THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL

Report #363 of the Academic Appeals Committee
February 7, 2012

To the Academic Board
University of Toronto

Your Committee reports that it held a hearing on Friday, November 25, 2011, at which the following members were present:

Professor Hamish Stewart, Chair
Professor Andrea Sass-Kortsak
Mr. Kenneth Davy

Secretary: Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances
Observer: Mr. Jason Marin, Administrative Assistant, Appeals, Discipline and Faculty Grievances

Appearances:

The Students Appellant:

Mr. [redacted]
Ms. [redacted]

For the School of Graduate Studies:

Mr. Robert Centa, Counsel, Paliare Roland
Ms. Julia Wilkes, Articling Student, Paliare Roland
Professor Berry Smith, Vice-Dean Students, SGS
Ms. Jane Alderdice, Director Quality Assessment and Governance, SGS

I. The Appeal

The Students each appeal from a decision of the Graduate Academic Appeals Board (GAAB), to the extent that the GAAB dismissed their appeals from a decision of the Graduate Department Academic Appeals Committee of Economics (GDAAC), dismissing their appeals from their grades of FZ in two courses in the Winter 2009 term and upholding a decision of the Department of Economics, refusing to grade their tests in two courses in the Fall 2009 term.

At the beginning of the hearing, the male Student stated that he would speak for both Students. The Chair asked the female Student if she was content to have the male Student proceed on her

behalf. She said that she was. Since the factual basis of the two appeals and the issues raised by the Students in each appeal were substantially identical, the two appeals were heard together. One copy of the decision will be placed in each Student's file.

Finally, unless otherwise indicated, all page references in this decision are to the two volumes of material filed by the Students in support of their appeal, as amended in accordance with the order of the Chair in Motion Decision #359-1 of the Academic Appeals Committee (see Appendix A).

Your Committee unanimously finds that the appeals should be dismissed.

II. Overview

This overview is drawn in part from Motion Decision #359-1 and in part from the decision of the GAAB.

In the 2008/09 academic year, the Students were enrolled in the first year of the Ph.D. program in the Department of Economics. The Students are married to each other. They were absent from the University for much of the Fall 2008 term and part of the Winter 2009 term owing to the serious illness and subsequent death of the male Student's father. Both Students received grades of FZ in the five courses that they took that year (three in the Fall 2008 term and two in the Winter 2009 term).

In the Fall 2009 term, the Students were permitted to audit the first module of two courses and to write the test for that module. However, the Students never registered for the 2009/10 academic year; for that reason, the Department refused to mark those tests.

The Students eventually appealed the FZ grades and the refusal of the Department to grade the tests they took in Fall 2009. They also sought numerous other remedies including a tuition refund, guaranteed funding for four years from their new registration date, and prompt registration. Their appeal was considered by the GDAAC. In two substantially identical reports dated 3 June 2010, the GDAAC recommended that the appeals be dismissed. The GDAAC held that the Students' requests for a tuition refund, guaranteed funding, and prompt registration were not within its jurisdiction. It found that the FZ grades were appropriate. It held that Department's refusal to grade the tests taken in Fall 2009 was justified because the Students were not at that time registered. In decisions dated June 17, 2010, Professor Arthur Hosios, Chair of the Department of Economics, accepted the GDAAC's recommendation and dismissed the Students' appeals (vol. 1, pp. 173-191).

The Students appealed to the GAAB. In a decision dated November 19, 2010, the GAAB allowed the Students' appeal in part. The GAAB found that "a decent solution" to the Students' situation would have been a leave of absence for Fall 2008 (vol. 1, p. 221). Since a leave of absence had not in fact been granted, the appropriate outcome was "to award the non-mark grade of WDR for each of the courses taken in the Fall Term, 2008" (vol. 1, p. 222). The GAAB therefore directed that the grade of FZ for the three courses that the Students took in Fall 2008 be vacated and replaced with the notation WDR. The GAAB also recommended that the university

waive the Students' fees attributable to Fall 2008. However, the GAAB dismissed the Students' appeal of the FZ grades for the two courses taken in Winter 2009, and agreed with the GDAAC and Professor Hosios that the Students were not entitled to have the tests written in Fall 2009 graded (vol. 1, p. 223).

In a letter dated December 3, 2010, Professor Brian Corman, Dean of the School of Graduate Studies, rejected the GAAB's recommendation that tuition attributable to Fall 2008 be waived (vol. 1, p. 225). Professor Corman gave three reasons for this decision. First, he noted that graduate students pay a program fee rather than a fee for each course; consequently, replacement of an FZ by a WDR did not entitle the student to a fee waiver. Second, the Students had not withdrawn so as to entitle them to a refund of any part the program fee. Finally, the Students "did not in fact pay any fees for 2008-9, nor did [they] repay any of the funding that [they] received which amounted to more than $22,000 each."

III. Jurisdictional Issues

The Students appealed from the GAAB to the AAC, seeking a large number of remedies. In advance of the appeal, the SGS moved before the Chair for directions concerning the scope of the appeal, submitting that the AAC did not have jurisdiction to award many of the remedies sought and that some of the material the Students submitted to the AAC was inadmissible because irrelevant and/or privileged. In Motion Decision #359-1, dated August 25, 2011, the Chair accepted the SGS's submissions and made certain directions concerning the conduct of the appeal. The Chair stated his conclusion on the scope of the appeal as follows:

> *The Remedies Sought in Category 1*
>
> The SGS concedes that the AAC has jurisdiction to grant the remedies sought under category 1. The Students have set out those remedies are as follows (vol. 1, p. 22):
>
> > 1-1) The groundless FZs in Winter 2009 to be removed.
> > 1-2) An official letter from the SGS explaining our circumstances in fall 2008 and winter 2009 and certifying our justified absence due to family crisis that resulted in WDRs.
> > 1-3) Immediate registration not to lose another academic year. Also, our OSAP loan is due as a result of the department's illegitimate termination and refusal to process our registration.
> > 1-4) Special accommodations from the department and the SGS so that we could complete the first year courses as soon as possible.
> > 1-5) In Fall 2009, we took the final exams for the first stage of micro and macro. We would like them to be marked and considered completed.
>
> The AAC has jurisdiction to grant remedies 1-1 and 1-5. The Chair is not certain that the AAC has jurisdiction to grant the remaining remedies, but considers it preferable to decide that question, if necessary, at the hearing on the merits.

In light of the submissions and the conduct of the parties at the hearing of the appeal on November 25, 2011, the Chair has concluded that the AAC does not have jurisdiction to make any order in respect of remedies 1-2 and 1-3. As explained in the Motion Decision, the AAC's jurisdiction flows from its Terms of Reference, which state that its function is:

> 2.1 To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements, and to report its decisions, which shall be final, for information to the Academic Board ...

The decision under appeal here is that of the GAAB, dismissing the Students' appeals from the grades of FZ given for their courses in the Winter 2009 term. The GAAB's Terms of Reference provide in part:

> 3. The [GAAB] shall hear and determine appeals of students registered in the School of Graduate Studies concerning grades in a course or component of a grade in a course, or concerning any other decision with respect to the application of academic regulations and requirements to a student. ...

The Chair's view is that while a division of the university might well decide to write a letter explaining a student's situation, the jurisdiction of the AAC does not extend to ordering university officials to write such a letter. Moreover, it is quite clear that in this appeal, the AAC does not have jurisdiction to order the SGS to register the Students, for the simple reason that the Students are not appealing a decision refusing them registration. There is no evidence that they have attempted to register and have been refused. (The Chair expresses no opinion as to whether such a decision would be appealable and, if so, by what route.) The decisions under appeal may have consequences for the Students' ability to register, but, as explained more fully in Motion Decision #359-1, "The AAC's jurisdiction does not extend to remedying all the consequences, whatever they may be, of a decision that the AAC does have jurisdiction to review." Regardless of the outcome of this appeal, if the Students wish to register, they will have had to seek registration in accordance with whatever procedures are appropriate for students in their situation.

As for Remedy 1-4, the Chair is of the view that the AAC may well have the power to recommend, or perhaps even to order, a division of the University to provide a student with some accommodation so as to give effect to a remedy granted by the AAC. However, as your Committee has decided to dismiss the appeal, this possibility need not be considered in this case. If the Students do at some point re-enter the program, the Ph.D. program in Economics, it will be for the department to decide whether to provide any accommodation in relation to their first-year courses.

The SGS did not cross-appeal from the decision of the GAAB. Therefore, the GAAB's decision to substitute WDRs for FZs for the three courses taken by the Students in Fall 2008 stands. The GAAB's recommendation that the SGS waive the Students' fees attributable to Fall 2008 also stands. The AAC has jurisdiction to make additional recommendations in respect of tuition, but

no jurisdiction to review Professor Corman's decision not to follow the GAAB's recommendation.

Thus, the Chair rules that the only issues before your Committee at the hearing on November 25, 2011, were the following (the first two issues are as stated in the submissions of the SGS, para. 10):

(a) was the award of FZ grades for the Students' work in Winter 2009, given their personal situation at the time, a correct, consistent, and fair application of the University's policies and procedures?
(b) should the Department grade the tests that the Students wrote in Fall 2009?, and
(c) should the AAC recommend any rebate or cancellation of tuition for 2008/09, in addition to the recommendation made by the GAAB?

IV. The Hearing

Your Committee heard the Students' appeal on the morning of November 25, 2011, beginning at around 8:00 a.m. and concluding at around 12:30 p.m. Neither party argued that additional time was required or requested an additional hearing date.

During the hearing, both parties made occasional reference to material concerning the Students' negotiations with Professor Berry Smith, Associate Dean of SGS, and Professor Martin J. Osborne, Associate Chair, Graduate Studies, of the Department of Economics, between May 22 and October 27, 2009. In Motion Decision #359-1, the Chair had ruled that this material was inadmissible because it was irrelevant and privileged, though the Chair also ruled that "[t]he fact that negotiations did occur is relevant ... to explain why the Students were permitted to write the tests in Fall 2009". In accordance with the Chair's ruling, your Committee disregarded both parties' references to the inadmissible material.

At the hearing, the Students attempted to establish that the SGS had terminated their enrollment in the Ph.D. program. It was not clear to your Committee why this point was important to the Students. There are some references in the material to the Students' having been terminated (e.g., vol. 2, p. 221), but your Committee finds that these references are erroneous. The Department intended to seek the Students' termination, but suspended that request during the negotiations mentioned above; and the request remains suspended. Therefore, the Students are not terminated but lapsed; they are lapsed because they have failed to register; and they are not eligible to register because they have not paid their fees for 2008/09 (SGS Submissions, paras. 47-8).

Immediately following the hearing, and in accordance with its usual practice, your Committee met in private, discussed the parties' positions, and unanimously concluded that the appeals should be dismissed.

V. Decision

Background: Fall 2008

The Students began the Ph.D. program in Economics in the Fall 2008 term. At this time, Professor Adonis Yatchew was Associate Chair, Graduate Studies. The Students were enrolled in three required courses: ECO2020H (Microeconomic Theory I), ECO2021H, (Macroeconomic Theory I), and ECO2400H (Econometrics I). However, they spent a substantial portion of the term in Iran owing to the serious illness of the male Student's father. On October 6, 2008, the male Student informed Professor Yatchew of his absence, and on October 13, the female Student informed Professor Yatchew of her absence. During October and November, the Students and Professor Yatchew exchanged a number of e-mails concerning the Students' personal situation and the need for them to fulfil the residency requirements of the Ph.D. program. Eventually, the Students requested a Leave of Absence, but there was some confusion as to whether leave was requested for September 2008 to January 2009, or for January 2009 to April (or August) 2009. This request was ultimately cancelled, and the Students returned to the program in January 2009 (as described below). But the department assigned grades of FZ for their Fall 2008 courses.

The GAAB found that "A leave of absence for the fall term would have been a decent solution" to the situation and that it was likely permissible for the department to have granted such a leave retroactively (vol. 1, pp. 335-6). The GAAB found that "assuming that retroactive leave was not possible, ... assigning failing grades to the Fall Term courses was too draconian" (vol. 1, p. 336):

> The Students were in a family situation for which the University has often granted relief from the normal consequences of failing to achieve required standards. There has been no suggestion that the University questioned, or had reason to question the facts of the Students' family situation before the decision to enter failing grades was made.

The GAAB ruled that the Students' FZ grades for the Fall 2008 term should be vacated and notations of WDR substituted. The Students' academic records were modified in accordance with the GAAB's ruling. The SGS does not appeal from this decision.

Winter 2009

In January 2009, the Students returned to the Ph.D. program on the following terms, which had been proposed by Professor Yatchew: they would enroll in two courses, namely ECO2030H (Microeconomic Theory II) and ECO2031H (Macroeconomic Theory II); they would take their comprehensive examinations in microeconomics and macroeconomics in June 2009; and they would retake ECO2020H, 2021H, and 2400H, as well as ECO2401H (Econometrics II), during the 2009/10 academic year (SGS Book of Documents, Tab 6; see also vol. 1, p. 336).

The final date to withdraw from Winter 2009 term courses without academic penalty was February 27, 2009 (see http://www.sgs.utoronto.ca/calendar/cal2008-09/dates.htm). The Students had no reason to, and did not, seek withdrawal from their courses before that date

Some time in March 2009, the male Student's father died. On March 17, and again on March 19, the male Student advised Professor Yatchew that both Students were in Iran, attending to the

funeral arrangements (vol. 2, pp. 177-8). It appears that the Students returned to Toronto on March 26, 2009. They did not attend any classes after their return (SGS Book of Documents, Tab 2). They did not communicate with their instructors. The examinations in their two courses were scheduled for April 14 and 16, 2009. The Students did not write these examinations. The Students received grades of FZ in both courses. On May 3, 2009, the male Student wrote to Professor Yatchew (SGS Book of Documents, Tab 7). This e-mail is concerned primarily with his and the female Student's responsibilities as teaching assistants; it does not make any request in respect of the work the Students missed. On May 12, 2009, Professor Yatchew wrote to each of the Students, stating that "the Department has decided to seek termination of your registration in the Economics Ph.D. program." He noted that the male Student's father had died and that the male Student had travelled to Iran to make funeral arrangements. He concluded the letters by inviting the Students to provide him with "any information of which I am not aware" within one week. (The letter to the female Student appears at vol. 1, pp. 134-6.) There is no evidence that the Students responded to Professor Yatchew's message. On May 22, 2009, the Students wrote to Professor Smith, seeking an appointment "in regards to our termination, sought by the Economics department" (vol. 2, p. 180).

The SGS Calendar states (SGS Book of Documents, tab 3):

> Students with health problems or other personal circumstances which may adversely affect their performance in, or their ability to complete course work, examinations or other departmental assessments may request special consideration. Requests, supported by a medical certificate, or other appropriate evidence, should be submitted to the instructor or the coordinator of graduate studies as soon as possible or within 48 hours of the deadline or date of assessment. ...

If they wished special consideration because of the death of the male Student's father in March 2009, the Students should have submitted a request for special consideration to Shannon Elliot (coordinator of graduate studies) and/or to Professor Yatchew not later than April 18, 2009 (two days after the missed examinations). But, between March 19, 2009 and May 3, 2009, the Students did not communicate with the department at all. Between March 19, 2009 and May 22, 2009, the Students made no request for special consideration. They made no request to defer their examinations and no request for any other form of accommodation for their personal circumstances. The Students' behaviour during the Winter 2009 term is in striking contrast with their behaviour during the Fall 2008 term, when they had lengthy discussions with the department about their personal situation (see vol. 2, pp. 154-171).

Your Committee understands that the personal circumstances of the Students were difficult in March 2009; however, the Students have never offered a satisfactory explanation for their failure to make a timely request for special consideration on account of these circumstances. In their additional written submissions (an 8-page document headed "Facts and Violations"), the Students offer no explanation for this failure. At vol. 1, p. 17, of the appeal materials, the male Student states that "On March 25th, I returned to Toronto but was not feeling good enough to go to school. It took me a month and a half to recover." Similarly, in his first communication to Professor Yatchew following the death of his father, the male Student states that it has "not been easy for [him] to handle" his father's death (SGS Book of Documents, Tab 7). Your Committee

accepts these statements; however, there is nothing in the written material to indicate why the male Student's personal circumstances were so severe as to prevent the Student from making a request for special consideration. Moreover, there is nothing at all to indicate why the female Student was unable to make such a request.

The GAAB accepted the Students' statement that they were upset by the death of the male Student's father, but commented (vol. 1, p. 337):

> ... [the Students' upset] did not warrant the subsequent complete withdrawal from participation in the courses and examinations which occurred. The Students were well aware that Economics had made some concessions from its regular program in an attempt to accommodate their familial problems, and they should not have assumed, without even consulting the department or SGS, that the University's academic requirements would be further rearranged to suit their circumstances.

Your Committee agrees with the GAAB on this point.

At the hearing, the male Student offered a different reason for the failure to contact the department. He stated that, in March and April 2009, he had the impression that any request for special consideration would not have been accepted, so there was no point in making one. This assertion was not made at any time before the hearing; but apart from that, your Committee does not find it credible. Although, as the GAAB found, the Students' experience with the department in the Fall 2008 term was not entirely satisfactory, in the Winter 2009 term the male Student was well aware from his own experience that accommodations were available for students in difficult personal circumstances. Indeed, during that term, he was enrolled in the Ph.D. program under an arrangement that was designed to accommodate him following the disruption of the Fall 2008 term. He was permitted to take a reduced load in the Winter 2009 term; he was permitted to take ECO2020H and ECO2021H in the second rather than the first year of the program, and he was permitted to take his comprehensive examinations in microeconomics and macroeconomics before having completed the required course work in those subjects.

Even if your Committee were to accept the male Student's submission on this point (which it does not), there was at the hearing no additional evidence from the female Student explaining her failure to make any request for special consideration following the death of her father-in-law in March 2009.

The Students seek the remedy of late withdrawal from ECO2030H and ECO2031H without academic penalty. Late withdrawal without academic penalty is an extraordinary remedy. Your Committee has granted this remedy in cases where a student has made a timely petition for late withdrawal and where a division of the University has responded unreasonably to that petition (see, for example, Report #302 of the AAC); your Committee has refused to grant this remedy where the Student has not offered a good reason for not making a timely request for late withdrawal (see, for example, Reports #328 and #337 of the AAC). The fact that a student has been accommodated in the past has been taken into account in assessing whether the student had a good reason for not making a timely request (see Report #337). Neither the male Student nor the female Student made a timely request for special consideration, and in particular neither of

them requested late withdrawal without academic penalty. Neither the male Student nor the female Student has satisfactorily explained this failure to seek special consideration. Neither Student is entitled to the extraordinary remedy of late withdrawal without academic penalty.

The tests written in Fall 2009

Between May and October 2009, the Students engaged in negotiations with Professor Yatchew and Professor Martin J. Osborne (who succeeded Professor Yatchew as Associate Chair, Graduate Studies) as well as with Professor Berry Smith, Vice-Dean of SGS, with a view to enabling the Students to resume their studies in the Fall 2009 term. While these negotiations were ongoing, the Department permitted the Students to audit ECO2020, ECO2021, and ECO2400. However, the negotiations were unsuccessful, and the Students did not register for the Fall 2009 term.

Your Committee agrees with the GAAB (vol. 1, p. 337) that the tests the Students wrote in Fall 2009 should not be graded because the Students were not at that time registered. It would have been appropriate to grade these tests only if the negotiations between the Students and the department had resulted in the Students' returning to the Ph.D. program for the 2009/10 academic year. The rationale for the department's decision is fully and persuasively explained in the e-mail of October 20, 2009, from Professor Osborne and the e-mail of 27 October 2009 from Professor Smith (SGS Book of Documents at Tabs 8 and 9).

Cancellation or rebate of tuition

Since the Students have not succeeded in having the FZs awarded for Winter 2009 removed, there is no reason to make any additional recommendation concerning cancellation or rebate of tuition.

VI. Conclusion

The award of FZ grades for the Students' work in Winter 2009, given their personal situation at the time, was a correct, consistent, and fair application of the University's policies and procedures. The Department should not grade the tests that the Students wrote in Fall 2009. Your Committee makes no recommendations concerning rebate or cancellation of tuition for 2008/09.

The appeals are dismissed.

APPENDIX A

THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL

Motion Decision #359-1 of the Academic Appeals Committee
August 25, 2011

To the Academic Board
University of Toronto

Your Committee reports that it heard a motion on Wednesday, August 17, 2011, at which the following were present:

Professor Hamish Stewart, Chair

Secretary: Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances

Appearances:

For the Students:
Mr. [redacted]
Ms [redacted]

For the School of Graduate Studies (SGS):
Mr. Robert A. Centa, Counsel, Paliare Roland
Ms. Julia Wilkes, Articling Student

I. The Nature of the Motion

The Students appeal from a decision of the Graduate Academic Appeals Board (GAAB) to the Academic Appeals Committee of Governing Council (AAC). They have filed more than 800 pages of material in support of their appeal. Counsel for SGS had this material paginated and bound in two separate volumes, and page references in this Report are to that material. Volume 1 is titled "Academic Appeal to the Governing Council" and contains 580 pages. Volume 2 is titled "Graduate Academic Appeal to GAAB" and contains 261 pages.

Before responding to the Students' appeal, the SGS moves pursuant to ss. 3.1.4 and 3.1.7 of the AAC's Terms of Reference for directions concerning the scope of the appeal. Specifically, the SGS submits that:

1. the AAC does not have jurisdiction to award many of the remedies sought by the Students; and

2. some of the material in the Students' material is (i) protected by dispute settlement privilege and (ii) irrelevant to the dispute, and is therefore inadmissible in the hearing on the merits before the AAC.

The Students submit that the AAC, being a committee of the Governing Council, does have jurisdiction to award all remedies sought, that all of their material is relevant, and that none of it is privileged. In addition, by e-mail sent before the hearing and again at the hearing, the Students made certain requests of the Chair. For the reasons given below, the Chair accepts the SGS's submissions, and declines to act on the Students' requests.

II. Background to the Appeal

In the 2008/09 academic year, Mr. [redacted] and Ms. [redacted] (the Students) were enrolled in the first year of the Ph.D. program in the Department of Economics. The Students are married to each other. They were absent from the University for much of the Fall 2008 term and part of the Winter 2009 term owing to the serious illness and subsequent death of Mr. [redacted]'s father. Both Students received grades of FZ in the five courses that they took that year (three in the Fall 2008 term and two in the Winter 2009 term).

In the Fall 2009 term, the Students were permitted to audit the first module of two courses and to write the test for that module. Because the Students never registered for the 2009/10 academic year, the Department refused to mark those tests.

The Students eventually appealed the FZ grades and the refusal of the Department to grade the tests they took in Fall 2009. They also sought a tuition refund, guaranteed funding for four years from their new registration date, and prompt registration. Their appeal was considered by the Graduate Department Academic Appeals Committee of Economics (GDAAC). In two substantially identical reports dated 3 June 2010, the GDAAC recommended that the appeal be dismissed. The GDAAC held that the Students' requests for a tuition refund, guaranteed funding, and prompt registration were not within its jurisdiction. It found that the FZ grades were appropriate. It held that Department's refusal to grade the tests taken in Fall 2009 was justified because the Students were not at that time registered. In decisions dated 17 June 2010, Professor Arthur Hosios, Chair of the Department of Economics, accepted the GDAAC's recommendation and dismissed the Students' appeals (vol. 1, pp. 173-191).

The Students appealed to the GAAB. In a decision dated November 19, 2010, the GAAB allowed the Students' appeal in part. The GAAB found that "a decent solution" to the Students' situation would have been a leave of absence for Fall 2008 (vol. 1, p. 221). Since a leave of absence had not in fact been granted, the appropriate outcome was "to

award the non-mark grade of WDR for each of the courses taken in the Fall Term, 2008" (vol. 1, p. 222). The GAAB therefore directed that the grade of FZ for the three courses that the Students took in Fall 2008 be vacated and replaced with the notation WDR. The GAAB also recommended that the university waive the Students' fees attributable to Fall 2008. However, the GAAB dismissed the Students' appeal of the FZ grades for the two courses taken in Winter 2009, and agreed with the GDAAC and Professor Hosios that the Students were not entitled to have the tests written in Fall 2009 graded (vol. 1, p. 223).

In a letter dated December 3, 2010, Professor Brian Corman, Dean of Graduate Studies, rejected the GAAB's recommendation that tuition attributable to Fall 2008 be waived (vol. 1, p. 225).

III. The Students appeal to the AAC of Governing Council

There has been some confusion throughout the process as to the Students' status at the University of Toronto. The Department of Economics at one point asked SGS to terminate the Students (see Vol. 1, p. 134), but later stated that it was considering suspending that request (see Vol. 1, p. 144). Although there are a number of references to "termination" in the material, the SGS did not act on the Department's request and the Students were never terminated. At the hearing of the motion, Mr. Centa stated that the Students are currently lapsed, not in good academic standing, and in arrears on their tuition for 2008/09. On the basis of the material filed, that appears to be the correct description of their current status.

IV. Jurisdiction

The Students have asked the AAC to grant some 37 remedies, grouped into five categories (see vol. 1, pp. 22-23):

1. Academic remedies, for example, removal of their FZ grades from Winter 2009;
2. Remedies relating to tuition and funding, for example, waiver of all tuition for the 2008/09 academic year;
3. Compensation for various costs they have incurred since 2007, for example, "monthly expenses due to the unexpected unemployment since September 2009"
4. Compensation for "losses and damages" flowing from the Department's conduct, for example, "Compensation for 3 years of delay to get into job market as a PhD graduate"; and
5. "An official apology letter from the SGS and the University of Toronto".

The SGS submits that the AAC has jurisdiction to grant the remedies in the first category, and jurisdiction to recommend the rebate or cancellation of fees, but no jurisdiction to grant any of the remaining remedies. The Students submit that the AAC has jurisdiction to grant all of these remedies.

Jurisdiction to Grant the Remedies Sought in Categories 2 through 5

The AAC is a committee of Governing Council, and as such has only the powers given to it by the Governing Council, expressly or by necessary implication, in its Terms of Reference. It has no inherent jurisdiction. However, some light may be shed on its jurisdiction by examining the jurisdiction of those bodies whose decisions it reviews, in this case, the GAAB.

The AAC Terms of Reference defines the AAC's functions, as they are relevant to the Students' appeal, as follows:

> 2.1 To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements ...

The GAAB's Terms of Reference are somewhat more detailed than those of the AAC, and provide in part:

> 3. a The [GAAB] shall hear and determine appeals of students registered in the School of Graduate Studies concerning grades in a course or component of a grade in a course, or concerning any other decision with respect to the application of academic regulations and requirements to a student. ...
>
> 3. b. ... The [GAAB] may recommend to the University that fees of a student be rebated or cancelled in whole or in part, but shall not otherwise recommend or award any monetary or other compensation.
>
> ...
>
> 19. The Chair [of a GAAB hearing panel] shall determine issues of the law of Ontario or of Canada that may arise with respect to an appeal. ...

Mr. Centa submitted that the Terms of Reference do not grant the AAC any power to make decisions in respect of waiver of tuition, to grant financial compensation for any loss flowing from an academic decision, or to order any division of the University to apologize to anyone. He noted that the GAAB terms of reference, while granting a power to recommend the rebate or cancellation of fees, explicitly forbid the GAAB from making a monetary award and argued that the AAC, hearing an appeal from the GAAB, could not have any additional powers in this respect.

The Students were unable to identify anything in the AAC Terms of Reference that might expressly give it the jurisdiction to grant the remedies in categories 2 through 5. However, they made several arguments in support of the AAC's jurisdiction to grant those remedies. None of these arguments has any merit.

First, the students repeatedly stated that no-one told them that they could not get a financial remedy from Governing Council. This statement is not consistent with the record before your Committee. Professor Berry Smith, Vice-Dean of SGS, told the students on September 22, 2009, that they could not appeal fees (vol. 2, p. 219). In an e-mail dated April 29, 2010, Ms Jane Alderdice of SGS advised the students that "Financial matters are not within the jurisdiction of the GDAAC" (vol. 1, p. 171). This advice was evidently based on the GDAAC Guidelines, which are available on-line to the public, including the Students. In its report of 3 June 2010, the GDAAC held that it lacked jurisdiction to consider any financial remedies and therefore rejected the Students' claims of that nature (vol. 1, p. 188). The Chair of the Department agreed (vol. 1, p. 173). At the GAAB, Mr. Centa, on behalf of the SGS, submitted that the GAAB lacked jurisdiction to give any financial remedy. The Department of Economics and the SGS have consistently taken the view that the Students could not get a financial remedy through the GDAAC-GAAB-AAC academic appeal process.

More fundamentally, the Students' first argument is irrelevant. Even an express statement (and there was none) from SGS that the Students could obtain an award of damages from the GAAB or the AAC would not have given those bodies the necessary jurisdiction. The jurisdiction of the GAAB and the AAC does not depend on what University officials or students think it is but on their Terms of Reference, as interpreted by their Chairs. In respect of fees in a graduate program, the jurisdiction of the GAAB, and of the AAC hearing an appeal from the GAAB, is limited to making recommendations, which the SGS may accept or reject.

Second, the Students submitted that all of the losses that they allegedly suffered flowed from the academic decisions that they challenge—the FZs that they received in 2008/09—and that those losses should therefore be considered "academic" matters. This submission has no merit. The damages sought by the Students are in the nature of financial compensation for losses allegedly flowing from allegedly erroneous decisions taken by the Department of Economics and the SGS; but those losses are not themselves academic matters. The AAC's jurisdiction does not extend to remedying all the consequences, whatever they may be, of a decision that the AAC does have jurisdiction to review.

A similar result was reached in a decision of Professor Emeritus Ralph Scane in the appeal of T.D., dated March 14, 2008, ruling on the jurisdiction of the GAAB. The student argued that a decision of SGS, over which the GAAB clearly had no jurisdiction, should nonetheless be reviewed by the GAAB because of its academic consequences. Professor Scane rejected this argument at p. 4:

> In a university, almost every regulation, requirement or decision has an academic effect, at some greater or lesser degree of remoteness from an individual student. It is ridiculous to contemplate that the academic appeals procedures set up by the University can on that basis be invoked to review and control all of these.

Professor Scane's reasoning applies not just to the scope of decisions that are reviewable in the academic appeals process but also to the scope of consequences that are reviewable in the appeals process. A decision does not fall under the process merely because of its academic consequences; similarly, "the application of academic regulations and requirements" does not include all the consequences of an academic decision, even if that decision does fall under the process. To hold otherwise would be to expand the jurisdiction of the ACC well beyond its intended scope.

Third, the Students rely on s. 19 of the GAAB Terms of Reference, which provides that the GAAB Chair "shall determine issues of the law of Ontario or of Canada that may arise with respect to an appeal." They suggested that this term gives the GAAB, and by extension the AAC hearing an appeal from the GAAB, the power to award financial compensation for losses flowing from academic decisions. This argument cannot be accepted. Section 19 does not enable the GAAB Chair to decide any dispute arising under the law of Ontario or Canada; that would give him or her powers comparable to those of a Superior Court judge. The purpose of s. 19 is to enable the GAAB Chair to determine a point of law that arises in connection with an issue that is otherwise within its jurisdiction. The Students' own case before the GAAB provides a good example. Professor Scane decided that certain evidence was inadmissible before the GAAB on the ground of privilege (vol. 1, p. 223). In so ruling, he was deciding an issue of the law of Ontario that had arisen in connection with the issues that were within his jurisdiction. He would not have had jurisdiction to decide a point of privilege in a case that was not otherwise properly before the GAAB. Similarly, s. 19 does not give the GAAB, or the AAC for that matter, the power to award damages.

Finally, the Students argued that there must be some committee at the University that can give them the remedies they seek. The Students submitted that Governing Council, being the University's highest decision-making body, must have the power to give them all the remedies that they sought, and that the AAC, being a committee of Governing Council intended to deal with complaints about academic decisions, also has this power. This argument is misconceived. Even if the Governing Council has the powers that the Students attribute to it (a point on which the Chair expresses no opinion), the AAC does not necessarily have those powers; it has only the powers that Governing Council has given it. It may well be, as Mr. Centa suggested in his oral submissions, that there is no body at the University that has the power to give a financial remedy for the kind of losses that the Students allege they have suffered. However, for the purposes of this motion, it is not necessary to decide that point; it is sufficient to observe that if the AAC has any power to award financial compensation, or to order an apology, that power must flow from the AAC's Terms of Reference.

The purpose and function of the AAC, according to s. 2.1 of its Terms of Reference, is to decide "appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements". Its jurisdiction is therefore limited to considering whether those academic regulations and requirements have been applied correctly, consistently, and fairly. Its remedial jurisdiction is limited to making orders of an academic nature; such as allowing a student

to withdraw late without academic penalty, granting aegrotat standing, granting a request to write a deferred examination. It is well-recognized that the AAC has no jurisdiction to re-read a paper or examination to consider the merits of the grade assigned, or to review decisions about admissions. Awarding financial compensation for the losses flowing from an erroneous or unfair "application of academic regulations and requirements" is not within the jurisdiction of the AAC. Neither is requiring the SGS and the University of Toronto to apologize to the Students.

A similar conclusion was reached in Report No. 302, dated July 26, 2005. Your Committee granted a student permission to withdraw late from a course without academic penalty. The student asked the AAC whether, as a consequence of that decision, "she could be refunded the money she spent on the course" (p. 3). Your Committee decided that it lacked jurisdiction to make any order in this respect.

At the hearing on the merits, the Students will be permitted to argue for a recommendation concerning their tuition for 2008/09, but will not otherwise be permitted to argue for the remedies sought under categories 2 through 5, and the AAC will not grant any of the other remedies sought under categories 2 through 5.

The Remedies Sought in Category 1

The SGS concedes that the AAC has jurisdiction to grant the remedies sought under category 1. The Students have set out those remedies are as follows (vol. 1, p. 22):

> 1-1) The groundless FZs in Winter 2009 to be removed.
> 1-2) An official letter from the SGS explaining our circumstances in fall 2008 and winter 2009 and certifying our justified absence due to family crisis that resulted in WDRs.
> 1-3) Immediate registration not to lose another academic year. Also, our OSAP loan is due as a result of the department's illegitimate termination and refusal to process our registration.
> 1-4) Special accommodations from the department and the SGS so that we could complete the first year courses as soon as possible.
> 1-5) In Fall 2009, we took the final exams for the first stage of micro and macro. We would like them to be marked and considered completed.

The AAC has jurisdiction to grant remedies 1-1 and 1-5. The Chair is not certain that the AAC has jurisdiction to grant the remaining remedies, but considers it preferable to decide that question, if necessary, at the hearing on the merits.

V. Privilege and Relevancy

The SGS submits that some of the material filed by the Students is inadmissible at the hearing on the merits on the ground of that they were communications in furtherance of dispute settlement and therefore privileged. The SGS submits that the Students'

discussions with Professor Berry Smith, Associate Dean of SGS, and Professor Martin J. Osborne, Associate Chair, Graduate Studies, of the Department of Economics, between May 22 and October 27, 2009 as well as their correspondence and meetings with Mr. Centa in the fall of 2010, constituted failed attempts to settle the Students' dispute with SGS. The SGS submits that no evidence concerning the content of these efforts at settlement should be admitted at the hearing on the merits, and notes that Professor Scane ruled to that effect at the GAAB (vol. 1, p. 223). The SGS submits in the alternative that this material is irrelevant.

The Students submit that their interactions with Professor Smith were not settlement negotiations. In their written submissions, they stated that they were not negotiating but "seeking help and academic advise" from Professor Smith and also asking him "to FORCE the department to reverse their illegitimate academic decisions about our case". The Students did not make any specific submissions about their correspondence and meetings with Mr. Centa in the fall of 2010. However, they argued that all of the material they filed was relevant to their case.

Privilege

The privilege for communications in furtherance of dispute settlement is described in *Halsbury's Laws of Canada: Evidence* (2010) as follows (HEV-182, footnotes omitted):

> Communications between the parties to a dispute for the purpose of settling the dispute are not admissible in subsequent litigation if the attempt to settle fails. The purpose of this privilege is to encourage settlement by enabling the parties to speak frankly and to offer concessions without the fear that those words will be used against them in litigation. ... There are three conditions for the existence of the privilege:
>
> 1. Litigation must have commenced or be contemplated;
> 2. The communication must have been made with the express or implied intention that it not be disclosed if negotiations failed; and
> 3. The purpose of the communication was to reach a settlement.

The privilege originated in judicial proceedings, but is also applicable in proceedings before other tribunals (see, for example, *Canadian Broadcasting Corporation v. Paul* (2000), 198 D.L.R. (4th) 633 (F.C.A.)) because the underlying policy is the same: the parties to a dispute should be encouraged to explore possible avenues of settlement, to suggest accommodations, to compromise their positions, without fear that those accommodations and compromises will be used to their detriment if settlement negotiations fail. "In the absence of such a protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was reached." (Bryant, Fuerst, and Lederman, *The Law of Evidence in Canada* (3d ed. 2009) at §14.314.)

The involvement of a mediator does not in itself destroy the privilege (Bryant, Fuerst, and Lederman, §14.349), though some authorities suggest that a mediator might be compelled

to testify about the mediated settlement discussions if, in the particular case, the interest in disclosure outweighed the interest in confidentiality (*e.g.*, *Rudd v. Trossacs Investments Inc.* (2006), 265 D.L.R. (4th) 718 (Ont.Div.Ct.)). The Chair's view is that the policy reasons for protecting communications in furtherance of dispute settlement, and therefore the privilege itself, apply whether the settlement discussions took place with or without a mediator.

The privilege protects the content of the communications. The fact that settlement discussions were underway, though not the content of those discussions, may be admissible if relevant.

The onus of establishing a privilege is on the party who asserts it. If the privilege is established, it is permanent and may be asserted in any subsequent proceedings, even if those proceedings involve a different dispute or different parties (Bryant, Fuerst, and Lederman at §14.331).

Relevance

Evidence is relevant to a fact in dispute "if its admission in the proceedings makes the existence of that fact more or less probable, to any degree" (*Halsbury's Laws of Canada* at HEV-9).

The 2009 Discussions: Privilege

The SGS appeal process provides that at any time before an appeal is heard by the GAAB, "a student may consult the relevant SGS Vice-Dean for advice and/or informal mediation". The Students initiated this process by e-mail on May 27, 2009 (Vol. 2, p. 37 and p. 179). During the summer of 2009, the Department of Economics and Professor Smith sought and obtained information from the students concerning their situation. On September 15, 2009, Professor Osborne made a proposal under which the Students might resume their studies for the 2009/10 academic year (Vol. 2, p. 214); later that week, Professor Osborne gave a deadline of September 22 for replying to that offer (Vol. 2, p. 215). On September 21, Mr. [redacted] sought some clarifications; Professor Osborne and Professor Smith responded the next day (Vol. 2, pp. 217-219). On September 23, Mr. [redacted] wrote to Professor Osborne, stating "This is to accept the offer" (Vol. 2 p. 222). However, the Students never registered, apparently because they were unable or unwilling to pay any portion of their arrears of tuition fees, and on October 13 chose to decline the offer and pursue an appeal (Vol. 2, pp. 227-32). After some further discussion (Vol. 2, pp. 233-44), Professor Smith wrote to the Students stating that "we seem to have run out of options in this case and I do not believe it would be helpful to discuss it any more."

At the hearing of the motion, Mr. Centa made a very compelling argument that these discussions were privileged. The Chair advised the students of the three conditions necessary for the existence of the privilege and invited them to identify which condition was lacking in this case. The Students repeated their written submission that their

discussions with Professors Smith and Osborne were in the nature of receiving academic advice rather than dispute settlement, thus in effect denying that the third condition was satisfied.

The Chair is persuaded that the discussions between May and October 2009 satisfy all the conditions for dispute settlement privilege.

First, the Students disagreed with the grades assigned by the Department of Economics for the 2008/09 academic year and with other decisions that the Department had taken in connection with their personal situation (vol. 2, pp. 33-35) and were contemplating invoking the University's appeal procedures to obtain a remedy. Thus, the dispute was contemplated, though the appeal had not yet been launched.

The Students did not dispute the existence of the second element of the privilege. In any event, whatever the Students' intention may have been, your Chair infers from the nature of the offers made that the Department of Economics and the SGS intended to keep these discussions confidential.

The Students argued that the third element of the privilege was lacking because the 2009 discussions were not settlement discussions but the giving and receiving of academic advice. Some of these discussions may well be characterized that way. But even if that is the case, the giving and receiving of that advice was part of a process of negotiation, of offer and counter-offer, in which the Department of Economics and the SGS made a number of proposals to accommodate the Students' situation and to enable them to re-enroll in the fall of 2009. Some of these proposals involved compromising the University's usual policies. For example, the SGS would have allowed the Students to register on the basis of partial, rather than full, payment of their arrears of tuition (vol. 2, p. 227). It is wholly implausible to describe all of these discussions as the giving and receiving of academic advice, rather than as negotiation to resolve a dispute.

It might be argued that the 2009 negotiations were not intended to settle the underlying dispute in this case, that is, the award of five FZ grades in 2008/09. The Students might well have accepted the Department's offer and nonetheless proceeded with a grade appeal to the GDAAC and then to the GAAB. Professor Smith left this possibility open in his e-mail of September 22 (Vol. 2, p. 219). However, this possibility does not destroy the privilege. The 2009 negotiations were clearly designed to settle a dispute about whether the Students could resume their studies in the Ph.D. program; even if it was not the precise dispute that is now before the AAC, those discussions were privileged.

The 2009 Discussions: Relevance

The only issues properly before the AAC are (i) whether the award of FZ grades for the Students' work in Winter 2009 was, given their personal situation at the time, a correct, consistent, and fair application of the University's policies and procedures, and (ii) whether the Department should grade the tests that the Students wrote in Fall 2009. The content of the negotiations concerning the Students' possible registration for 2009/10

have no bearing one way or the other on those issues. They are therefore irrelevant and the Students will not be permitted to put them in evidence at the hearing on the merits of the appeal. The fact that negotiations did occur is relevant only to explain why the Students were permitted to write the tests in Fall 2009.

The 2010 Discussions: Privilege

The Students appealed to GAAB in March 2010 (vol. 2, p. 250); however, that was the incorrect appeal route, and their appeal was eventually directed to the GDAAC. As noted above, the GDAAC made its recommendations on 3 June 2010, and Professor Hosios accepted them on 17 June 2010. The students then appealed to the GAAB. Before the hearing at the GAAB, Mr. Centa, counsel for the Department of Economics, e-mailed the Students, inviting them to a meeting "to see if we can try to resolve the outstanding issues between you and my client" (vol. 1, p. 511). Mr. Centa advised the Chair that some discussions did occur. These discussions did not succeed in resolving the issues, and the Students' appeal to the GAAB was heard in October 2010.

The Students' discussions with Mr. Centa in the fall of 2010, in advance of the hearing at the GAAB, are privileged. The appeal to the GAAB had been launched. The intention to keep the discussions confidential is readily inferred. The purpose of the discussions was, as Mr. Centa stated in his e-mail, to resolve the outstanding issues, including the very issue that was before the GAAB. The Chair infers that at that stage of the proceedings, there is no chance that the parties would have agreed to a settlement that did not cover all of the issues. Evidence concerning the Students' settlement discussions with Mr. Centa will not be admitted at the hearing on the merits of the appeal.

The 2010 Discussions: Relevance

The fact that settlement discussions took place before the GAAB hearing in 2010 is irrelevant to the issues on this appeal.

VI. The Students' Requests

By e-mail before the hearing, and again at the hearing, the Students made a number of requests of your Chair. They were all declined, for the reasons that follow.

By e-mail dated August 13, 2011, the Students asked Mr. Lang for "a complete archive of notes, minutes, statements and of course testifies of the GAAB's hearings". They asserted that Ms Jane Alderdice, Secretary to GAAB, had made a complete record of the proceedings. Mr. Lang replied by e-mail that same day, indicating that he had nothing to do with the GAAB. The Students then directed their request to Ms Alderdice herself. Mr. Centa responded on behalf of SGS, stating that "Documents created by or for the use of the GAAB chair or panel are not provided to students as part of the appeal process." The Students therefore requested that the Chair order Ms. Alderdice to produce these documents for use in the hearing at the AAC. The Chair refused to make that order, for

three reasons. First, the Chair of the AAC has no power to compel anyone to produce documents. Second, even if the Chair did have the power to order production of these documents, he would not do so. Ms. Alderdice's role at the GAAB was not to prepare a transcript for the use of the parties; the GAAB is not a court of record. Her role was to assist the GAAB panel hearing the Students' appeal. Any documents that she may have prepared in that role are solely for the use of the GAAB and are immune from disclosure to the parties in the appeal to the AAC. Third, the documents sought by the Students are irrelevant. The Students appeal from the decision of the GAAB. All material relevant to that appeal has already been filed.

Second, in several e-mails sent to Mr. Lang within a few days preceding the hearing, the Students requested that they be allowed to enroll in the Ph.D. program in Economics in September 2011. The day before the hearing, Mr. Centa replied on behalf of SGS: "Lapsed graduate students are not entitled to register and must apply for reinstatement which is not automatic but subject to the review and approval of the graduate unit and SGS." The Students renewed their request at the hearing. Although the nature of their request was not entirely clear, it appeared to the Chair that the Students were asking him to order SGS to register them immediately for the 2011/12 academic year. Your Chair refused to make any order relating to the Students' registration. Any such order is clearly not within the jurisdiction of the AAC Chair hearing a preliminary motion to decide questions of law, where a hearing on the merits has not occurred.

Third, the Students asked the Chair, Mr. Lang, and Mr. Centa to identify the University committee that would have jurisdiction to grant the remedies they seek under categories 2 through 5, should the Chair issue a decision in favour of the SGS. It was not appropriate for the Students to seek this information from Mr. Centa, whose duty in these proceedings is not to assist the Students but to represent SGS's position. Mr. Lang's role in these proceedings is neutral, and is to assist the Chair and the parties with issues that arise in these proceedings; it is not to advise the Students on the proper route for commencing other proceedings. And the Chair does not know the answer to the Students' question, nor is it the role of the Chair to answer it. The Students have already been advised by the ADFG Office to go to Downtown Legal Services, and they may also wish to consult with the University Ombudsperson.

VII. Orders and Directions to the Parties

1. The AAC may make a recommendation concerning rebate or cancellation of tuition for 2008/09, but otherwise has no jurisdiction to grant the remedies sought by the Students under categories 2 through 5 (vol.1, pp. 22-23).

2. At the hearing on the merits, the Students may not call any evidence or make any argument to prove their entitlement to the remedies that they seek under categories 2 through 5, except to the extent that such evidence or argument is relevant to a recommendation concerning rebate or cancellation of tuition for 2008/09.

3. The only proper respondent on this appeal is the SGS; accordingly, the names of the other respondents listed at vol. 1, p. 13, are to be deleted or, if that is not convenient, to be disregarded by the AAC.

4. At the hearing on the merits, no evidence may be called concerning the Students' negotiations with SGS and the Department of Economics between May and September 2009, unless and to the extent that the fact that negotiations were occurring during that time is relevant to an issue in the hearing.

5. At the hearing on the merits, no evidence may be called concerning the Students' settlement discussions with SGS in the fall of 2010.

6. The appeal books filed by the Students are to be edited as described in paras. 27 and 28 of the Submissions of the SGS, except for the Students' e-mail correspondence with Professor Osborne mentioned in para. 27(ii), which Mr. Centa conceded at the hearing was not privileged; the editing is to be carried out by Mr. Centa's office.

7. Within three weeks of receiving this Report, the SGS is to file its response to the Students' appeal.