

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #439 of the Academic Appeals Committee
May 6, 2025

To the Academic Board
University of Toronto

Your Committee reports that it held a hearing on March 31, 2025, at which the following members were present:

Academic Appeals Committee Members:

Professor Hamish Stewart, Senior Chair
Dr. Audrey Karlinsky, Faculty Governor
Liam Dravid, Student Governor

Hearing Secretary:

Carmelle Salomon-Labbé, Associate Director, Office of Appeals, Discipline and Faculty Grievances

For the Student Appellant:

J.J. (the “Student”)

For the Toronto School of Theology:

Lily Harmer, Paliare Roland Rosenberg Rothstein LLP
Catherine Fan, Paliare Roland Rosenberg Rothstein LLP

Your Committee considered the Student’s appeal from a decision of the Toronto School of Theology’s Academic Appeal Committee (TST-AAC), dismissing his appeal from a decision of Knox College to dismiss him from the Master of Theological Studies (MTS) program. The appeal is dismissed.

Background

From 2017 onward, the Student was enrolled in the MTS program at Knox College. In the Fall 2021 term, the Student failed two courses (referred to in this Report as Matthew and Galatians). As a result, his GPA fell below the minimum required to continue in the program. Accordingly in March 2022, Knox College dismissed the Student from the program. The Student’s appeals of his failures in these two courses were successful and he ultimately received the INC notation for each course. As a result, his GPA was no longer below the minimum. For that reason, on November 28, 2023, Knox College reinstated him into the MTS program. The issues that the

Student raised in his appeals from his results in Matthew and Galatians have been resolved and are not now before your Committee.

Meanwhile, the Student separately grieved Knox College's decision to dismiss him. The issues the Student raised in this appeal did not relate to his academic performance in Matthew and Galatians, but alleged procedural irregularities in the decision to withdraw him.

On November 29, 2023, Knox College moved before TST-AAC for the appeal to be dismissed on the basis that it was moot because Knox College had reinstated the Student into the MTS program. In a decision dated January 15, 2024, the TST-AAC agreed with the submissions of Knox College and dismissed the appeal as moot, without considering its merits.

The Student appeals to your Committee.

Subsequent events

In January 2024, the Student requested a leave of absence from the MTS program. Knox College refused to grant this request and advised the Student that to remain in the program he needed to register in at least one course for the Winter 2024 term. The Student did not register for any courses. On January 29, 2024, Knox College advised the Student that he was deemed to have withdrawn from the MTS program and, that if he wished to resume his studies, would have to reapply. This advice was reiterated in a letter of May 9, 2024. There was no information before your Committee to indicate that the Student had challenged these decisions in any forum.

The remedies sought by the Student

In his written materials, the Student stated that he was seeking the following two remedies (Student's appeal materials, p. 011):

1. "I request that the Committee uphold the explicit agreement made by Chair Lisa Austin of the Academic Appeals Committee, on behalf of the Governing Council, which stated that a hearing should be held to determine whether the Knox College Handbook's dismissal policy is consistent with the TST BD Handbook. This agreement is binding, with both Toronto School of Theology (TST) and myself having agreed to it. The offer and the agreement were officially recorded in Report 427."
2. "I request that the notation for the Galatians course be changed from INC back to SDF, as Knox College and TST used Report 428 to deny me a hearing regarding the improper dismissal."

In his reply submissions and at the hearing of the appeal on March 31, 2025, the Student made it clear that he was also seeking the following remedies:

3. To order an appeal from the 2024 dismissal be heard together with his appeal of the 2022 dismissal. [See also p. 011 of the Student's appeal materials.]

4. “The first dismissal should be void due to administrative errors and procedural breaches, and I am seeking a declaration to that effect.”

Your Committee interprets the first remedy requested by the Student as follows. On the merits of the appeal, the Student wants to argue that after he failed Matthews and Galatians, he should have been placed on academic probation rather than being dismissed from the program. The Student was dismissed according to the relevant Knox College policy (see pp. 061 to 063 of TST’s materials); however, the Student’s position is that these policies are inconsistent with the relevant TST policy, which, the Student argues, would have resulted in his being placed on probation rather than being dismissed (see pp. 318-319 of the Student’s appeal materials). Your Committee refers to this argument as “the inconsistency argument.” The first remedy requested by the Student is in essence a claim that that he had been guaranteed that he would have a forum in which to make the inconsistency argument, regardless of the outcome of his grade appeals; accordingly, his appeal should be heard on its merits even if it is moot. Your Committee considers this argument to be relevant to the question whether TST-AAC should have exercised its discretion to hear the appeal, notwithstanding its mootness, and we consider it in its appropriate place below.

Your Committee has no jurisdiction to grant the second or third requested remedies.

The Student’s request that “the notation for the Galatians course be changed from INC back to SDF” refers to the Student’s situation between August 30 and November 24, 2023. TST-AAC had dismissed the Student’s appeal from his failure in Galatians. In Report 427, your Committee allowed the Student’s further appeal and gave the Student a choice of remedies: either resubmit the final paper for Galatians to be graded or accept a notation of INC. Pending the Student’s election, on August 30, 2023, TST changed the notation for Galatians on the Student’s transcript from FZ to SDF (standing deferred). As the Student appeared reluctant to make his election, TST sought directions from the Senior Chair of your Committee as to the implementation of the remedy granted in Report 427. In Report 428, released November 10, 2023, the Senior Chair held that the intent of Report 427 was to require the Student to make his election within a reasonable time and authorized TST to change the notation to INC if the Student did not make a timely election. The Senior Chair specifically noted that SDF was not a permanent notation and that at some point in time it would have to be replaced by a grade or other permanent notation. On November 24, 2023, the Student elected to receive the INC notation rather than completing the course work for Galatians. The Student’s argument now appears to be that if the notation of SDF had remained on his transcript, he would have remained in bad standing and would therefore not have been reinstated, and accordingly the appeal of his dismissal would not have been moot.

In these circumstances, your Committee has no jurisdiction to require TST to change the notation for Galatians from INC to SDF. The Student did not appeal TST’s decision to change the notation from SDF to INC and therefore there is no basis for the Student to challenge that

decision before your Committee. More fundamentally, the Student is essentially asking a panel of your Committee to reconsider the Senior Chair's decision in Report 427. Pages 023 to 026 of the Student's appeal materials make this intent clear, as they recycle arguments that the Senior Chair rejected in Report 428. As explained in Report 418, your Committee has no power to reconsider its decisions. The fact that the prior decision in question was made by a Chair sitting alone rather than by a panel is irrelevant.

Your Committee has no jurisdiction to make any orders in respect of the 2024 dismissal, and thus has no jurisdiction to order such an appeal to be heard together with an appeal of the 2022 dismissal. The Student has argued that the 2024 dismissal is a direct consequence of his 2022 dismissal appeal having been dismissed for mootness. Even if that is so, and your Committee makes no finding to that effect, your Committee has no jurisdiction over the Student's complaints about the 2024 dismissal. Students are required to exhaust their appeals within their divisions before appealing to your Committee. The Student has outlined his argument as to why this dismissal was contrary to TST policy (Student's reply submissions, pp. 003-004), but he has not appealed it within TST. Your Committee therefore has no jurisdiction to deal with it. The dismissal flowed from Knox College's decision to refuse to grant the Student a leave of absence. The parties appear to be in agreement that that decision could not be appealed to TST-AAC (see para. 62 of TST's submissions; in his reply materials and at the hearing of the appeal, the Student appeared to accept this point). If that is correct, and it appears to your Committee that it is, then the refusal to grant the leave of absence could not be the subject-matter of an academic appeal at all and your Committee once again would have no jurisdiction to consider it.

With respect to the fourth remedy, although the issue was not argued, the Senior Chair is of the view that TST-AAC and the University's academic appeal bodies, including your Committee, do not have jurisdiction to make a declaration concerning the rights of the parties appearing before them. That power is generally available only to superior courts. However, if an academic appeal body were to exercise its discretion to hear a moot appeal, whatever it did say about it would be relief akin to or in the nature of a declaration. It would be available if TST-AAC were to hear the appeal; but it is not available now because your Committee did not hear argument for or against it. This remedy therefore need not be considered separately from the first requested remedy.

The applicable law and the standard of review

The parties agree that the test to be applied in determining whether an appeal to your Committee is moot is the test from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, adapted to your Committee's circumstances. TST argues that administrative tribunals have the power to dismiss matters as moot on the basis of their powers to control their own processes (*B.S.A. Diagnostics Ltd. v. Ontario (Ministry of Attorney General)*, 2014 ONSC 6054, at paras. 39-40). The Senior Chair agrees.

Borowski states that a matter is moot “when the decision of the [tribunal] will not have the effect of resolving some controversy which affects or may affect the rights of the parties ... at the time when the [tribunal] is called upon to reach a decision” (at p. 353).

Borowski confirms that a court or tribunal has a discretion to hear a matter that is moot, and identifies three factors to consider in exercising this discretion: whether there is a “full adversarial context, in which both parties have a full stake in the outcome”; whether “it is worthwhile to allocate scarce judicial resources to resolve the moot issue”; and whether it is appropriate to make a decision on a moot matter in light of “the judiciary’s role in our political framework” (at p. 345). The factors are interrelated and none of them is necessarily determinative.

The standard of review is reasonableness. Your Committee must determine whether the TST-AAC’s determination that the Student’s appeal was moot was reasonable and whether its decision not to hear the appeal despite its mootness was reasonable.

The Student’s appeal is moot

TST-AAC found that “reinstatement [was] the certain practical remedy for an appeal against dismissal” and concluded “that the live controversy has been resolved” (Student’s appeal materials, p. 009). Accordingly, the Student’s appeal was dismissed as moot.

TST-AAC’s determination that the Student’s appeal was moot was not only reasonable but correct. The only practical remedy that the Student could hope to obtain in his appeal from the 2022 dismissal was reinstatement in the MTS program. He was reinstated on November 28, 2023. Therefore, when TST-AAC considered his appeal in January 2024, the only practical remedy they could provide was one the Student had already received: reinstatement.

The Student has maintained throughout these proceedings that reinstatement was not the remedy he sought, and accordingly the fact that he was reinstated does not make his appeal moot. In his written and oral submissions, the Student sought to emphasize a purported difference between reinstatement and what he referred to as the “lifting” of the original dismissal. In your Committee’s view, there is no legal, academic, or practical difference between the reinstatement that the Student received on November 28, 2023, and an order from TST-AAC or from your Committee “lifting” his dismissal. These are two different ways of describing the same outcome.

The Student also argues that TST-AAC’s decision was procedurally unfair because, in filing its motion to dismiss the appeal on November 29, 2023, Knox College did not comply with s. 16.5.4.5 of the TST Handbook, requiring that “other submissions” be filed at least 10 days before an appeal was to be heard, *i.e.*, December 8, 2023. The procedural unfairness argument does not assist the Student. TST makes the plausible submission that its motion was not subject to this rule because it was not “other submissions” on the appeal but a new matter. Nevertheless, assuming without deciding that the filing of TST’s motion was inconsistent with that rule, it did not occasion any procedural unfairness. TST-AAC adjourned the matter, granted the Student

ample time to respond to the motion, and ultimately considered it in early January 2024, more than 10 days after TST filed its motion.

TST-AAC’s decision not to consider the merits of the moot appeal was reasonable

TST-AAC’s reasons for declining to consider the merits of the appeal were brief, but their decision to decline to do so was reasonable.

The first *Borowski* factor weighs against hearing the appeal on its merits. There is no live issue between the parties, nor are there any collateral consequences of the kind discussed in *Borowski* that might provide an appropriate adversarial context.

The second *Borowski* factor, adapted to the circumstances of an administrative tribunal, requires a consideration of whether “it is worthwhile to allocate scarce [adjudicative] resources to resolve the moot issue” (at p. 345). In his submission to TST-AAC, under the heading “Resources,” the Student stressed “the critical importance of this appeal, not just for me but for all students ... to safeguard against similar unjust dismissals by Knox College” (p. 229). TST notes that “the members of the TST AAC hold fulltime positions as staff and students at the TST” and argues that “[t]he principles of judicial economy weigh against hearing theoretical disputes” (TST Submissions, p. 23).

As noted above, the Student wants to make his inconsistency argument before TST-AAC or before your Committee and asks for a remedy in the nature of declaratory relief. Your Committee expresses no opinion on the merits of the inconsistency argument but notes that it involves the interpretation of TST policy, which is a proper subject-matter for appeals to TST-AAC and your Committee. Your Committee acknowledges that the inconsistency argument, if successful, would have implications that go beyond the merits of the Student’s case alone. This consideration weighs in favour of considering the merits of the inconsistency argument. However, considerations of adjudicative economy weigh strongly in the other direction. The members of TST-AAC (and of your Committee) are not full-time adjudicators but carry out their adjudicative functions in fulfillment of their administrative and governance roles within TST (and the University). Their time and attention are a scarce resource that should be reserved for the resolution of disputes that might have concrete, practical outcomes for student appellants.

The third *Borowski* factor, again adapted to the circumstances of an administrative tribunal, requires consideration of the appropriate role of the tribunal in the relevant dispute resolution process. The Student’s submissions do not directly address this factor. TST submits that proceedings before the TST-AAC are intended “to manage disputes in the ongoing relationship between students and the TST’s member colleges and provide certainty about their path forward in their programs”, not “to pronounce on the rights of the parties in the abstract, nor to reprimand the parties appearing before it” (TST Submissions, pp. 025-026).

The roles of TST and University academic appeal bodies are somewhat different from the role of an appellate or superior court. Academic appeal proceedings are meant to be relatively informal and to be focussed specifically on the reasonableness of the application of academic rules and regulations to particular students in specific circumstances. Academic appeal bodies do not have the power to invalidate University policies. In keeping with these features of their procedures, the doctrine of precedent does not apply strictly to the decisions of these adjudicative bodies; thus, if even TST-AAC (or your Committee) were to grant the quasi-declaratory relief sought by the Student, the inconsistency issue would not necessarily be resolved, as the decision would not be binding in future appeals where the same issue arose. The third *Borowski* factor weights strongly against consideration of the merits of this appeal.

As noted above, the Student also submits that in Report 427, your Committee guaranteed him an opportunity to make his inconsistency argument. He characterizes a direction made by Professor Austin, a Chair of your Committee, in the proceedings leading up to Report 427 as having created a contract between himself and TST, and he argues that this contract has been violated (Student's appeal materials, pp. 022-023). In that form, the argument does not assist the Student because even if Report 427 constituted a contract (an issue of general law that is for the Chair to decide), your Committee has no jurisdiction to grant remedies for breach of contract. Your Committee therefore interprets this argument as a claim that the failure of TST and your Committee to abide by the alleged agreement in Report 427 was unfair and that the alleged agreement is a decisive reason for TST-AAC to exercise its discretion to hear the appeal even if it is moot.

Your Committee agrees with TST that this argument entirely mischaracterizes Professor Austin's direction. The direction was not a contract, nor was it an agreement of any other sort, and in any event, it has been fully complied with.

The alleged agreement arose as follows. In its decision on the Student's Galatians grade appeal, TST-AAC declined to address his complaints about the 2022 dismissal because he had not followed the relevant procedures for grieving the dismissal. When the Student appealed from TST-AAC's decision concerning Galatians to your Committee, he sought to argue that the 2022 dismissal was improper. In a direction sent by email to the parties on June 12, 2023, Professor Austin correctly noted that the Student could not yet make those arguments because he had not exhausted his appeal rights within TST and there was therefore no decision that he could appeal to your Committee. She then said (Student's appeal materials, p. 071):

There are two options.

1. We continue with the hearing as planned on June 26 [2023] and sever the Knox College issues. In other words, the issue of whether the Knox College policies are consistent with TST policies will be excluded from the scope of the hearing. [The Student] can continue to pursue those issues in a separate complaint.

2. We can postpone the hearing until that separate complaint reaches the AAC and then join them and hear them together.

Professor Austin further noted that she had the jurisdiction to order option 1 but would need agreement of the parties to order option 2. There was no such agreement and accordingly the proceedings continued according to option 1. As the Student said in an email to counsel for TST on the evening of June 12, 2023, “I have chosen to separate the two issues” (Student’s appeal materials, p. 100 of). The Student’s appeal concerning Galatians was successful. And the Student did pursue, and continues to pursue, the dismissal issues separately. They are the subject matter of the current appeal to your Committee. And they are moot.

Professor Austin’s direction of June 12, 2023, is not an agreement between the Student and TST but a direction from Professor Austin to the Student and TST concerning the conduct of the appeal. The agreement of the parties was irrelevant to the effectiveness of option 1. (Agreement would have been necessary to implement option 2, but as noted, there was no such agreement.) In any event, the direction does not state that “a hearing should be held to determine whether the Knox College Handbook's dismissal policy is consistent with the TST BD Handbook” (Student’s appeal materials p. 011). It states, rather, that “[The Student] can continue to pursue those issues in a separate complaint.” The Student has done that. Everything that has happened in this appeal is consistent with Professor Austin’s direction.

Conclusion

The appeal is dismissed.

APPENDIX A

UNIVERSITY OF TORONTO GOVERNING COUNCIL

BETWEEN:

[REDACTED] [REDACTED]

Appellant

AND

THE TORONTO SCHOOL OF THEOLOGY

Respondent

Motion Decision

Senior Chair: Professor Hamish Stewart

For the Appellant:

J.J (the “Student”)

For the Toronto School of Theology:

Lily Harmer, Paliare Roland Rosenberg Rothstein LLP

The Toronto School of Theology (“TST”) requests directions concerning the Student’s appeal from TST’s Academic Appeal Committee (“TST-AAC”) to your Committee. All otherwise unidentified page references in this decision are to the Student’s appeal materials submitted to the Office of Appeals, Discipline and Faculty Grievances (“ADFG”) on April 27, 2024.

Background

From 2017 onward, the Student was enrolled in the Master of Theological Studies (MTS) program at Knox College. Knox College is a member of TST. In March 2022, Knox College withdrew the Student from the MTS program. The basis for the withdrawal was that in the Fall 2021 term, the Student had failed two courses (referred to as *Matthew* and *Galatians*), resulting in his standing being unsatisfactory. The Student appealed the failures in both

courses. Both appeals were ultimately allowed. The TST-ACC allowed the Student's appeal in *Matthew*, but dismissed his appeal in *Galatians*. The Student appealed to your Committee, which allowed the *Galatians* appeal. See Reports 427 and 428. In each course, the Student was granted the option of taking an extension to resubmit the final paper for graded credit or accepting the non-credit notation INC. Ultimately, he chose to receive the INC notation for each course. As a result, his standing was no longer unsatisfactory. For that reason, on November 28, 2023, Knox College reinstated him into the MTS program.

Meanwhile, in May 2022, the Student grieved Knox College's decision to withdraw him. This grievance is the subject of the current appeal to your Committee. The issues the Student raised in this appeal did not relate to his academic performance in *Matthew* and *Galatians*, but in essence alleged a number of procedural irregularities in the decision to withdraw him and in various appeal processes. In his Notice of Grievance Form he said, for example, that there had been a delay in hearing his *Matthew* and *Galatians* appeals, that the word "communication" in the TST Basic Degree Handbook was unclear, and that TST had refused to respond to various requests for information (see attachment to counsel for TST's letter of June 21, 2024).¹ On October 25, 2023, Mr. Jed Blackburn, counsel for Knox College, wrote to TST, copying the Student, suggesting that the hearing of the appeal should be deferred until the Student had made his election in accordance with Report 427. He stated that the results of the Student's appeals in *Matthew* and *Galatians* "may, pending [the Student's] election, have rendered the prior Knox dismissal moot, in which case there would be no live controversy affecting the rights of the parties" (p. 44). From that date, the Student was therefore aware that Knox College might argue that the appeal was moot.²

¹ It appears that in the first instance this appeal was separate from the *Matthew* and *Galatians* appeal because those courses were taught at Wycliffe College and accordingly were subject to Wycliffe's appeal procedures, while the decision to withdraw the Student was made at Knox College and so was subject to Knox's appeal procedures. In June 2023, the Student was offered a path to consolidating the two appeals but chose not to take it (pp. 481-2, 512).

² A few days before sending this email, Mr. Blackburn had some discussions with TST and Ms. Catherine Fan (who acted for TST in the *Galatians* appeal) concerning the scheduling of the appeal and the position that Knox College and/or TST might take in this appeal (pp. 34-35). The Student argues that he should have been copied on these messages. He says that TST's not informing him about these messages was "beyond" procedurally unfair and was unethical (pp. 14-15, 489-492). He says that, had he known of them, he would have notified the Senior Chair (who was then drafting Report 428) and would have "steadfastly refused to make my decision [about the remedy in the *Galatians* appeal] and pursued immediate judicial review of the situation" (p. 493). This submission is utterly devoid of merit. The communications between TST, Ms. Fan, and Mr. Blackburn were privileged and the Student had no right to see them. Moreover, they disclose no unethical conduct by TST or by either counsel. Quite the contrary: Mr. Blackburn explicitly stated in his email of October 17, 2023, that the Student should be copied on any formal request concerning the mootness of the appeal – and so he was, on October 25, 2023. Thus, well before Report 428 was released, the Student was aware that TST might take the position that, depending on the resolution of the *Galatians* appeal, this appeal had become moot.

On November 29, 2023, Knox College moved for the appeal to be dismissed on the basis that it was moot because Knox College had reinstated the Student into the MTS program. On December 18, 2023, the TST-AAC received written submissions from the Student and on January 5, 2024, written reply submissions from Knox College. The TST-AAC met on January 24, 2024, to consider the issue. In a decision dated January 25, 2024, the TST-AAC agreed with the submissions of Knox College and dismissed the appeal as moot, without considering its merits.

The Student appeals the TST-AAC's decision to your Committee. The Student's appeal materials are 1,299 pages in length. On June 21, 2024, Ms. Lily Harmer, counsel for TST, wrote to ADFG asking for directions concerning the conduct of the appeal and requesting a case conference. On June 24, 2024, the Student replied by email to counsel and to ADFG. He stated that requiring him to reply to TST's request for directions would be procedurally unfair and that a case conference would not be appropriate. The email also included brief submissions as to why the directions sought by TST should not be granted.

This type of preliminary matter can be handled by any Chair of your Committee, but is usually dealt with by the Senior Chair. Since the Senior Chair had some involvement in the Student's *Galatians* appeal,³ he asked the parties, through ADFG, whether they had any objection to his dealing with TST's requests. Both parties indicated that they did not.

TST's request for a case conference

As noted, TST requests a case conference. The Student strongly objects to this request. In the Senior Chair's view, a case conference would not be helpful at this time. The information and written submissions provided by the parties are sufficient to resolve the TST's request for directions. A case conference may well be required after the release of these directions to determine how they will be implemented.

TST's request for directions

The specific directions sought by TST are as follows:

1. That Remedies 2 and 5 [in the Student's appeal materials] are beyond the jurisdiction of this Committee to grant, and that the related grounds of appeal in Sections 2, 3, and 4 [of the Student's appeal materials] should be struck.
2. That the Student has improperly filed without prejudice communications and settlement offers which should be struck from the record (as well as all references to these discussions); and

³ The Senior Chair was the author of Report 428, granting TST's request for directions concerning the implementation of the remedy granted by your Committee in Report 427.

3. That the proceedings before this Committee should be limited to determining whether the TST AAC's decision to dismiss the Student's appeal as moot was reasonable.

As noted, the Student's basic position is that TST's request for directions is premature and that all of these matters should be addressed in their Reply to his appeal and then fully considered by your Committee.

1. Jurisdictional issues

The Student seeks, among other remedies (p. 11):

Remedy 2: I seek a declaration from the AAC that the TST no longer functions as an impartial tribunal. Additionally, I request that the University of Toronto suspend Section 16 of the TST BD Handbook, pending revisions that w

ll ensure fair and transparent processes for all students.

...

Remedy 5: I request that the Committee enforce the application of FIPPA for academic appeals and programs of study. The Memorandum of Agreement specifies that the University holds jurisdiction over these matters. Despite this, FIPPA has not been applied, rendering TST students unequal to their peers at the University of Toronto. This omission constitutes a violation of the Memorandum of Agreement and contrary to the reasoning of Report 418.

TST says that these remedies lie outside the jurisdiction of your Committee (letter of June 21, 2024). The Student says in his email of June 24, 2024, that "The TST can argue jurisdictional issues in the Official Response" and that "It is inappropriate for TST to hear my stance on this point before submitting their Official Response". In the alternative, he submits that the remedies he seeks "are well within the AAC's scope and are crucial for ensuring a fair hearing." He adds:

This hearing is not only to hold the TST accountable for their actions but also an opportunity for the University to correct their mistakes. When I submit my Reply submission, the University will understand the full damage to its reputation caused by the late evidence disclosure and why a declaration, as mentioned in my notice of appeal, will correct the matter and reverse the damage. When the University sees the full extent of the damage it caused to its reputation, it will be in the best interest of both the University and the TST to make this declaration.

The Senior Chair rejects the Student's contention that it is inappropriate to determine these jurisdictional issues before the hearing and before TST has filed its reply. While a jurisdictional issue can arise and be determined by a Chair at any point in the proceedings, it is very convenient that such issues be determined in advance of a hearing so that the

parties and the panel members can focus their attention on issues that your Committee actually has the power to decide. It is a waste of everyone's time and attention for the parties to expend resources preparing materials on questions that your Committee cannot decide. It is therefore entirely appropriate for TST to make this request in advance of preparing its reply to the Student's appeal materials.

The Senior Chair agrees with TST on the merits of its request. In general terms, your Committee has no jurisdiction to make declarations. Moreover, it is not your Committee's function to hold University divisions "accountable." Its role is to hear and consider academic appeals (AAC Terms of Reference, s. 2.1).

Specifically, your Committee does not have the jurisdiction to issue the declaration sought by the Student, namely, "that the TST no longer functions as an impartial tribunal." An allegation that the TST-AAC acted impartially in a specific case could of course be raised as a ground of appeal in that case and, if your Committee found merit on that ground, it could fashion a remedy for that particular case. But your Committee has no jurisdiction to make a general declaration of the kind sought by the Student.

Similarly, your Committee has no jurisdiction to "suspend Section 16 of the TST BD Handbook ..." It is well-established that your Committee lacks jurisdiction to invalidate a divisional policy (see, among other decisions on point, Report 391 and Report 406). An order "suspending" a policy would have the same effect as invalidating it and is equally outside your Committee's jurisdiction.

Finally, your Committee has no jurisdiction to "enforce the application of FIPPA". The *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F.31, does not grant your Committee any power to make orders. Moreover, TST is not subject to FIPPA. The Student recognizes this point, but argues that the principles of FIPPA and of natural justice "dictate that the aggrieved party should have access to information critical to their appeal" (p. 187). The Senior Chair rejects this argument. There is nothing in your Committee's Terms of Reference to suggest that it or its Chairs have any powers that are analogous to those granted by FIPPA to the Information and Privacy Commissioner. It is highly doubtful that your Committee even has the more modest power to compel production of relevant documents from University divisions in the context of a particular academic appeal (see, for example, Report 359-1).

The Student shall delete the requests for remedies 2 and 5 from his materials. Since sections 2, 3, and 4 of his materials speak to those requests, he shall delete those sections as well.

2. Settlement privilege

TST says in its letter of June 21, 2024, that “the Student has included a number of references to the fact and contents of settlement discussions involving the Student and TST, a mediator appointed in the TST grievance process, and counsel for the TST.” TST submits that these references are protected by settlement privilege and should be excluded from the Student’s materials. The Student submits, in his email of June 24:

After hearing the matter before a full panel, if the decision-maker deems any piece of evidence (including the unsigned settlement documents used as evidence of the TST's impropriety in handling academic appeals) inappropriate, that decision must be recorded in their official decision report. The unsigned settlement document is crucial because the documents by the TST emerged just a few weeks before they disclosed evidence in their official response, which led to the acceptance of my appeal. Deleting or excluding evidence, especially if used to show a lack of impartiality, is entirely inappropriate. This committee must review all evidence indicating a lack of impartiality by the TST.

st review all evidence indicating a lack of impartiality by the TST.

The Student’s submission misunderstands the respective roles of an AAC chair and an AAC panel. Admissibility of evidence is a question of law to be determined by an AAC Chair, not by the full AAC panel at the hearing of an appeal. If, by chance, a panel were to receive inadmissible evidence, the Chair would be required to instruct them to disregard it. It is therefore highly desirable that admissibility issues be determined, if possible, before the parties finalize their materials and before the hearing is convened. Where admissibility turns on a question of privilege, it is particularly important that it be resolved before the materials are finalized; if not, the privilege may be damaged or lost when it should have been maintained.

The test for settlement privilege is well-established (*Halsbury’s Law of Canada: Evidence* (2022 Reissue), HEV-187):

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; and
3. The purpose of the communication was to reach a settlement.

As counsel for TST notes, a chair of your Committee applied this test in Report 359-1.

TST has identified several passages in the Student’s materials that it submits contain not only references to the fact that the Student and TST were in negotiations but also communications made to that end. The Senior Chair has reviewed these passages. They include, among other materials, draft minutes of settlement that, if executed, would have

resolved the appeal concerning *Matthew* and *Galatians* as well as this appeal. The Student has not made any argument that the passages in question are not covered by settlement privilege, nor has he identified any exception to the privilege under which they might be admitted. Instead, he asserts that the “unsigned settlement document is crucial” to his appeal.

The passages identified by TST meet all three requirements for settlement privilege.

1. Litigation had commenced, as the Student had commenced two appeals within TST.
2. TST’s intention to maintain the confidentiality of the draft minutes of settlement is explicit, and the Chair infers from that explicit statement and from all the circumstances surrounding the negotiations that TST intended all other communications concerning a possible settlement to be confidential.
3. The explicit purpose of the communications was to settle the two appeals.

The Student’s assertion that these communications are “crucial” is, with respect, beside the point. Privileged communications are inadmissible regardless of any probative value they might (or might not) have if they were not privileged. Settlement privilege is a class privilege (*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at para. 12); consequently, the Senior Chair has not weighed the interest in admitting the privileged communications for fact-finding purposes against the interest in excluding them to protect the settlement process. In matters of class privilege, the latter interest always prevails. None of the exceptions to the privilege (*Sable Offshore Energy* at para. 19) is applicable.

The Student shall delete all references to his settlement discussions with TST from his appeal materials.

3. *The scope of the appeal*

TST asks “that the scope of this appeal be limited to the reasonableness of [the TST-AAC’s] decision to dismiss the appeal as moot.” TST submits that because TST-AAC made no decisions on the merits, there is, in effect, nothing to review except its determination of mootness. Moreover, TST says that only two of the 72 pages of the Student’s written argument “deal with the merits of the underlying decision to dismiss the Student from the program.”

The Student has not specifically responded to this aspect of TST’s request for directions; as noted above, the Student’s core position is that TST’s request should be dismissed as premature and that it is procedurally unfair to ask him for a response to it. But there is a sentence in the Student’s email of June 24, 2024, that likely indicates the essence of his

objection to narrowing the scope of the appeal. As noted above, he writes in his email of June 24, 2024: “This hearing is not only to hold the TST accountable for their actions but also an opportunity for the University to correct their mistakes.”

The Senior Chair agrees with TST that the scope of this appeal should be limited to the question whether TST-AAC’s determination that the Student’s appeal should be dismissed for mootness was reasonable. To a large extent, this result would follow in any event from the directions made under points 1 and 2 above. The Senior Chair is struck by the fact that very few pages in the Student’s appeal materials speak to the reasonableness of the TST-AAC’s decision or even to the reasonableness of Knox College’s decision to withdraw him from the MTS program. Focussing the appeal on these issues would considerably simplify the tasks of the parties and your Committee in preparing and considering the appeal, and would ensure that the issues argued before your Committee are within its jurisdiction.

TST-AAC applied the test from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, in deciding that the appeal was moot. In his appeal materials, the Student makes some submissions as to why, under the *Borowski* test, his appeal is not moot (pp. 484-489). This issue is for the panel of your Committee hearing the Student’s appeal to decide.

Having found the Student’s appeal to be moot, the TST-AAC did not consider whether to exercise its discretion to hear the appeal notwithstanding its mootness. In the context of this motion, and without having received submissions on this issue, the Senior Chair is hesitant to express a definite view about whether the University’s academic appeal bodies have a discretion to consider the merits of a moot appeal. But he observes that your Committee has recently determined the merits of at least one appeal which was clearly moot.⁴ For the purposes of this motion decision, the Senior Chair therefore assumes that your Committee could consider both the reasonableness of the TST-AAC’s finding that the appeal was moot and the reasonableness of its implicit decision not to exercise its discretion to hear it nevertheless. The Student’s claim that Knox College did not follow its own procedures in withdrawing him from the MTS program (pp. 485-486) might, for example, be a point your Committee or TST-AAC could consider even if the appeal was found to be moot. Having said that, the Senior Chair notes that any of the Student’s arguments that are linked with his requests for remedies which your Committee has no jurisdiction to grant could not justify an exercise of discretion to hear a moot appeal.

⁴ Report 420. The Senior Chair’s view then was, and is now, that the issues in that appeal were moot. However, as it was apparent that both parties wanted to have a decision on the merits, your Committee provided one.

Conclusion

TST's request for directions is granted in the following terms:

1. The Student shall delete the requests for remedies 2 and 5 from his materials. Since sections 2, 3 , and 4 of his materials speak to those requests, he shall delete those sections as well.
2. The Student shall delete all references to his settlement discussions with TST from his appeal materials.
3. The scope of this appeal will be limited to the question of whether TST-AAC's determination that the Student's appeal should be dismissed for mootness was reasonable.

To give effect to these directions, rather than attempting to edit the materials filed on May 3, 2024, the Student may wish to consider filing fresh materials. The Student's fresh materials would then be due to the ADFG Office by August 30, 2024, and the TST will have the standard sixty days to submit the divisional response. If the Student wishes to file a reply, he will then have two weeks to do so.

Should the parties wish to discuss the implementation of these directions, the Senior Chair will be available for a case conference.

APPENDIX B

UNIVERSITY OF TORONTO GOVERNING COUNCIL

BETWEEN:

[REDACTED]

Appellant

AND

THE TORONTO SCHOOL OF THEOLOGY

Respondent

Stay Decision

Senior Chair: Professor Hamish Stewart

For the Appellant:

J.J (the “Student”)

For the Toronto School of Theology:

Lily Harmer, Paliare Roland Rosenberg Rothstein LLP

On March 16, 2022, Knox College withdrew the Student from the Master of Theological Studies (MTS) program. In a decision dated January 25, 2024, the Toronto School of Theology’s Academic Appeals Committee (TST-AAC) dismissed the Student’s appeal from that decision. The TST-AAC ruled that the Student’s appeal was moot because, owing to the Student’s success in another appeal, in November 2023, Knox College had reinstated the Student into the MTS program. The TST-AAC did not consider whether to exercise its discretion to decide the appeal notwithstanding its mootness.

The Student is appealing the TST-AAC’s decision to your Committee. The Student’s appeal materials, as initially filed, are voluminous. On July 10, 2024, the Senior Chair of your Committee issued a Direction that (1) required the Student to delete from his materials requests for remedies over which your Committee lacks jurisdiction and the material supporting those requests; (2) required the Student to delete from his materials documents that were protected by settlement privilege; (3) limited the scope of the appeal “to the question of whether TST-AAC’s determination that the Student’s appeal should be

dismissed for mootness was reasonable” (Direction, p. 9); and (4) set a deadline of August 30, 2024, for the Student to file revised materials.

On July 18, 2024, the Student applied to the Divisional Court for judicial review of the Direction. He asks the Divisional Court to quash the Direction. More specifically, he asks for an order declaring that the *Freedom of Information and Personal Privacy Act*, R.S.O. 1990, c. F.31, applies to TST. In the alternative, he asks the Divisional Court to direct your Committee “to determine whether FIPPA should be applied to the TST and to implement FIPPA accordingly for academic appeals ...”.

On July 24, 2024, the Student wrote to the Office of Appeals, Discipline and Faculty Grievances (ADFG), asking your Committee to stay his appeal pending the outcome of his application for judicial review. On August 1, 2024, TST responded briefly, opposing this request, and the Student provided a response. On August 6, 2024, the Senior Chair, through ADFG, invited the parties to make brief written submissions as to the application of the general test for interim relief set out in *RJR-Macdonald v. Canada (Attorney General)*, [1994] 1 S.C.R 311, in these circumstances. On August 7, 2024, the Student wrote to ADFG, requesting that the Senior Chair appoint another Chair of your Committee to decide his request for a stay “to avoid any potential perception of bias and ensure that the process remains transparent and fair for all parties involved.” TST opposes this request. The Student replied to TST’s position on August 7, 2024, and, in the event his request for a stay was denied, he also requested an extension to file his revised appeal materials. On August 9, after working hours, the Student provided written submissions on the application of the *RJR* test. TST provided its written response on August 14, 2024, opposing all of the Student’s requests.

This seemingly straightforward matter therefore requires determination of the following questions:

- A. Should the Student’s request for a stay be assigned to a different Chair of your Committee?
- B. Should the Student’s academic appeal be stayed pending the determination of his application for judicial review of the Direction?
 - 1. Does the Student’s application for judicial review raise a serious issue?
 - 2. Will the Student suffer irreparable harm if the stay is not granted?
 - 3. Does the balance of convenience favour granting the stay?
- C. If the stay is not granted, should the Student be granted an extension to file his revised appeal materials in accordance with the Direction?

A. Should a different Chair of your Committee determine the Student's request for a stay?

If the Senior Chair were required to consider the merits of his own Direction, it would be prudent to grant the Student's request that a different Chair of your Committee decide his request for a stay. However, as indicated in B below, it is not necessary for the Senior Chair to review the merits of his own previous decision, and he will not do so. The Student's request for a different decision-maker is therefore refused.

B. Should the Student's academic appeal be stayed pending the determination of his application for judicial review of the Direction?

1. Does the Student's application for judicial review raise a serious issue?

The main point raised in the Student's application for judicial review is that FIPPA applies to TST and that your Committee has jurisdiction "to implement FIPPA". In its submissions concerning the stay, TST does not address the merits of this claim. The Chair therefore assumes, but does not decide, that there is arguable merit in the Student's claims that FIPPA applies to TST and that your Committee has the power to make orders under FIPPA.

TST argues that there is a "fundamental defect in [the Student's] application for judicial review: that it is premature" (TST Submissions, p. 4). TST made this point on August 1, 2024, shortly after being notified of the Student's request for a stay, and repeated it in their submissions of August 14. TST cites *Spence v. University of Toronto*, 2017 ONSC 3803, and *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61, in support of the proposition that, absent exceptional circumstances, reviewing courts will not hear interlocutory applications for judicial review and so will not entertain applications for judicial review until the administrative process to be reviewed is complete. The Student makes no submissions concerning prematurity but focuses on the merits of his argument that FIPPA applies to TST (Student's e-mail of August 9, 2024).

The Senior Chair accepts the legal proposition as stated by TST. The Student has pointed to no exceptional circumstances that would likely move a reviewing court to consider the merits of the Direction before the appeal to your Committee has been concluded. The Senior Chair agrees with TST that the Divisional Court is very likely to find that the Student's application for judicial review is premature and to dismiss it accordingly, whatever its ultimate merits may be. In this sense, the Student's application, even if meritorious, does not raise a serious issue at this time. The first element of the *RJR* test therefore weighs against the granting of a stay.

2. Will the Student suffer irreparable harm if the stay is not granted?

The Student states that the harm he will suffer if the stay is not granted is as follows (e-mail of August 9, 2024):

If a stay is not granted while my judicial review application is in process, I risk not having my dismissal from the program lifted. I was dismissed due to the denial of my leave of absence, which was necessitated by procedural delays, withholding of evidence, late evidence disclosure, and lack of full transparency by TST.

As noted above, the Student was reinstated into the MTS program in November 2023. In January 2024, the Student requested a leave of absence for the Winter 2024 term. On January 8, Knox College denied his request, noted that his standing in the MTS program was satisfactory, and reminded him that he needed to enroll in at least one course in order to remain in the program. On January 11, the Student's request for reconsideration of this decision was denied. The Student did not enroll in any classes and did not pay any fees for the Winter 2024 term. On May 9, 2024, Knox College informed him that, as a result, he was deemed to have withdrawn from the MTS program. (TST Submissions, Tabs 6, 7, and 8.)

The Student's submission that staying this appeal would assist him in having his "dismissal from the program lifted" is misconceived. To repeat, the Student's appeal is concerned with the decision to withdraw him from the MTS program on March 16, 2022. It has nothing to do with his being withdrawn from the MTS program on May 9, 2024. Staying these proceedings would in no way affect that decision and would not lead to the Student's reinstatement. Not staying these proceedings would therefore not cause the harm that the Student has identified. The second *RJR* factor weighs against the granting of a stay.

3. Does the balance of convenience favour granting the stay?

The Student argues that TST would suffer at most "inconvenience" if a stay is granted. On the other hand, if a stay is not granted, he says he "risk[s] a procedurally unfair hearing where I am denied access to evidence that other University of Toronto students are entitled to". He also argues that "if the appeal is denied, I will not be able to overturn my dismissal, which would prevent me from pursuing my career" (Student's e-mail of August 9, 2024). The Student also submits that there is a public interest in subjecting TST to FIPPA.

TST notes that the issues in this appeal are limited to whether the appeal of the March 16, 2022, dismissal is moot and, if so, whether TST-AAC should nevertheless have exercised its discretion to consider its merits. TST submits that “[t]he balance of convenience favours a timely resolution of the issues between the parties” (TST submissions, p. 7).

If the Student’s application for judicial review is entirely successful in its own terms, the Student may subsequently obtain access to some information that he does not currently have. What that information might be is entirely speculative; more to the point, whatever that information might be, it will not change the fact that the Student was reinstated into the MTS program in November 2023; it would therefore likely have little if any effect on the issues at stake in these proceedings. The Student’s claim that if this appeal is dismissed, he “will not be able to overturn [his] dismissal” is, once again, misconceived, as the May 9, 2024, decision to withdraw him is not at issue in these proceedings. Even if the Student is entirely successful in the appeal to your Committee, that decision will be unaffected.

The Senior Chair therefore agrees with TST that the balance of convenience favours the continuation rather than the staying of these proceedings.

4. Conclusion

All three *RJR* factors weigh against the Student’s request for a stay of this academic appeal pending the determination of his application for judicial review of the Direction. The Student’s request for a stay is therefore refused.

C. Should the Student be granted an extension to file his revised appeal materials?

The Direction required the Student to file revised appeal materials by August 30, 2024. It has, however, taken some time to resolve his request for a stay. The Senior Chair is mindful of the time required for the parties to exchange materials and for a panel of your Committee to review them in advance of a hearing. Balancing these considerations, a brief extension is justified. The Student is directed to file revised materials no later than 5:00 p.m. on Monday, September 16, 2024.