THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on October 27, 2006;

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995*;

AND IN THE MATTER OF the *University of Toronto Act*, 1971, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

BETWEEN:

THE UNIVERSITY OF TORONTO
- and -
Mr. S.S.

Members of the Panel:
- Mr. Raj Anand, Chair
- Professor Ikuko Komuro-Lee, Faculty Member
- Mr. Christopher Oates, Student Member

Appearances:
- Ms. Lily Harmer, Assistant Discipline Counsel for the University, and Ms. Jodi Martin
- Mr. Maurice Vaturi, Counsel for the Student, and Mr. Ben Zacks
- Mr. S.S., Student

In attendance:
- Professor G.S. Graham, Dean's Designate, University of Toronto at Mississauga
- Ms. Lucy Gaspini, Academic Affairs Officer, University of Toronto at Mississauga

Preliminary

[1] The Trial Division of the University Tribunal was convened on November 26, 2007 and January 11, 2008 to consider charges under the University of Toronto *Code of Behaviour on Academic Matters, 1995* (the "Code") laid against the Student by letter dated October 27, 2006 from Professor Edith Hillan, Vice-Provost, Academic.

[2] The Student attended the hearing and was represented by counsel.

Hearing on the Facts

[3] The charges are as follows:

1. On or about April 24, 2006, you knowingly used or possessed an unauthorized aid or aids or obtained unauthorized assistance in an academic examination or term test, namely the final examination in GGR207H5S – Cities, Urbanization and Development, contrary to Section b.i.1.(b) of the *Code of Behaviour on Academic Matters*.

2. In the alternative on or about April 24, 2006, you knowingly engaged in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not otherwise described in the *Code* in order to obtain academic credit or other academic advantage of any kind during the final examination in GGR207H5S – Cities, Urbanization and Development, contrary to Section B.i.3.(b) of the *Code*.

Note: Wherever in the *Code* an offence is described as depending on "knowing", the offence shall likewise be deemed to have been committed if the person ought reasonably to have known.

[4] Particulars of the charges are as follows:

1. At all material times you were enrolled in GGR207H5S – Cities, Urbanization and Development. This course was taught by Professor Allan Walks.

2. The final examination in the course was held on April 24, 2006. No aids were permitted in the examination room. Jackets with front pouches were required to be removed.

3. During the examination, you were found to be in possession of a cell phone, cue cards containing text related to the examination, and a photocopy of a prior year's examination with answers.

[5] In response to the reading of the Charges, the Student pleaded "Not Guilty" to both Charges.

[6] The University called three witnesses: Mr. Eerik Ilves, the Teaching Assistant (TA); Ms. Jennifer Heywood, the Chief Presiding Officer (CPO); and Professor Walks.

[7] The first witness, Mr. Eerik Ilves, testified from Vancouver via video conferencing. Mr. Ilves testified that he was the TA for GGR207, *Cities, Urbanization and Development* and was present as an assistant invigilator for the final exam held on April 24, 2006. As an invigilator, Mr. Ilves was responsible for taking attendance and supervising students during the exam to ensure compliance with examination procedures. Mr. Ilves testified that the CPO made a series of announcements at the outset of the exam and periodically

thereafter as groups of students arrived after the start of the exam. These announcements informed students that cell phones, notebooks, bags, and jackets with large pockets, described as "kangaroo jackets", were prohibited during the exam.

[8] During the exam, Mr. Ilves escorted the Student to the washroom where he waited 10 to 15 feet from the washroom door for the Student to return. Upon exiting the washroom, the witness noticed that the Student held an open cell phone in his hand. Mr. Ilves testafied that the Student appeared to be checking the cell phone and pressing its keys. Mr. Ilves reported being surprised to find the Student in possession of a cell phone, given that students had been told repeatedly that cell phones were prohibited during the exam. As the Student approached the witness, Mr. Ilves told the Student that he was not supposed to be in possession of a cell phone and that the Student should make sure that the cell phone was turned off. The Student assured Mr. Ilves that he had the phone on silent. Mr. Ilves reiterated the prohibition against cell phones during the examination, but promised the Student that he would not report the incident if the Student promised to turn the phone off. The witness did not check to see if the phone had been turned off and, therefore, could not testify with certainty whether the cell phone had, indeed, been turned off.

[9] Following the washroom break and approximately 15 minutes after returning to the classroom, the CPO approached Mr. Ilves and showed him a stack of note cards that she had taken from the Student. Mr. Ilves then informed the CPO that he had found the same Student in possession of a cell phone during the washroom break. Upon hearing this, the CPO approached the Student and confiscated the cell phone.

[10] The CPO and Mr. Ilves sought advice from the Exams Office to determine if they were allowed to keep the phone or if it had to be returned immediately at the end of the exam. They were instructed by staff in the Exams Office to bring the phone to the Exams Office. Mr. Ilves testified that he had not viewed the contents of the cell phone.

[11] Mr. Ilves was asked to describe the clothing that the Student had been wearing during the washroom break. He reported that the Student wore a large hooded sweatshirt of the type that the CPO had instructed students to remove prior to the exam. Discipline counsel then asked the witness what he understood to be the problem with this type of jacket. He testified that it was probably the size of the pockets that was problematic, since it would be easy for students to hide items in them. Mr. Ilves acknowledged that he had not raised the jacket issue when he accompanied the Student to the washroom for two reasons: firstly, because he thought that the prohibition against jackets with large pockets was an odd request and, secondly, he did not want to cause the Student further anxiety. When asked if he had received any invigilator training, the witness replied that he had not.

[12] During cross-examination, counsel for the defence, Mr. Vaturi, asked Mr. Ilves if students were stopped at the front of the room until the conclusion of the announcements, to which the witness responded that he could not remember. When asked if he had ever heard the expression "kangaroo jacket" before, the witness testified that he had not, but that the CPO had described what she meant by the term, namely jackets with large

pockets or a pouch at the front. The witness was asked why he had thought the prohibition against such clothing was an odd request, to which Mr. Ilves responded that that rule had not been in effect in other exams that he had invigilated. Mr. Ilves testified that, when he saw the Student leaving the washroom with the cell phone, he reminded the Student that cell phones were not permitted during the exam and that he should shut the phone off. When asked why he had merely instructed the Student to shut the phone off, rather than confiscating the phone, the witness replied that he bent the rules a little bit, since he had no reason to cause the Student stress. The witness was asked if the Student knew the rules were being bent for his benefit, to which Mr. Ilves replied that he presumed so, given the announcements that were made at the beginning of the exam.

[13] The second witness, Ms. Jennifer Heywood, was asked by discipline counsel to describe the role of the Chief Presiding Officer. Ms. Heywood explained that as CPO she is responsible for ensuring that an examination is conducted in an equitable manner; that the examination environment is as comfortable as possible, so that students can perform to the best of their ability; and that all examination regulations are followed. Ms. Heywood testified that she had attended CPO training sessions, received an 8-page training package and was provided with ongoing email updates and reminders from the UTM Registrar's Office. The training package included a list of announcements that had to be made at the beginning of every exam.

[14] The witness testified that students are permitted entrance to the exam room 15 minutes prior to the beginning of the exam. While the students were assembled outside of the exam room and during their procession into the room, Ms. Heywood announced that cell phones must be turned off and placed in the students' bags and that jackets and bags must be left at the front of the room prior to taking a seat in the exam room. Because a large number of students were writing this exam, Ms. Heywood repeated this announcement several times. At 5 minutes before the exam, the doors were closed. The TA, who was standing at the door, allowed latecomers to wait by the door inside the exam room until they could be seated. Students who arrived after the exam had started were required to speak with Ms. Heywood privately, at which time she informed me them of the rules concerning cell phones, jackets and bags. Ms. Heywood recalled that she spoke with some late arrivals privately, but was not certain if the Student was among them.

[15] Ms. Heywood testified that, once all the students were seated, she read the official exam regulations to them from the front of the room. The witness also testified that these same regulations are posted on the door of every examination room and are printed on the first page of every examination. The notice posted on the door and printed on the examination states:

> "It is an academic offence for students to possess the following items at their examination desks: cell phones, pagers, personal digital assistants or wristwatch computers. If any of these items are in your possession, put them in your belongings at the front of the room before the examination begins. No penalty will be imposed."

Ms. Heywood reported that after reading this notice aloud, there were a few students who came forward to deposit their cell phones with their other belongings. For those students who were afraid of losing their cell phones, Ms. Heywood offered to hold their cell phones at the front of the room until the conclusion of the exam. In addition to these official announcements, the witness testified that she also made a special announcement regarding various items of personal apparel, including kangaroo jackets. When asked to define a "kangaroo jacket", the witness said it was a jacket that has a hood and a pocket in the front. Ms. Heywood testified that, while the students were finding their seats, she instructed them to remove such jackets. The witness was asked if she provided an explanation of what she meant by the term "kangaroo jacket", to which Ms. Heywood replied that she did.

[16] Discipline counsel asked Ms. Heywood if she was acquainted with the Student prior to this incident, to which she responded that she was not. The witness' first encounter with the Student occurred when the Student returned from the washroom, at which time Ms. Heywood noticed that he was wearing a "kangaroo jacket". Upon seeing the Student, Ms. Heywood approached his desk and explained that such a jacket was not permitted during the exam. The Student indicated that he wanted to keep the jacket on, so Ms. Heywood asked him to show her what, if anything, was in his pockets. The Student readily complied and withdrew from his pocket a piece of paper and some index cards. Ms. Heywood identified the items she had taken from the Student. The paper was the 2005 Spring examination for GGR207H5S and the cards contained notes on urbanization.

[17] Upon finding and confiscating the above listed items, the witness informed the Student that it was an academic offence to be in possession of such material during an exam. Ms. Heywood instructed the Student to continue writing and that the issue would be dealt with at the end of the exam. Ms. Heywood recalled that the Student apologized for having the items. Following this exchange, Ms. Heywood sought the advice of the instructor of the course, Professor Walks. Professor Walks identified the items Ms. Heywood confiscated as an old exam from the GGR207H and study notes related to the course. While in conversation, the TA joined Professor Walks and Ms. Heywood and reported finding the Student in possession of a cell phone. He relayed the instructions that he had given the Student regarding the cell phone. The TA was told that asking the Student to simply shut the phone off was not sufficient and that the phone would also have to be confiscated.

[18] Ms. Heywood then approached the Student and asked him if he was in possession of a cell phone, to which he replied that he was. The witness informed the Student that possession of a cell phone constituted an academic offence, that she had to confiscate the phone, and that the Student was to remain after the exam to discuss these issues. At the time the phone was confiscated, the witness noticed that the phone was on. Ms. Heywood placed the phone on the podium at the front of the room. While it sat on the podium, the phone was vibrating and receiving text messages. The witness characterized this as an extreme case because, during the thirty exams over which she had presided, she had never encountered anyone who so blatantly disobeyed examination rules.

[19] At the end of the exam, Ms. Heywood and Professor Walks informed the Student that the old exam, the index cards and the cell phone had to be taken to the Exams Office in the Registrar's Office. When Ms. Heywood was asked about the *Anomaly Report* she was required to write, she testified that she wrote the report when she returned to the Exams Office.

[20] On cross-examination, Ms. Heywood was asked to explain why she characterized this as an extreme case. She replied that it was not because the act was "more wrong" than other types of misconduct, but that it occurred after so many verbal and written warnings. Defence counsel asked the witness where, in the *Code of Behaviour on Academic Matters*, does it prohibit cell phones during examinations. Ms. Heywood replied that the *Code* prohibits all types of unauthorized aid and that a cell phone falls into the category of an unauthorized aid. Mr. Vaturi then asked the witness to indicate where in the *Code* a cell phone is defined as an unauthorized aid. At this juncture, counsel for the University, Ms. Harmer, acknowledged that the *Code* does not specifically identify cell phones as unauthorized aids. Ms. Heywood testified that the University had made it clear that cell phones were considered unauthorized aids when it published prohibitions against them on examinations and exam room doors.

[21] On direct examination, the third witness, Professor Walks, testified that he had written on the examination that no aids were permitted, which meant that students were prohibited from bringing anything into the exam room that could assist them to answer the exam questions. The witness confirmed that the warning quoted in paragraph 15 above was printed on the examination, in compliance with University policy.

[22] Professor Walks was asked if he recalled the announcements made by the CPO, to which he responded that he did. He explained that CPOs were given pre-written text to read at the outset of every exam and he confirmed that he heard the CPO read the announcement at this exam. Professor Walks also recalled that the CPO made an announcement regarding jackets, specifically kangaroo jackets, and that she had described to the students what she meant by the term.

[23] With respect to the incident involving the Student, Professor Walks could not remember if he had seen that the phone was on or if he had been told by the CPO that it was on when taken from the Student. Professor Walks identified the paper items taken from the Student: a copy of an old GGR207 final exam and index cards with notes relating to the content of the material being tested. The witness testified that the old exam contained similar, and in some cases identical, questions to those on the exam that the Student was writing. At the end of the exam, Professor Walks accompanied the CPO and the Student to the Registrar's Office, at which time the cell phone and index cards were given to the Registrar. The witness stated that he did not review the contents of the text messages on the cell phone; rather the Registrar checked the text messages.

[24] The Chair asked Professor Walks how students would gain access to previous exams, to which the witness responded that old exams are made available in the library. The

witness was then asked if an answer key was provided with the exam, to which he responded that students had to find the answers on their own initiative.

[25] Defence counsel asked the witness how an old exam can be an aid, if none of the answers are provided. Professor Walks agreed that, without answers, an old exam could not be an aid. Professor Walks was then asked to compare the notes on the index cards to the answers the Student provided on his exam. The comparison did not provide any evidence that the Student had copied from the cards or used the cards to help answer the exam questions. In fact, the witness acknowledged that some of the answers on the note cards were overlooked in the answers provided on the exam.

[26] Mr. Vaturi then questioned Professor Walks about the meeting he had with the Student on May 3, 2006. At that meeting, the Student showed Professor Walks a collection of cards, approximately 40 in total, from which the few cards found in his possession during the exam had been taken. During that meeting, the Student explained to Professor Walks that the whole incident was a mistake; he had never intended to use the items for the purpose of cheating on the exam. The cards were in his pocket because he had been using them to study prior to the exam; he had simply forgotten to remove them before entering the exam room. When asked if the Student seemed to be honest and genuine during the meeting, Professor Walks confirmed that that had been his assessment.

[27] Mr. Vaturi asked Professor Walks whether, if a person were going to cheat, one would choose a few note cards randomly or take the whole set of cards to the exam. The witness responded that having a small subset of the cards in his possession seemed to indicate that the Student had no intention of using the cards as an aid during the exam. Professor Walks was then asked if the Student achieved a higher mark on the final exam compared to his term work, to which the witness responded that he had not. The final exam mark was consistent with the assignments completed by the Student during the term.

[28] On direct examination, the Student admitted that his academic record was not particularly good. He noted that there had been some improvement over the 5 years he attended University of Toronto, but acknowledged that the first few years were rather poor. Mr. Vaturi asked the Student if he had taken any steps to improve his performance, to which the witness responded that he had sought help from the Academic Skill Centre at UTM in his third year. The Student was instructed to note key concepts on cue cards while reading course materials, and then use these cue cards as study aids. The Student confirmed that he followed this advice.

[29] Mr. Vaturi asked the Student about his exam schedule in the Spring of 2006. The Student explained that he had six final exams scheduled as follows: April 10, 17, 19, 24, 25, and 26. The exam in question occurred on April 24, 2006. The Student testified that he studied during the weekend prior to the exam (April 22 and 23) in a 24-hour library located at UTM. He reported that he went home only to freshen up and then returned to the library. Consequently, he got very little sleep prior to the exam. The Student could not recall eating on the day prior to the exam. Defence counsel produced a doctor's

report dated April 26, 2008 which stated that on the 26th the Student was experiencing weakness, fatigue, dehydration and headache.

[30] The Student reported that he arrived in the examination room after 12:00 noon, whereupon he noticed that other students had already arrived and taken seats. The Student testified that he felt very nervous when he arrived to write the exam. The witness reported that he did not hear any announcements; he did not hear Ms. Heywood ask him to remove his kangaroo jacket.

[31] When asked about the cell phone, the Student admitted that he had a cell phone in his possession, but he thought that he had turned it off before he entered the exam room. However, the phone he was using on the day of the exam was a loaner phone, which had been given to him while his regular phone was being repaired. The loaner phone was a different model than the one the Student was accustomed to using. The Student speculated that perhaps he had inadvertently left the cell phone on because he did not know how to operate it properly. When asked why the Student had not turned the phone off after the washroom break, as the TA had instructed him, the Student replied that he thought he had shut the phone off. The Student again concluded that he had failed to shut the phone off because he was not familiar with the particular model loaned to him.

[32] The Student recollected that the CPO asked to check the pockets of his jacket after learning about the cell phone, not before, contrary to the testimony of the CPO. He stated that a few other people who were seated in close proximity also had their jackets checked. The Student had the impression that others were searched as a cover, so that he would not feel singled out. The witness reported being as surprised as the CPO to find the cue cards and exam paper in his pocket. The Student stated that he did not make a fuss; he simply reached into his pocket, found the items, and handed them over to the CPO.

[33] The witness was asked if he knew that possession of a cell phone constituted an academic offence. He replied that he did not think it was an offence to merely be in possession of a phone; rather, it was his understanding that a student could possess a cell phone during an exam provided it was turned off. The Student was then asked to review the warning written at the top of the exam paper. He was asked what he understood an "aid" to be. He reported that an aid would be anything that might enhance his performance on an exam. The Student admitted that he had merely skimmed the warning paragraph, rather than reading the text in detail. The witness stated that, when he read that certain items were prohibited *at* the desk, he interpreted that to mean *on* the desk.

[34] On cross-examination, the Student was asked if he was late for all his exams, to which he replied that he was not. It was then suggested to the Student that he must be familiar with the rules regarding books, bags, jackets, etc., since he attended some exams on time. The Student confirmed that he was aware of the policies and that he complied with them at all exams. The Student also confirmed that he had been told at previous exams that cell phones, calculators, etc. were not permitted at the desk during the exam. The witness testified that, while he had heard the University announcements read by either a CPO or

an instructor at other exams, he did not actively listen to the announcements, since he was confident that he had already complied with the policies. Given that he had heard these announcements at other exams, discipline counsel presumed that the Student was aware that he could be charged with an academic offence for possessing prohibited items during an exam. The witness affirmed that he was aware of the possibility; however, he reiterated that he understood *at* the desk to mean *on* the desk.

[35] Discipline counsel challenged the Student's explanation for the cell phone being on. After reviewing the witness' earlier testimony, the Student was asked how he could not have known how to shut the phone off, since he had already written two exams after receiving the loaner phone. The Student responded that, although a cell phone is his "life-line" and that he normally took one wherever he went, he could not remember if he had taken his cell phone to the two exams he had written on April 17 and 19.

[36] On November 27, 2007 at 12:41 a.m. the hearing adjourned.

[37] On January 11, 2008 the University Tribunal re-convened to continue the hearing. At the outset, the Chair provided an overview of the testimony heard on November 27. He asked counsel for both parties to explain the conclusions that they wished the panel to draw based on the testimony already heard.

[38] Discipline counsel began with a review of the *Code*, specifically Section B.i.1.(b), which states that "it shall be an offence for a student knowingly to use or possess an unauthorized aid or aids or obtain unauthorized assistance in any academic examination or term test or in connection with any other form of academic work". In the University's submission, the Student knowingly possessed unauthorized aids in the form of a cell phone (which was turned on), cue cards, and an exam from a previous academic year. Counsel reviewed the definition of knowing by again referring to the *Code*, which states "Wherever in this *Code* an offence is described as depending on 'knowing', the offence shall likewise be deemed to have been committed if the person ought reasonably to have known."

[39] In light of the Student's testimony, the University argued that the Student knew or ought reasonably to have known that the items found in his possession were unauthorized aids. To substantiate this conclusion, counsel for the University directed the panel's attention to the Student's ROSI record, which revealed that the Student, at the time of the alleged offence, was registered in the second term of his third year at the University. Given the Student's experience and knowledge, the University argued that it was very difficult to believe that the Student had not taken greater care in making sure that he was not in breach of the rules. It was incumbent upon the Student to make sure that he was in compliance with the exam rules. With respect to the "ought reasonably to have known" aspect of the *Code*, discipline counsel introduced a decision of the Discipline Appeals Board, which affirmed that the *Code* "penalizes not only intentional [offences] but also [offences] that result from unreasonable ignorance ... It is important to note and to reflect in sanctions that the offence occurs not only when the student knows, but also when the

student 'ought reasonably to have known'."[1] The University concluded that the Student knew, but that he chose not to take the necessary steps to abide by the rules. However, even if he did not know some or all of the rules or if he did not know that he was in possession of prohibited items, he ought reasonably to have known and he ought to have taken steps to deal with them.

[40] Counsel for the Student focused the panel's attention on the meaning of the word "aid" and noted that the *Code* does not define a cell phone as an unauthorized aid. While acknowledging that cell phones were prohibited, defence counsel pointed out that cell phones were not identified as aids. The cue cards and old exam can legitimately be called aids, since they are connected with the course and academic performance; however, a cell phone is something else. Mr. Vaturi reminded the panel of his client's cooperative behaviour during the exam and the candor of his testimony at the hearing. The Student had stated frankly that he was unaware that he had aids in his jacket pocket and he admitted to being ignorant of how to correctly operate the loaner cell phone.

[41] Defence counsel undertook an analysis of the phrase "ought reasonably to have known". Mr. Vaturi argued that the phrase entails more than mere knowledge; it suggests a subjective element. It implies the intent to do wrong.

[42] Following these submissions, the Chair asked if the argument put forth by the Student could not be said of thousands of other students registered at the University. That is, most students report feeling stressed, fatigued and anxious when writing exams and, therefore, may not pay attention to things they might otherwise. Nothing in the evidence presented distinguishes the Student's state of mind from thousands of other students. Why should this Student be excused from the objective standard of "ought reasonably to have known" he was in possession of unauthorized aids? In response, Mr. Vaturi agreed that if all students suffer the same state of mind, then they all could make the same claim as his client. However, he argued that generalizations should not be made; each case must be considered on its own merits.

[43] In her reply, discipline counsel discussed the concept of "unauthorized aid". She stated that it is clear that an unauthorized aid is anything that is not allowed in an exam that could help or assist a student in writing an exam. Ms. Harmer argued that "unauthorized aid" is not defined in the *Code* for a reason: it is impossible to create an exhaustive list, since the *Code* cannot anticipate every situation or every new invention.

Decision of the Tribunal

[44] Following deliberation, the panel found the Student guilty of having committed an offence under Section B.1.i.(b) of the *Code*. The panel concluded that the Student subjectively knew and ought reasonably to have known that the three items (cue cards, previous year's exam and the cell phone, at least while on) were unauthorized aids; and

[1] *In the Matter of the University Tribunal (Appeal Division) between the University of Toronto and Mr. C.Z.*, heard on March 30, 2006 on appeal from the decision of the University Tribunal of November 8, 2004, pp 8-9.

he ought to have known that he had those unauthorized aids in his possession during the exam.

Penalty Phase

[45] The University submitted that the appropriate penalty in the circumstance was:

- a grade of 0 in GGR207
- 1-year suspension from attendance at the University
- a notation on the Student's transcript for 2 years or until graduation, whichever occurs first

[46] In addition, the University requested that a report of the decision be made to the Provost for publication in the University's newspaper with the Student's name withheld.

[47] The University placed a Book of Authorities before the panel so that it might have an opportunity to review several decisions of other panels of the University Tribunal in similar cases. In particular, the panel reviewed the criteria for sanction first proposed by the late and former Mr. Justice Sopinka in the matter of the appeal of Mr. C. (November 5, 1976). According to these guidelines, the Tribunal should consider the following six criteria when deciding on an appropriate sanction:

a) the character of the person charged;

b) the likelihood of a repetition of the offence;

c) the nature of the offence committed;

d) any extenuating circumstances surrounding the commission of the offence;

e) the detriment to the University occasioned by the offence;

f) the need to deter others from committing a similar offence.

[48] Counsel for the University characterized the Student's attitude as lackadaisical. Even though he knew the rules, he chose not to follow them. The nature of the offence and the detriment to the University are comingled in the University's submission. Ms. Harmer explained that it is very difficult to monitor several hundred students during an exam. Consequently, the rules are explicit and are constantly reiterated to students by various means. When a student willfully disregards the rules, it jeopardizes trust and integrity, the foundation of the teaching/learning relationship. As for general deterrence, Ms. Harmer argued that it is important to send a message to other students and to the community that the University will uphold its rules and regulations.

[49] Mr. Vaturi argued that the cases cited by discipline counsel were not similar and, therefore, should not be considered relevant as precedents. For example, in some cases,

the defendants were repeat offenders, which is not true of this Student. He had never been charged with academic misconduct before this incident. In other cases, defendants not only possessed unauthorized aids, but also used them. However, in this case there was no evidence that the Student even used, much less benefitted, from the aids in his possession.

[50] Counsel for the Student turned the panel's attention to the list of possible sanctions provided by the *Code* at Section C.ii.(b) and submitted that the panel should impose sanctions at the more lenient end of the continuum, so that the punishment fits the crime. Mr. Vaturi informed the panel that the Student is eligible to graduate in June 2008. If he were given a grade of 0 on the course, he may become ineligible to graduate due to low grade point average (GPA). Mr. Vaturi argued that had the case come to Tribunal directly following the allegation, then the Student would have had time to take extra courses to improve his GPA.

[51] At this juncture, the Chair sought clarification of the Student's registration status vis-à-vis graduation, noting that the consequences of the penalty are important to the panel's deliberations. A review of the Student's transcript revealed that, indeed, the Student had earned the required 20 credits for a bachelor's degree. What could not be determined with certainty was whether (a) the Student had completed the program requirements and (b) the imposition of a grade of 0 in the course would lower the GPA to the point that the Student would become ineligible to graduate.

[52] Ms. Harmer argued that the answers to these questions were not relevant to the panel's deliberations and cautioned that following this reasoning would result in inequitable treatment of defendants. That is, weaker students with lower GPAs would be dealt with more leniently than those with higher GPAs. Counsel stated that the Tribunal had to allow the "chips to fall where they may". Fairness dictates that a student should be dealt with on the basis of the offence, the consistent approach of the Tribunal to those offences in the past, and, to some extent, extenuating circumstances.

[53] The Chair suggested that the offence and the offender appeared to be the significant factors to be taken into account. Moreover, all sorts of subjective factors had been adduced already and will be adduced in every case, in order to differentiate one offender from another. This may lead to an offender being treated more leniently, because of individual circumstances, than someone else who committed the same offence.

[54] The Chair requested that the parties provide written submissions on the academic consequences of proposed penalties, addressing both fact and principle. It was agreed that Mr. Vaturi would provide written submissions by January 25, 2008, with discipline counsel providing a reply by February 8, 2008.

Sanction and Reasons

[55] On June 26, 2008 the panel reached a decision on penalty. The Chair requested that the Judicial Affairs Officer circulate that decision to the parties via email.

[56] The decision was circulated via email to the parties on June 26, 2008. It stated that the Tribunal imposes the following sanction in the matter of the Student, with full reasons to follow:

- Mark of 0 in GGR207H5S for the Winter 2006 session
- Notation on the Student's transcript for two years
- A recommendation that the Provost publish the results of the hearing with the Student's name withheld

[57] The Tribunal's reasons for the penalty imposed are as follows.

[58] In terms of the nature of the offence, it was at the less serious end of the spectrum of cases that come before this Tribunal. There is no evidence that the student used the cell phone, cards or previous examination to assist him in any way in this examination, or that he gained any benefit from their presence.

[59] Nevertheless, the Student knew from his seven terms at the University, the many examinations he had previously written, and the warning at the front of the examination in question, that the three categories of aids were unauthorized. He acknowledged in testimony that two of them (the cue cards and the old examination) were prohibited items. Indeed, the application of common sense, even without any specific listing of unauthorized aids, dictated this conclusion. I do not accept Mr. Vaturi's argument that there is nothing in the Code to say a cell phone is an aid, when both the examination paper and common sense prohibited it. Whether or not the Student turned his mind to the issue, he should have taken more care in ensuring that he was not violating the rules. Any student is expected to do so, and that is why the offence is written as "knew or ought to have known."

[60] This was a first allegation of an academic offence against this student at the Decanal or Tribunal level. There is nothing to suggest that a repetition of this offence is likely.

[61] On the other hand, the detriment to the University, and the need to deter other students from bringing study notes, "cheat sheets" or similar items into closed book examinations is self-evident. The integrity of the University's processes and the value of the academic recognition it bestows is dependent on widespread respect for straightforward rules of the kind at issue in this case. Conversely, the University should not be compelled to produce evidence of actual use and benefit obtained from prohibited notes or similar items before it is able to enforce its rules and impose sanctions. To allow disregard of a blanket principle - check unauthorized aids at the door before writing the exam - is to compromise the University's processes and tempt other students to test its ability to catch them.

[62] It is important to consider mitigating or extenuating circumstances where they exist. The Student's counsel suggested that the stress and fatigue of preparing for and writing examinations was relevant in this regard. We disagree. Stress will affect almost every student undergoing evaluation in a post-secondary institution, and the related

phenomenon of fatigue will affect many of them. It is inconceivable that these circumstances can justify disdain for such an elementary and widely-understood principle as the meaning of a closed book examination.

[63] As a general matter, however, the personal circumstances of the offender are certainly relevant to any disposition that results from an academic offence. Character evidence exemplifies the proposition that the adjudicator must consider both the offence and the offender in fashioning an appropriate sanction. In this connection, we found the University's submission - that the academic impact of the sanctions proposed by the respective parties is an improper consideration for the Tribunal - to be surprisingly one-sided. We say so for several reasons.

[64] First, the impact on the University of the offence and its disposition is taken into account in virtually every case, including this one, under the seminal Mr. C. case. We have given weight to that factor in this case, as noted above. It would be anomalous if the impact on the offender did not attract some attention as well. Put differently, the impact on the others - the University's "public" in this case - and on the individual in question - is a reflection of the twin factors of general and specific deterrence. The Tribunal must make its best choice of a penalty which will have the appropriate impact on the University community and on the student in question, and to do so the Tribunal must exercise its best understanding of the University community generally and the student who appears at the hearing.

[65] Second, in using the terms specific and general deterrence, we are aware that this is not a criminal or quasi-criminal proceeding (even if the University's Code is still written in terms of "charges", "offences", "guilt" and "prosecutions", and the Mr. C. case itself largely mirrors criminal law principles in its discussion of sanctions), but rather an administrative law issue of University discipline. There is ample judicial authority for the application of criminal law principles of sentencing, with appropriate recognition of the unique attributes of the particular administrative context, in cases of professional or regulatory discipline: see for example, Re Munro (1993), 105 D.L.R. (4th) 342 (Sask. C.A.), at pp. 349-50, adding in a case of teacher misconduct that "it is the consequences of an authority's decision that have the most direct impact on the individual concerned"; Pottie v. N.S. Real Estate Commission (2005), 37 Admin. L.R. (4th) 131 (N.S.S.C.) at paras. 60-61 (the object of the imposition of sanctions resulting from breaches of the Act or of professional misconduct are not dissimilar to the purpose and principles of sentencing contained in the Criminal Code..."); Jaswal v. Medical Bd. (Nfld.) (1996), 42 Admin. L.R. (2nd) 233 (Nfld. S.C.), applying Pottie at para. 35.

[66] Third, under both criminal and administrative law discipline principles, mitigating or extenuating circumstances are obviously relevant. These necessarily involve a consideration of the individual characteristics of the offender, and whether in those circumstances it would be unduly harsh or excessive to impose a penalty that was otherwise dictated by previous cases in which the misconduct was objectively similar.

[67] Fourth, these principles are reflected in the cases put forward by the parties before us.

[68] In Mr. C. itself (tab 1 of the University's casebook), after stating the oft-quoted sentencing principles, Mr. Sopinka noted: "We are told that the appellant will not lose credits in respect of subjects which he completed in the session except for the credit in Sociology. In the circumstances, therefore, I am of the opinion that the local branch of the Trial Division which tried this case was justified in imposing the maximum sentence..."

[69] In M. (tab 3), the Tribunal referred to two types of individual circumstances - past history and future impact - in its penalty decision:

> "We also recognize what we have been told in terms of the difficult circumstances of Mr. M.'s background...So, we are prepared to accept that there is relevance to the difficult circumstances that Mr. M. has quite clearly experienced in this life. We were not inclined to agree with the University's proposal for a suspension in this case. We believe that, for the most part, the necessary disciplinary sanction can be achieved through the sanction proposed by Mr. M.'s counsel, that being a grade of zero for the course, with a letter of reprimand. We believe that, for the most part, the necessary disciplinary effect can be achieved in that way."

[70] The University cited the Ms. B. decision (tab 4 of its supplementary brief), in which the Tribunal specifically considered at page 9 that "if expelled, [the student] would be deprived of any opportunity to obtain her degree after several years of attendance at the institution", but ultimately concluded "that the matter of the student's seniority should count against her rather than be taken into account in amelioration of any penalty".

[71] The same proposition emerges from Ms. D. (tab 4 of the original brief), an appellate decision in which the Tribunal Appeals Board rejected the student's "principal argument" that the jury below had not given "sufficient weight to the personal circumstances of the appellant, and the relevance of substantial mitigating circumstances" (p.4). The University countered that these points, including the academic choices available to the student at that point, had been explicitly put forward by her counsel. The Board noted that the jury had recognized "the unusual circumstances resulting from the closure of the...program" and that a juror had asked a series of questions about "the possibility of the appellant concluding her studies elsewhere. The juror then remarked: 'It seems to be a rather important factor, the Faculty...is going to cease offering these courses...' [University counsel]: "It's an important factor for your consideration, no question." The Board stated: "Notwithstanding its evaluation and obvious appreciation of the relevant personal factors...the jury determined that a delayed suspension was not an appropriate penalty in the appellant's case."

[72] We consider that the Ms. B. and Ms. D. decisions contradict the University's submission that consideration of the academic consequences of a proposed penalty is improper; to the contrary, it provides an example of explicit consideration of the consequences but eventual dismissal of the argument that those consequences should favour the student's position. It would be surprising if the Tribunal were entitled to consider the academic consequences of its disposition only when those consequences militate against the

student; only through inquiry and assessment of the implications of its intended penalty can the Tribunal determine which side that evidence supports.

[73] The University argues that in the Mr. P. decision (tab 6 of its supplementary brief), the Tribunal said at paragraph 13 that while the student's circumstances - "he is very close to obtaining his degree from this University and that, should he be expelled, he may have difficulty in securing a place at another university" - were "perhaps unfortunate, we are not persuaded that this is a relevant factor for us to consider". We note, however, that in the next paragraph, the Tribunal did in fact consider and reject the argument that this detriment should result in mitigation of the expulsion penalty. In this sense, the Mr. P. decision again supports the proposition that consequences for the student – as for the University - are relevant but not determinative considerations in weighing the various factors in Mr. C.

[74] In virtually every case, the parties provide some context in order to permit the Tribunal to assess whether the competing penalty submissions would be overly harsh or lenient in the circumstances of the particular offender. Thus, in the related Mr. D.L. and Ms. Y.W. decisions, the Tribunal noted the academic histories of the students between their offences in 2002 and the Tribunal hearing in 2005. The delay, and the resultant graduation of the two students in the meantime, was explicitly listed by the Tribunal as having been taken into account. In the Ms. T. case (tab 5 of the supplementary brief), the jury spokesperson imposed

> "a notation on the transcript of one year rather than two years, with regard to the situation of the defendant, taking into consideration her personal circumstances and in the desire not to impose an extraordinary burden on the defendant. We felt that it would be fairer to allow her to make a new start...."

[75] In this case, the student's counsel argued for a reprimand and no other penalty. The University submitted that he should receive a zero in the course, a one year suspension, and a notation on the student's transcript for two years or until graduation, which occurred first.

[76] Mr. Vaturi's argument in terms of academic consequences was based on a zero grade and/or suspension being disproportionate, harsh and punitive because they would prevent the Student from graduating or delaying his graduation by one or two years. A zero grade would drop his weak 1.87 GPA "further behind from the required CGPA of 2.00 making his entrance into the [Industrial Relations] Program much more difficult and eliminating all his chances of graduation this year....If the Student does not graduate this year, he will have to return for one more year to take additional courses to raise his average."

[77] We have considered the academic consequences put forward by Mr. Vaturi. They do not coincide with the information submitted in the University's post-hearing brief, but we did not need to resolve their differences. We concluded that even on the information contained in his counsel's submission, the detriment to him of a zero grade is neither disproportionate nor unduly harsh in the context of the many other factors we have considered above. To the contrary, a zero grade is entirely consistent with every previous

Tribunal decision to which we were referred. It is the base minimum. A simple reprimand on the uncontradicted facts of this case would eliminate all general deterrence: it would provide every University student with an incentive to bring unauthorized aids into a closed book examination, with no risk upon detection other than a "slap on the wrist" unless the University were to amass proof that the aids were actually used in the particular situation. It would make a mockery of the warning on the examination paper and the meaning of a closed book examination.

[78] Conversely, we regarded the suspension sought by the University as an excessive penalty for a first offence, involving no use of the unauthorized aids during the examination, with no likelihood of repetition by this student. Mr. Vaturi was quite correct in his analysis of the five cases put forward by the University. Y.L. (tab 2) and Ms. D. (tab 4) were second offences that resulted in suspensions. Mr. M. (tab 3) and Mr. C. (a first offence case at tab 6) resulted in a zero grade and no suspension. Ms. T. (tab 5) was a suspension case in which we have no information about previous offences but do note that the unauthorized aid was found on the student's desk.

[79] We therefore decided upon the penalty as conveyed to the parties above.

Oct. 6/03
Date

Raj Anand, Chair