

**THE UNIVERSITY OF TORONTO**  
**THE GOVERNING COUNCIL**

Report #429 of the Academic Appeals Committee  
November 21, 2023

To the Academic Board  
University of Toronto

**Senior Chair:**  
Professor Hamish Stewart

**For the Student Appellant:**  
■ (the “Student”)

**For the Rotman School of Management:**  
Lily Harmer, Paliare Roland Rosenberg Rothstein LLP

Witness Ruling

In September 2021, the Student was enrolled in RSM1160 at Rotman School of Management (Rotman). He received a grade of B+ for the course. The grade included three components: class participation, a group presentation, and a reaction paper. The Student sought a review of the grade. Rotman declined to provide a review of the first two components of the grade. The review process therefore involved a re-reading of the paper by an anonymous second reader. The second reader confirmed the grade for the reaction paper. The Student appealed the course grade to the Graduate Department Academic Appeals Committee (GDAAC). The GDAAC recommended that his appeal be dismissed. Rotman’s Interim Vice-Dean accepted that recommendation. The Student’s further appeal to the Graduate Academic Appeal Board (GAAB) was dismissed.

The Student now appeals to your Committee, seeking to have a grade of CR substituted for B+, or, in the alternative, a grade based solely on the reaction paper, or, in the further alternative, a substantive re-evaluation of all three components of his grade. His appeal materials are dated May 15, 2023, and are 429 pages long. Rotman’s materials, dated July 17, 2023, are 319 pages long (24 pages of submissions, a Book of Documents of 5 pages, and a Book of Authorities of 290 pages). The Student’s reply, dated September 5, 2023, is 12 pages long. The Senior Chair has rejected Rotman’s request to file a revised version of its submissions. The hearing panel has been constituted and the hearing is scheduled for the afternoon of November 23, 2023.

On November 14, 2023, the Student wrote to the Senior Chair, requesting that the Senior Chair issue summonses pursuant to s. 10.1 and 12 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, compelling the following persons to appear at the hearing: Professor Richard Powers, who was the course instructor in RSM1160; Professor Scott Liao, who at the relevant time served as Academic Director of the Full-Time MBA Program at Rotman; and Professor Michael Ryall. The Student helpfully appended draft summonses to his request. On November 15,

counsel for Rotman provided written submissions opposing the Student's request. The Senior Chair has advised the parties that the Student's request was denied, with reasons to follow. These are the reasons.

Article 3.1.8 of your Committee's Terms of Reference provides that your Committee follows "[t]he procedures for hearings required by the [*SPPA*] ..." The relevant sections of the *SPPA* provide:

**2** This Act ... shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

**10.1** A party to a proceeding may, at an oral or electronic hearing,  
(a) call and examine witnesses and present evidence and submissions; and  
(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

**11 (1)** A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal.

...

**12 (1)** A tribunal may require any person, including a party, by summons,  
(a) to give evidence on oath or affirmation at an oral or electronic hearing ...

relevant to the subject-matter of the proceeding and admissible at a hearing.

The power conferred by s. 12(1) is discretionary. The objectives stated in s. 2 of the *SPPA* are relevant to the exercise of this discretion. A necessary, though not sufficient, condition for exercising the discretion to summons a person to be a witness before an administrative tribunal is that the person could offer testimony that would be necessary or helpful to the tribunal in resolving the factual issues before it. The Senior Chair finds that this condition is not satisfied because the issues before your Committee in this appeal are not primarily factual, and to the extent that they are factual, the testimony of the proposed witnesses would be unhelpful.

As counsel for Rotman correctly submits, "the standard of review of an academic appeal is reasonableness." While the application of this standard depends on the facts of the case, on reading the parties' materials, the Senior Chair notes that there are very few facts in dispute that are material to a determination of the reasonableness of any of the decisions appealed from. On pp. 5-7 of his appeal materials, the Student outlines the facts underlying his appeal. In its responding materials, Rotman relies almost entirely on the Student's appeal materials in its recounting of the facts and, with some exceptions, does not take issue with any of the material facts recounted by the Student. To the extent that there are facts in dispute, the Senior Chair finds that testimony from the proposed witnesses would add little if anything to the written record.

The Student has characterized the issues to be decided by your Committee as follows (Student's appeal materials, p. 7):

- (A) Were the prior decisions to uphold the Appellant's failing class participation grade and presentation grade without a substantive re-evaluation into the Appellant's performance reasonable?
- (B) Were the prior decisions to uphold the Appellant's reaction paper grade reasonable?
- (C) Were the prior decisions made in a procedurally fair manner?

In resolving these issues, the panel will interpret the relevant University and Rotman policies and will decide whether those policies were reasonably applied in the Student's case. If the parties' approach to these issues raises any questions about the jurisdiction of your Committee, your Senior Chair will determine those questions.

Under Issue (A), the Student makes five submissions.

- (i) Rotman's policy concerning disputes about grades provides that "participation points or presentations are not subject to a re-read ..." (Student's appeal materials, p. 8). The Student submits that the GAAB's decision to uphold this policy was unreasonable (Student's appeal materials, pp. 8-13). Rotman defends its policy. Resolving this issue requires your Committee to interpret University and Rotman policies. It does not require fact-finding. The proposed witnesses cannot provide any testimony that is material to this issue.
- (ii) The Student submits that neither the GAAB nor the GDAAC conducted a substantive review of the participation and presentation components of his grade and that their refusal to do so was unreasonable (Student's appeal materials, p. 14). Rotman does not dispute the fact that the GAAB refused to conduct a substantive review. The question whether the GDAAC provided a substantive review must be, and can be, determined on the face of the record, without additional evidence. If your Committee ultimately agrees with the Student's statement that "not a single decision maker has initiated a substantive review of the [Student's] participation and presentation components", the issue will be whether that refusal was a reasonable application of the relevant policies. Resolving this issue does not require fact-finding. The proposed witnesses cannot provide any testimony that is material to this issue.
- (iii) The Student submits that the participation grade awarded by the course instructor was unreasonable (Student's appeal materials, pp. 15-19). To the extent that this submission requires a substantive review of the course instructor's evaluation of the Student's participation, it is outside the jurisdiction of your Committee. It is well-established that on a grade appeal neither the GAAB nor your Committee will consider the substantive merits of a student's work (see, for example, Report #358 and Report #363-1, Student's appeal materials, pp. 419-428; Report #359-1 and Report #415, Rotman Book of Authorities, Tabs 7 and 8). To the extent that this submission turns on allegations that the process of determining the grade was unfair, see (C)(ii) below. The proposed witnesses cannot provide any testimony that is material to this issue.

- (iv) The Student submits that the presentation grade awarded by the course instructor was unreasonable (Student's appeal materials, pp. 19-21). Again, to the extent that this submission requires a substantive review of the course instructor's evaluation of the Student's participation, it is outside the jurisdiction of your Committee. To the extent that it turns on allegations that the process of determining this component of the grade was unfair, it can be determined on the face of the record. To the extent that it turns on the Student's submission that he was disadvantaged by the fact that his group was smaller than the others (a fact that Rotman does not appear to dispute), the evidence of the proposed witnesses would be immaterial. Similarly, there appear to be no facts in dispute concerning the timing and the process by which the groups were constituted. The Student's claim that the groups were constituted after the "drop date" can, if necessary, be resolved by your Committee on the basis of the written record. The drop/add date for the course is clearly stated in the record (Student's appeal materials, p. 391) and is not contested by Rotman. Whether, as Rotman has argued at previous levels of appeal (Student's appeal materials, p. 324), there was also a later date by which students could withdraw without academic penalty is a question of Rotman policy that, if material to any issue in this appeal, can be determined at the hearing. The proposed witnesses cannot provide any testimony that is material to this issue.
- (v) The Student submits that the grading scheme for the course violated Rotman's policies (Student's appeal materials, pp. 21-22). Resolving this issue requires interpretation of the relevant policies. It does not require additional fact-finding. The proposed witnesses cannot provide any testimony that is material to this issue.

Issue (B) concerns the third component of the Student's grade, the reaction paper. As noted above, on a grade appeal neither the GAAB (from whose decision the Student appeals) nor your Committee will consider the substantive merits of a student's work. Your Committee will therefore not conduct a substantive assessment of the Student's paper or of the second reader's review of the paper. For the same reason, your Committee will not entertain the Student's submission that the GAAB's decision was unreasonable because it did not include such a substantive assessment of the paper (Student's appeal materials, pp. 24-25). Rather, Issue (B) requires your Committee to review the fairness of the procedures by which the Student's reaction paper was reassessed. The central allegation of unfairness in the Student's written submissions is what he characterizes as a "lack of transparency," namely, Rotman's refusal to disclose the identity of the second reader. Relatedly, he submits that "the Academic Director failed to provide the [Student] with an opportunity to object to the appointment of the Anonymous Regrader" (Student's appeal materials, p. 28). These facts are not in dispute. Rotman agrees that it failed to disclose the second reader's identity and that it did not consult with the Student before selecting the second reader. Rotman submits that its process "adhered to the provisions of the Faculty Policy providing for re-read requests" (Rotman submissions, para. 56). Your Committee will be required to interpret Rotman's re-reading policy and to decide whether Rotman applied that policy fairly to the Student's case. If your Committee agrees with Rotman's submission that refusing to disclose the second reader's identity was in accordance with Rotman's policy (and that will be for your Committee to decide), then the identity of the second reader will be irrelevant. If, on the other hand, your Committee agrees with the Student's submission that the refusal to disclose the second reader's identity was an unfair application of Rotman's policy, then

it will be for your Committee to determine an appropriate remedy. The proposed witnesses cannot provide any testimony that is material to this issue.

The Senior Chair would add the following. The Student states that he has sought to discover the identity of the second reader via a freedom of information request pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, that his request was refused, and that he has appealed the refusal to the Information and Privacy Commissioner (Student's appeal materials, pp. 23-24). He also submits that "the evidence suggests that Professor Ryall was the Anonymous Re-grader" (p. 23). He now asks the Senior Chair to summons Professor Ryall as a witness. The Senior Chair infers that the Student wishes to ask Professor Ryall directly, under oath, whether he was the second reader. Even if it were otherwise appropriate to summons Professor Ryall (which it is not), the Senior Chair would not allow the Student to ask him that question. The Student's using your Committee's process as a vehicle for determining the identity of the second reader would be in the nature of a collateral attack on the *FIPPA* process and would therefore be an abuse of your Committee's process.

Issue (C) involves several allegations of procedural unfairness that overlap to some extent with issues (A) and (B).

- (i) The Student submits that he was entitled to a high degree of procedural fairness (Student's appeal materials, pp. 26-27). This submission raises questions of law and of interpretation of University and Rotman policies, to which the testimony of the proposed witnesses would be immaterial.
- (ii) The Student submits the course instructor impermissibly delegated his authority over grading the participation component of the grade to the teaching assistant (Student's appeal materials, pp. 16-47 and 27-28).  
Rotman notes that the GAAB rejected the allegation of impermissible delegation and submits that the GAAB's decision was reasonable and that your Committee should defer to it (Rotman submissions, paras. 50-53). Rotman's position throughout this appeal has been, as Professor Liao put it in his submissions to the GAAB, that in assessing class participation "[t]he Instructor complemented the TA's records with his own qualitative assessment" (Student's appeal materials, p. 324). This position is consistent with an email dated February 7, 2022, in which the instructor stated that "Based on records kept by the TA, and my own comments, you had a total of 4 comments, none of which I had highlighted as insightful or adding significantly to the topic and/or discussion" (Student's appeal materials, p. 38).  
The Student, however, does not accept Rotman's position. He asks your Committee to infer that the course instructor "focused entirely on the quantitative metrics recorded by the [teaching assistant]" and did not exercise any independent judgment concerning the stated criteria of "thoughtfulness, understanding, and promotion of further questioning" (Student's appeal materials, p. 16).  
Although this factual issue is for your Committee to decide after the hearing, not for your Senior Chair to decide on a pre-hearing ruling, the Senior Chair observes that if Rotman's position is correct, the Student's assertion of impermissible delegation is likely without merit, whereas if your Committee draws the inference urged by the Student, then the assertion of impermissible delegation may have some merit. Two of

the proposed witnesses (the program director and Professor Ryall) have no knowledge of this issue. Therefore, the question for the Senior Chair on this motion is whether testimony from the course instructor would assist your Committee in determining it. Your Senior Chair finds that it would not.

The Student's appeal materials include the course instructor's email to the Student (Tab A); the Student's account of his meeting with the course instructor (p. 6); records of the participation grades (Tab R); emails between Professor Doidge and the course instructor concerning the appeal to the GDAAC (Tabs S and T); and the Student's submissions as to why the inference should be drawn (pp. 15-17). The inference sought by the Student can be drawn on the basis of this written record, if your Committee chooses to do so; it would then be for your Committee to determine the significance of the impermissible delegation to the outcome of the Student's appeal. Testimony from the course instructor would be of limited, if any, assistance, for the following reasons.

The Senior Chair infers that the Student intends to cross-examine the course instructor with a view to impugning the credibility of his description of how he determined the participation mark. But it is improper to call a witness for the purpose of cross-examining them to impugn their credibility (*R. v. Soobrian* (1994), 21 O.R. (3d) 603). The Senior Chair will not permit the Student to do so. As counsel for Rotman correctly points out, if the course instructor were called as a witness, the Student would have to begin by examining him in chief. The Senior Chair anticipates that the course instructor would testify in accordance with his email to the Student. As counsel for Rotman correctly points out, the Student would be unable to cross-examine the course instructor in the absence of a ruling from the Senior Chair that he was a hostile witness. The possibility that the course instructor might turn out to be a hostile witness and that, following a ruling to that effect, the Student's cross-examination of him would add anything significant to the written record before your Committee is vanishingly small.

On the other hand, the course instructor might well be a witness adverse to the Student's position. Section 23 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, concerns the cross-examination of an adverse witness. Rotman has cited authority for the proposition that s. 23 does not apply in proceedings before administrative tribunals governed by the *SPPA*. Whether or not that is a correct statement of law, the Senior Chair notes that s. 23 provides only for a right of cross-examination of an adverse witness on a prior inconsistent statement to impeach credibility, not for cross-examination at large, and would therefore be of very limited assistance to the Student. Finally, it is always impermissible to impeach the credibility of one's own witness by evidence of bad character (*Evidence Act*, s. 23). Page 30 of the Student's appeal material suggests that he might attempt to do so. The Senior Chair would not permit this form of impeachment.

- (iii) The Student submits that he was not consulted "when the instructor carried out his evaluation of the [Student's] class participation" and when the Academic Director assigned the second reader (Student's appeal submissions, p. 28). These facts are not in dispute. Rotman accepts that the Student was not consulted but submits that Rotman acted in accordance with its policies. As noted above, in considering the Student's submission on this point, your Committee will be required to interpret

Rotman's re-reading policy and to determine whether Rotman applied that policy fairly to the Student's case. The evidence of the proposed witnesses is immaterial to this exercise.

- (iv) The Student submits that the conduct of (a) the course instructor and (b) the GAAB demonstrated reasonable apprehension of bias. As to (a), Rotman does not challenge the facts underlying the Student's assertions concerning the course instructor's apparent support for the Liberal Party of Canada; rather, Rotman submits that those facts do not give rise to a reasonable apprehension of bias (Rotman submissions, paras. 65-66). Your Committee can determine this issue without testimony from the proposed witnesses. As to (b), the proposed witnesses' testimony would be irrelevant.
- (v) The Student submits that "the instructor's assessment was procedurally unfair because of the inordinate delay in rendering his decision" (Student's appeal materials, p. 32). Rotman does not challenge the Student's assertion that he received his grade 103 days after the course ended, but submits that the delay did not create procedural unfairness (Rotman submissions, paras 73). On this issue, there are no facts in dispute and therefore no need for the testimony of the proposed witnesses.

For these reasons, the Student's request to summons the three proposed witnesses was refused.