal Complaint Procedure'.

[98] Even in the Formal Complaint Procedure, under the Equity Policy, the test for the determination of issues is not the criminal test. At paragraph C.7, page 3, the Equity Policy reads:

> All judgments required by the policy are subject to the ***test of a reasonable person***. The reasonable person test provides that a reasonable person in roughly the same position as the complainant would judge harassment or discrimination to have occurred as a result of the behaviour or pattern of behaviour.

[99] The 'reasonable person' test is similar to the civil standard of proof on a balance of probabilities.

[100] Even though the Judicial Policy does not expressly identify the burden of proof as being proof beyond a reasonable doubt, there is no other reasonable conclusion from the words used in the Judicial Policy and the two hearing reports than that the criminal standard of proof was applied.

[101] That the disciplinary process involved the criminal standard starts with the descriptions of the parties. In the Judicial Policy, the parties are described as the 'complainant' and 'accused'. In the Equity Policy, they are described as 'complainant' and 'respondent'.

[102] The Judicial Policy includes other clear indicia that the procedure is quasi-criminal and facts determined on the criminal standard of proof. Section A (Overview) at p. 5 reads:

> The sanction chosen as one which "fits the crime" when an individual is determined to be responsible for violating a campus regulation. The sanction is rarely solely that of punishment for the offence but is chosen because that particular sanction is believed to be educational in its impact on the offender. The emphasis, therefore, is of a dual nature, both the punish and the educate. …

[103] In Section C, "Sequence of Events and Time Limits", at pp. 11 and 12, the procedure is described as:

> **TIME AND PLACE OF HEARING**
>
> The Executive Director, Student Services shall within five (5) working days of receiving the complaint inform the accused in writing of the complaint with appropriate documentation including a copy of the Acadia University "Charged with a Non-Academic Offense?" brochure. The accused shall also be informed of the time and place of hearing …
>
> **PROCEDURES AT HEARING**
>
> The hearing shall be conducted by the chairperson of the Judicial Board. Questions of procedure or any other matters pertaining to the general conduct of the hearing shall be subject to the rule of the chairperson. The complainant and the accused person shall both be permitted to testify personally and call witnesses, provided, however, that the complainant's case against the person accused shall be completed prior to the accused person testifying or calling witnesses. In no event can the accused person be compelled to testify. Upon completion of the above, both the complainant and the accused, in that order, are permitted time for rebuttal and summary.
>
> …

ADVISORS

… Two student Advisors are available to the complainant and accused to assist in discussing complaints, preparing for hearings, and in presenting cases at a hearing. …

Lawyers are permitted to represent clients at hearings of the Judicial Board, Acadia University Disciplinary Appeals Committee and at disciplinary hearings before the Board of Governors.

RENDERING A DECISION

… The accused must then be informed in writing of the decision in the case and of the right to appeal.

[104] Section D, "Offenses and Sanctions", describes the third category of offences as follows:

3. **Physical Violence against Persons**

Anyone who actually or threatens to physically assault, strike, grab, push or threaten with a weapon a Campus Patrol Officer, Security Officer, University Official, Senior Resident Assistant, Resident Assistant, Students' Union Official, University employee or contract employee performing his or her duty or any other member of Acadia University campus community may be guilty of an offence.

Anyone who encourages, or engages in any form of assault, violence or threats to any person on Acadia University campus, or on any other member of Acadia University community off campus may be guilty of an offence.

Any student who sexually assaults or threatens sexual assault of any person on Acadia University campus, or any other member of Acadia University community off campus may be guilty of an offence.

(a) **Assault**: The act of physically touching or striking another person against that persons' will.

(b) **Physical Abuse**: The definition of assault provided shall not limit the flexibility of the Executive Direct, Student Services or the Coordinator, Student Community Development in making a judgment about which charge best applies to a particular situation. This definition should also not be interpreted in such a way as to limit the flexibility of the Judicial Board to find a person guilty of "Physical Abuse" (as a lesser charge) if he/she had originally been charged with "Assault". In short, the Judicial Board should be able to use its judgment and should be able to decide that if the person is not guilty of assault, he/she may still be guilty of physical abuse.

> Verbal provocation may not be considered by the Judicial Board in determining the innocence or guilt of an individual charged with physical abuse or assault. However, it may be taken into account by the Judicial Board in imposing a penalty on an individual who has been found guilty of physical abuse.

[105] At page 20, the policy describes the guidelines for the imposition of sanctions for violation of the third category of offences as follows:

> 6. **Physical Violence against Person –**
>
> **Physical Abuse**: Penalties range for a fine to dismissal from Acadia University plus a possible ban from the environment where the offense occurred.
>
> **Assault**: For the first offense, the minimum penalty is a fine plus disciplinary probation. For the second distinct offense, a minimum penalty of dismissal from Acadia University effective immediately on a finding of guilt and for the balance of the academic year. Penalties will be imposed on those found guilty through Acadia University's judicial process and/or through the courts.

[106] Section E, "Sequence Summaries", reads in part:

> **JUDICIAL HEARING SEQUENCE**
>
> …
>
> 4. The accused is asked whether the case is a question of innocence or guilt or whether it is a question of being unable to agree on a sanction with the Coordinator, Student Community Development. …
>
> 13. In cases where it is a question of innocence or guilt, the Chairperson will ask all those present to leave and then will follow this sequence:
>
> (a) The Board will determine innocence or guilt;
>
> (b) All parties will be called back and told what the decision is (innocence or guilt only) and the reasons for the decision.
>
> …
>
> 15. The Chairperson of the Judicial Board will submit the written case summary to the Coordinator, Student Community Development. This summary shall include:
>
> (a) The key points in the testimony of the accused and complainant;

(b) A list of witnesses and the key points of their testimony;

(c) How much weight was given to each piece of evidence;

(d) The decision:

I. Innocent or guilty;

II. If guilty, the sanction(s) and reasons for it (them).

16. The complete decision, with reasons, will be communicated to the accused and all affected parties in writing.

[107] The "Appeal Hearing Sequence" at para. 11 reads:

> If the Appeals Committee decides that the appellant should be allowed to present new evidence or explain new developments, then it will rehear the case immediately.

[108] Following a lengthy hearing on April 12, 2017, the UDAC released a decision on April 17, 2017, granting the appeal on the basis that it was not clear that the complaint had been filed within the 30-day time limit for filing a complaint. UDAC therefore granted a new hearing before itself.

[109] The Judicial Board Hearing Report consisted of five-typed pages that outlined in detail all the content requirements identified in Section E, para. 15. It described the accused as 'the accused'; listed the name of the complainant's and accused's advisors (as well as the accused's lawyer) and witness names. It identified the members of the Board who sat on the hearing; it described the 'charge' being heard as 'sexual assault'. It described in detail the evidence considered, including the summary of the key points in the testimony of the accused and the complainant; the key points of the witnesses' testimony and how much weight was given to each piece of evidence. It particularly assessed the credibility of the witnesses. It gave reasons for its finding that Student X was guilty of sexual assault.

[110] In contrast to this, the UDAC Report of its May 3rd hearing is very short. It was signed on May 8th. It contains no summary of the evidence of any of the witnesses nor any reasons whatsoever for its decision. The decision is given in two sentences:

> Based on the information presented on May 3rd at the hearing, the Appeals Committee has determined that there was insufficient evidence to confirm guilt. The Appeals Committee, therefore, finds [Student X] not guilty.

[111] It is clear that the Judicial Board and the UDAC conducted hearings of a quasi-criminal nature, using terminology throughout that applies to criminal proceedings. Nowhere does it expressly describe the burden of proof, but the detailed decision of the Judicial Board, supporting its finding of guilt, clearly indicates that "based on the sheer number of inconsistencies, discrepancies and lies that emerged from the testimony and statements of the accused and his witnesses", as opposed to the complainant's testimony "which was consistent throughout", Student X was guilty of the offense of sexual assault.

[112] Even though the UDAC Report is written in the context of a criminal proceeding, it is impossible to determine what evidence it considered and what factual findings it made.

[113] Section C.7 of the Equity Policy defines the basis for any findings of fact. It reads:

> All judgments required by the policy are subject to the ***test of a reasonable person***. The reasonable person test provides that a reasonable person in roughly the same position as the complainant would judge harassment or discrimination to have occurred as a result of the behaviour or pattern of behaviour.

[114] The burden of proof is not that of proof beyond a reasonable doubt, but rather a 'reasonable person' test, a standard not identical to the civil test of determination on a balance of probabilities, but substantially alien to the quasi-criminal standard applied in the disciplinary process.

[115] I find that the same question was not in issue before, or decided in, the Judicial Board proceeding, nor by the UDAC at the rehearing, as is to be determined under the Equity Policy.

[116] The first precondition to issue estoppel has not been established.

[117] My conclusion would have differed (if not in respect of issue estoppel, then in respect of the abuse of process doctrine) if, in the first proceeding, the 'accused' was convicted on a question of fact, or mixed question of fact and law, on the criminal burden of proof beyond a reasonable doubt, and the standard or burden of proof in the second proceeding in respect of the same fact(s) or mixed fact(s) and law was the civil burden.

Step Two Analysis

[118] If I am wrong, then I am obligated to assess whether issue estoppel should apply.

[119] The Supreme Court in *Danyluk* stated that discretion as to whether issue estoppel should apply to a prior tribunal decision is necessarily broader than whether it should apply to a prior court determination "because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers" (para 62). At paragraph 67, Justice Binnie wrote:

> 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.

He stated that the list of factors is open.

[120] Four factors weigh against finding that issue estoppel should apply in this case.

[121] The first factor was considered in the Step One analysis. The same question was not asked and answered in the Judicial Policy proceeding that is to be asked and answered in the Equity Policy proceeding regarding sexual harassment. The quasi-criminal standard of proof in the Judicial Policy procedure is not relevant to the decision that flows from the Formal Complaint Procedure under the Equity Policy.

[122] The second factor focuses on the vastly different approaches to, and purposes of, the two policies. The Judicial Policy's express purpose is to punish for offences after a formal hearing procedure (and appeal). The Equity Policy's purpose is not to punish offences but rather, as set out in Section B of the policy, to "provide and maintain a learning and work environment free from all … harassment."

[123] The contexts or matrices of the two policies differ so vastly as to make a finding of fact relevant to the first process irrelevant to any factual findings required under the second process.

[124] The third and arguably most important factor mitigating against the application of issue estoppel in this case is the absence of any findings of fact or law, or analysis, or reasons, in the UDAC hearing report following the May 3rd hearing. This is in contrast to the detailed analysis and reasons of the Judicial Board.

[125] When the UDAC determined by its April 17, 2017, decision to rehear the complaint, it was required by Section E, "Sequence Summaries", para. 11 of Ground #2, to rehear the case "using the procedures outlined for Judicial Hearings". Those procedures included paras 15 and 16 in Section E, "Judicial Hearing Sequence", which paragraphs, reproduced at para. 106 of this decision, mandate reasons.

[126] The UDAC's two sentence conclusory determination is devoid of analysis and reasons. It does not provide a summary of the key points in the testimony of the accused and complainant; it does not summarize the key points in the testimony of the other witnesses; it does not weigh any of the evidence.

[127] The Supreme Court of Canada has explained on more than one occasion when and why reasons for decisions by administrative tribunals are necessary. I have reviewed and adopt the analysis of when, and what kind of, reasons tribunal decision makers are required to give, in two texts: Guy Régimbald, **Canadian Administrative Law**, 2nd Edition (Markham: LexisNexis, 2015) at pp. 325 to 334; and, Sara Blake, **Administrative Law in Canada**, 5th Edition (Markham: LexisNexis, 2011) at pp. 92 to 95.

[128] In this case, the Judicial Policy mandated that a decision included the key points in the testimony of the accused, the complainant, and their witnesses, as well as setting out how much weight was given to each piece of evidence. It required the decision with reasons be communicated to all affected parties. In this respect, the UDAC breached its duty of procedural fairness, which is a fundamental requirement of natural justice.

[129] It is not relevant to my assessment in balancing fairness with finality that Student Y did not appeal to the Board of Governors. It is Student X who seeks an injunction on the basis that the same question or factual issue was decided under the Judicial Policy proceeding that is fundamental to the determination of whether Student X harassed Student Y.

[130] Without any reasons from the UDAC, it is impossible to know what findings were made by it.

[131] The seventh factor considered by Justice Binnie in *Danyluk* in the exercise of discretion is set out under the heading: "The potential injustice". He wrote:

> 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.

[132] He quotes from Jackson J.A. in *Iron v Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 WWR 1 (Sask CA), as follows:

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

[133] In *Danyluk*, the court considered the accumulative affect of the discretionary factors in refusing to apply issue estoppel in that case.

[134] The cumulative effect of the different onus of proof and contexts of the policies – meaning the questions differed, and the failure of the UDAC to disclose its findings of fact are both a failure to fulfill its duty under the Judicial Policy but also its duty of procedural fairness. Issue estoppel should not apply in this case.

Abuse of Process Doctrine

[135] Student X submits that the Equity Policy is an abuse of process. The codification of the procedure for abuse of process applications in *Civil Procedure Rule 88* does not affect the fundamental analysis.

[136] The leading decision is *Toronto v CUPE*.

[137] Donald J. Lange, at Chapter 4, sets out a thorough and clear analysis of this doctrine.

[138] Abuse of process by relitigation bars a second proceeding where the integrity of the judicial decision-making process will be undermined.

[139] The doctrine has a close relationship to issue estoppel and cause of action estoppel. Lange submits that the courts have stated that abuse of process is *res judicata* in the wider sense or a form of *res judicata*, and that abuse of process arguments are *res judicata* arguments in another guise. That submission was expressly adopted by Justice Arbour for the Supreme Court of Canada for *Toronto v CUPE* at para. 38:

> It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one

> (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, 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.

[140] Lange writes that this doctrine has largely been a response to the perceived deficiencies in the doctrine of issue estoppel and cause of action estoppel. The one concrete example of where issue estoppel will not apply, but abuse of process may apply, is where the same question is in issue in two proceedings, but the parties are not the same. That justification for application of abuse of process does not exist in this case, as the same party test for issue estoppel is met in this case.

[141] Lange writes at pp. 191 to 192:

> Courts have invoked the doctrine of abuse of process by relitigation as a concurrent ground with estoppel, perhaps unnecessarily when issue estoppel or cause of action estoppel would suffice to bar a proceeding. Courts have also invoked the doctrine as a judicial safety net to possible error in the application of the complex estoppel doctrines. Rarely has abuse of process been invoked alone, in and of itself, to preclude relitigation. The frequency of its invocation, as a companion to or backstop for issue estoppel and cause of action estoppel, has made commonplace what was once a rarely applied, last resort protection of the justice system. An exemplary approach against this practice is found in *Martin v Goldfarb* where Perell J. stated: "Resort to the doctrine of abuse of process is redundant in the circumstances of the case at bar." The court applied issue estoppel. As well, in *Chamberlain v Canada (Attorney General)*, Gleason J. stated: "The doctrine of abuse of process is normally not applied when issue estoppel pertains."

[142] *Toronto v CUPE* was a case where the preconditions to issue estoppel were not met. In applying the doctrine of abuse of process for the purpose of stopping a union from relitigation an employee's conviction on facts in a prior criminal proceeding that were relevant to an arbitration, the court set out terms for the application for the doctrine which Lange summarized at p. 194 as follows:

> (1) The doctrine is not encumbered by the specific requirements of *res judicata*.

> (2) The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.
>
> (3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.
>
> (4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.
>
> (5) The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision of little import in the application of the doctrine.
>
> (6) The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.
>
> (7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

[143] Interestingly, Lange notes that while the doctrine has been mostly invoked to prevent relitigation, it has also been invoked to permit litigation where the court is not persuaded that there has been an attempt to relitigate a matter already decided and where it would be an abuse of process not to let the matter go forward.

[144] Finally, Lange suggests that a court should not apply the doctrine "when its decision is not automatic or requires considerable thought". Said differently, it should not be applied except in those rare circumstances where the abuse is clear and obvious.

[145] This court's analysis that, as a matter of fact and mixed law and fact, the question was not the same in the two processes applies equally to the abuse of process by relitigation analysis. As noted, a not guilty verdict in a quasi-criminal proceeding is not a determination of the same question for a different purpose under the 'reasonable person' test described in the Equity Policy.

[146] More importantly in this case, the Judicial Board did convict Student X of sexual assault, with detailed reasons; the UDAC acquitted with no reasons. The latter circumstance, in the context of the Judicial Policy and the requirement for reasons, is problematic and provides no factual foundation for determining that the complaint under the Equity Policy would constitute relitigation of the same question or facts.

[147] The motion for a declaration that entertainment of the complaint by Student Y under the Equity Policy would constitute an abuse of process is dismissed.

Injunction

[148] It flows from the court's determination with respect to the claims of issue estoppel and abuse of process that the court dismisses the motion to enjoin Acadia University from proceeding to investigate Student Y's complaint against Student X under the Equity Policy.

Costs

[149] At the end of the hearing, the respondent advised that if it was successful, it was not seeking costs against Student X. For that reason, no costs are awarded.

Warner, J.