

**THE UNIVERSITY OF TORONTO  
THE GOVERNING COUNCIL**

Report #392 of the Academic Appeals Committee  
**December 11, 2017**

To the Academic Board  
University of Toronto

Your Committee reports that it held a hearing on Wednesday, November 1, 2017 at which the following members were present:

Mr. John Monahan (Chair)  
Professor Jan Mahrt-Smith, Faculty Governor  
Mr. Aidan Fishman, Student Governor

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

**Appearances:**

**For the Student Appellant:**

Mr. L.R. ("the Student")  
Mr. Robert Sniderman, Law Student, Downtown Legal Services  
Ms. Jennifer Fehr, Staff Lawyer, Downtown Legal Services

**For the Faculty of Engineering and Applied Science:**

Mr. Rob Centa, Counsel, Paliare Roland  
Ms. Emily Home, Counsel, Paliare Roland  
Professor James Davis, Associate Professor Teaching Stream  
Mr. Don MacMillan, Faculty Registrar

**I. Appeal**

The Student appeals a decision of the Academic Appeals Board (the "AAB") of the Faculty of Engineering and Applied Sciences dated August 29, 2016. Or, more accurately according to the Student's Notice and Statement of Appeal, the Student appeals "the aftermath" of that decision.

In its decision of August 29, 2016, the AAB had granted the Student's appeal of the Committee on Examinations' ("the CoE") decision to deny his petition for a re-read of his final examinations in the courses ECE314 and APM384. The re-reads of these two courses that took place in October and November 2016, respectively, are the subject of this appeal.

The Student asserts that the re-reads were performed in an unfair manner because they were not both conducted by external examiners and because neither involved the use of clean copies of his exams. Accordingly, the Student has asked your Committee to allow this appeal and to grant him the remedy of obtaining re-reads of clean copies of both examinations by Faculty professors other than those who originally taught him the courses.

For its part, the Faculty has responded by submitting that the appeal should be dismissed because the Student submitted his appeal outside the timeframe for doing so; that the Faculty acted reasonably and fairly in re-grading the Student's exams in both courses; and the Student has been accorded procedural fairness throughout both his earlier appeals and in the re-grading process.

## II. Facts

The Student began his studies in the Electrical & Computer Engineering program in the Faculty of Applied Science and Engineering in 2013.

In the 2015 Fall Semester, the Student took Fundamentals of Electrical Energy Systems ("ECE314H1") and Partial Differential Equations ("APM384"). He wrote final exams in both courses in December 2015. His final mark in the former was 57% (after an exam re-check that raised his mark by 1%), and his final mark in the latter was 52%. In January 2016, the Student was placed on Repeat Probation and required to withdraw from the Faculty until he could re-take the Fall 2015 semester.

During the Winter 2016 semester, although having been forced to withdraw from the program for the semester, the Student filed two petitions with the Faculty. The first, which was granted by the Faculty's Committee on Examinations ("CoE") on or about February 1, 2016, allowed the Student to register as a part-time student while waiting to repeat the Fall 2015 semester.<sup>1</sup> The second, requesting that his probationary status be removed, was refused.<sup>2</sup>

Meanwhile, the Student consulted Part B, section 2.3.1. of the *University Assessment and Grading Practices Policy*, which provides that "...all divisions should provide, in addition to the customary re-checking of grades, the opportunity for students to petition for the re-reading of their examinations where feasible."<sup>3</sup> The Student thereafter petitioned the CoE to request a re-read of his examinations in both courses. On or about June 28, 2016, the CoE advised the Student that his petition was denied based on "insufficient reasoning or invalid reason."<sup>4</sup>

The Student appealed the CoE decision to the Faculty's Academic Appeals Board ("AAB"). In his submission to the AAB, the Student "(requested) the panel to kindly initiate a re-read of the two final exams being sought, preferably by a competent person other than the instructor or member

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<sup>1</sup> Respondent's Book of Documents at Tab 10

<sup>2</sup> Respondent's Book of Documents at Tab 11

<sup>3</sup> Appellant's Notice and Statement of Appeal, at Tab F and Respondent's Book of Documents at Tab 6

<sup>4</sup> Appellant's Notice and Statement of Appeal, at Tab B

who has graded each of the two during Fall 2015.”<sup>5</sup> In his petition seeking appeal, the Student offered explanations and/or requested additional marks for a number of the answers he had provided.<sup>6</sup>

The AAB granted the Student’s appeal on or about August 29, 2016. In its letter to the Student advising him of that decision, the AAB informed him that it had considered his request that his final exams in ECE314 and APM384 be re-graded “by instructors other than the ones who taught the courses.” “(H)owever,” the AAB continued, “the re-reads will be conducted by the instructors who taught the courses.”<sup>7</sup> At the bottom of the same letter, beneath the listed names of those receiving copies of the letter, the AAB included the following recommendation:

Please review your rights and responsibilities surrounding academic appeals:  
<http://uoft.me/apscappeals><sup>8</sup>

On or about October 24, 2016, the Student was advised by the Chair of the Faculty’s AAB that the two re-reads would be performed by the original markers with the original exams, with the original markers’ comments included.<sup>9</sup>

During the fall of 2016, the two re-reads were conducted.

Because the original instructor for ECE314 was on sabbatical during that time, the re-read of the Student’s ECE314 examination was performed by another instructor. The Student’s examination was read with the notations that had been made and the marks that had been awarded by the original instructor visible. The instructor who performed the re-read made informal comments while reviewing the Student’s examination that led to his examination mark being increased by several points, and that ultimately resulted in the Student’s final mark in the course being increased to 61% from 57%. This news was communicated to the Student in early December 2016.<sup>10</sup>

The original instructor for APM384 re-read the Student’s final examination, and no additional marks were awarded.

In December 2016, the Student was in communication with Michael Nicholson and Helen Slade, both of them Coordinators of Student Progress & Support for the university. One of the topics of communication with the Student was the appropriate avenue for appealing the re-reads of the Student’s examinations. It was ultimately confirmed to the Student by Ms. Slade on or about

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<sup>5</sup> Appellant’s Notice and Statement of Appeal, at Tab H.

<sup>6</sup> Appellant’s Notice and Statement of Appeal, at Tab H.

<sup>7</sup> Appellant’s Notice and Statement of Appeal, at Tab A.

<sup>8</sup> Appellant’s Notice and Statement of Appeal, at Tab A.

<sup>9</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 12.

<sup>10</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 15.

January 19, 2017 that the Faculty had definitely confirmed that the only avenue of appeal left to the Student was to the Academic Appeals Committee of Governing Council.<sup>11</sup>

Later in January, 2017, the Student contacted Downtown Legal Services (DLS), his current representatives, for the first time. His first in-person meeting with DLS, however, did not take place until February 22, 2017. A number of weeks after that meeting, in mid-March 2017, DLS advised the Student that they could not represent him.

The Student confronted a number of medical challenges in the spring of 2017. According to medical documentation submitted, between mid-April and the end of that month, the Student suffered from sleep deprivation serious enough to interfere with his examination preparedness. Then, the Student was hospitalized from May 5 to 23, 2017, inclusive.

On or about May 9, 2017, the Student was advised by letter from the University of Toronto that a Notice of Trespass under the Trespass to Property Act had been issued against him, with the implication that he could not enter any University property until further notice.

On or about July 20, 2017, the Student returned to DLS to seek assistance again. This time, DLS accepted his case, and the Student submitted his Notice of Appeal of the AAB's decision to your Committee, through the Office of Appeals, Discipline and Faculty Grievances, on or about August 2, 2017.

### III. Preliminary Issue: Timeliness

Before turning its mind to the merits of the Student's appeal, your Committee first had to consider the preliminary issue of the timeliness of the appeal.

The Faculty, in its Calendar that is made widely available to students of the Faculty, outlines its policy with respect to both petitions and appeals. That policy includes the provision that a student wishing to appeal a final decision of the Faculty may appeal to the Governing Council, and that such appeals must be filed within ninety (90) days of the date of the notification of the Faculty's final decision. The relevant portion of the Calendar reads as follows:

#### XII. Petitions and Appeals

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2. A student wishing to appeal against a final decision of the Faculty may appeal to the Governing Council of the University. In that event, the student should consult the Director, Appeals, Discipline and Faculty Grievances, Office of the Governing Council, about the preparation and submission of the appeal. ***Appeals to the Governing Council must be***

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<sup>11</sup> Appellant's Notice and Statement of Appeal at Tab P.

***made within ninety days of the date of the notification of the final decision of the Faculty.*** [emphasis added]<sup>12</sup>

This same general information appears on the website of the Faculty under the heading “Appeals.” That term is easily searchable on the Faculty’s website pages for Current Engineering Undergraduates. It can also be found by clicking “Petitions,” which is both one of the major sub-headings on the main landing page for Current Engineering Undergraduates, and one of the links provided on the side of the website interface under the heading “Quick Links.” The relevant section of the website reads:

Appeal: Academic Appeals Committee, Governing Council

If your appeal is denied by the Faculty’s Board, the final level of appeal is the University’s Academic Appeals Committee (AAC), a committee of the Academic Board, which is the academic arm of Governing Council. The AAC meets infrequently and is a much more formal panel chaired by someone with legal expertise. Students are generally advised to seek legal assistance at this level; although it is not mandatory, it does help expedite the process.

Deadline: ***You must file your appeal from the AAB refusal within 90 days of the date on that decision.*** The appeal must be submitted in writing to the Office of the Governing Council, Simcoe Hall. [Emphasis added]<sup>13</sup>

In the event, however, the Student did not file his appeal to the AAB decision until August 2, 2017, almost a full year after the issuance of the AAB decision on August 29, 2016.

The preliminary question before your Committee, therefore, was whether there were compelling reasons for it to exercise its discretion to hear and decide the appeal of the Student on its merits even though the appeal was filed with Governing Council well outside the published timelines for doing so.

#### **IV. Substantive Issue: Was the Relevant Policy Applied Fairly?**

The Student and the Faculty both provided arguments regarding the substantive merits of the Student’s appeal.

The Faculty of Applied Sciences and Engineering does not have its own, faculty-specific written policy concerning the re-reading of contested undergraduate examinations that outlines such

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<sup>12</sup> Respondent’s Book of Documents at Tab 1.

<sup>13</sup> See <http://undergrad.engineering.utoronto.ca/petitions/appeals/>

matters as who should perform the re-reads or whether such re-reads should be performed using clean copies. However, the Faculty is subject to the *University Assessment and Grading Practices Policy*, the Overarching Principles of which are the following:

- That assessment and grading practices across the University are consistent and reflect appropriate academic standards;
- That student performance is evaluated in a manner that is fair, accurate, consistent, and objective and in compliance with these academic standards;
- That the academic standing of every student can be accurately assessed even when conducted in different divisions of the University and evaluated according to different grading scales.<sup>14</sup>

Regarding the re-reading of examinations, the *University Assessment and Grading Practices Policy* simply provides as follows in Part B, S. 2.3.1:

For undergraduate courses, all divisions should provide, in addition to the customary re-checking of grades, the opportunity for students to petition for the re-reading of their examination where feasible. Divisions/faculties may charge a cost-recovery fee (for re-reading) consistent with the Policy on Ancillary Fees.<sup>15</sup>

Both parties agreed that, in the absence of a specific policy governing undergraduate exam re-reads, the faculty has a duty to ensure a fair process is instituted and is applied consistently. Demonstration of a lack of fairness in the process itself or in its application to the Student in question would warrant your Committee granting the present appeal.

For his part, the Student argued that “While there is no specific process for how re-reads are conducted at the Undergraduate level, the process cannot be fair or objective without clean copies of the examination or external reviewers.”<sup>16</sup> The Student further argued that, because of the undue influence that an initial marker’s comments and the grade assigned could have on the re-reader’s own effort to assess a contested examination, “without a clean copy of the exam, the external review cannot be impartial or objective.”<sup>17</sup>

The Student noted that the practices concerning re-reads for graduate students enrolled in the Faculty were significantly different than those for undergraduates. In the case of the former, they were governed by the School of Graduate Studies’ policy on *Re-Reading and Retention of Examinations*, which requires both the use of clean copies and the use of external examiners for re-reads of examinations. The Student opined that because there is “no substantial difference between an undergraduate’s work and a graduate’s work such that the procedures for examination re-reads

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<sup>14</sup> Appellant’s Notice and Statement of Appeal at Tab F

<sup>15</sup> Appellant’s Notice and Statement of Appeal at Tab F

<sup>16</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 18.

<sup>17</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 19.

ought to differ”, and because the Faculty does not have any specific written policy concerning the re-reads of undergraduates’ examinations, the Faculty should apply the re-read standards of the SGS policy to all engineering students.<sup>18</sup>

By contrast, the Faculty took the position that fairness does not require that the Faculty assign someone to conduct the re-read other than the original instructor. In fact, the Faculty asserts that it is “entirely fair to allow re-grading to occur by the original grader and/or to occur with copies of the original grading comments...(because this) promotes consistency of grading between all students in the class.”<sup>19</sup> The Faculty further notes that “There are infinite ways to get a wrong answer, but students tend to make many of the same mistakes on their exams. It is fair that these students receive the same marks for these attempts.”<sup>20</sup>

The Faculty also argues that in highly technical courses such as ECE314 and APM 384, “(f)inding mistakes is not generally an issue of judgment.”<sup>21</sup> Therefore, the grading of answers in such courses’ final examinations is relatively devoid of subjectivity and independent of the grader.

With respect to the use of a student’s original marked exam by a re-reader, the Faculty asserts that there is no reason to assume that “another grading of a clean examination by a different person would produce a more ‘accurate’ grade than did the original grading.”<sup>22</sup>

## **V. Decision**

### **i. Preliminary Issue**

At essence, the role of this Committee is to evaluate the decisions of the bodies it reviews. In this case, however, before turning to the August 29, 2016 decision of the Faculty’s AAB - and/or its “aftermath,” as submitted by the Student - we first have to consider the essential preliminary issue of whether the Student initiated the appeals process with Governing Council within the timeframe of the relevant policy. If not, we are required to decide whether your Committee should exercise its discretion to overlook any lateness.

Much discussion ensued as to when the metaphorical “clock’ had begun on the 90-day time limit for the Student to submit an appeal application to Governing Council. However, while we are well-aware of the longstanding legal principle that “ignorance of the law is no excuse,” in an administrative context within a university your Committee believes it is reasonable to begin with a consideration of whether or not the Student in question was aware of the University’s policy imposing a 90-day time limit to appeal final Faculty decisions.

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<sup>18</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 24.

<sup>19</sup> Respondent’s Submissions at par. 73.

<sup>20</sup> Respondent’s Submissions at par. 76.

<sup>21</sup> Respondent’s Submissions at par. 74.

<sup>22</sup> Respondent’s Submissions at par. 86.

On that point, we are persuaded that the Student knew or ought to have known of the 90-day time limit on or about August 29, 2016. That was when he received the letter from the Faculty advising him that, while his two examinations would be re-read as he had asked for in his appeal, they would be re-read by the course's original instructors. At the bottom of that same letter was the following line:

Please review your rights and responsibilities surrounding academic appeals:  
<http://uoft.me/apscappeals>.<sup>23</sup>

However, even if the Student was aware of that 90-day time limit, your Committee heard from the Student that it would not be reasonable for the clock to begin running until after the Student fully understood the way in which those re-reads would be carried out. Your Committee found that argument to be persuasive.

Your Committee is therefore of the opinion that, in this instance, the clock did not automatically begin to run on August 29, 2016, when the Student was first notified of the decision of the AAB. Rather, your Committee finds that the clock did not begin to run for the Student's appeal deadline to Governing Council until he was aware both that the exams would be re-marked by the same instructors who had marked them in the first place, and that clean copies of the exams would not be used.

The Faculty contends that the letter of August 29, 2016 makes clear that "the re-reads (for the Student's ECE314 and APM384 exams) will be conducted by the instructors who taught the courses." The Student, by contrast, submits that he thought that the exams would be re-marked by *other* instructors who had previously taught the same courses. Although the Student's interpretation might have an element of wishful thinking attached to it, your Committee is prepared to believe that he did not fully understand that the very same instructors who had taught him the two courses would be asked to re-mark his exam papers.

Moreover, the letter of August 29, 2016 did not specify that the exams would be re-marked without benefit of clean copies. The Student submitted a copy of an e-mail he had written to the Chair of the AAB dated October 24, 2016 that suggests he only realized on or around that date that his exams would be re-read without first blacking out the markers' comments on his original exams.<sup>24</sup>

By his own admission, the Student was made aware on or around October 24, 2016 by the Chair of the AAB, Professor Jason Foster, that his two examinations were to be re-read by the original markers using the original exams and with the original markers' comments included. Further, as noted above, if by that time he had not already noted the information regarding the deadline for filing appeals in his Faculty's Calendar or by visiting the URL suggested to him in the AAB's letter of

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<sup>23</sup> Respondent's Book of Documents at Tab 15

<sup>24</sup> Appellant's Notice and Statement of Appeal at Tab I

August 29, 2016, he told your Committee that he had visited the Faculty's website page regarding appeals "in October."

Therefore, your Committee takes the position that the 90-day clock for the Student to file his appeal with Governing Council from *both* the August 29, 2016 decision of the AAB *and* its relevant aftermath began to run on or about October 24, 2016. Were it to run continuously from that date, therefore, the final deadline for submitting an application to appeal the decision of the AAB would have fallen on or around the end of January 2017.

In the event, however, the Student was advised by a university staff member, Mr. Michael Nicholson, a Coordinator of Student Progress & Support, on or about December 13, 2016 to "hit the pause button" on pursuing an appeal until such a time as he and the Student could meet in person.<sup>25</sup> Given the Student's reasonable perception that a staff representative responsible for Student Progress & Support was speaking for the university's administration, your Committee is prepared to find that Mr. Nicholson's message had the effect of pausing the 90-day clock at approximately the half-way mark of 45 days, even though a subsequent e-mail from Mr. Nicholson to the Student that same afternoon of December 13 specifically referenced Governing Council as the "next level" for any appeal.<sup>26</sup> Fairness dictates that the Student be given the benefit of any doubt in this instance.

Notably, the agents for the Student expressed to your Committee that the 90-day appeals clock should only begin to run on January 19, 2017. That was the date on which Helen Slade, a colleague of Mr. Nicholson who together with him had met with the Student the previous week, wrote to the Student to confirm what he had already been told previously by Faculty representatives:

The Faculty has clarified that if you do choose to appeal, your next appeal will be to Academic Appeals at the level of Governing Council.

<http://www.adfgutoronto.ca/processes/acappeals.htm>.<sup>27</sup>

For the reasons outlined above, your Committee believes that the clock had already been running for more than six weeks when it was paused on December 13, but it does take the view that the clock began to run *again* as of January 19, 2017.

With the clock running again, the Student contacted DLS in late January – when asked, neither the Student nor his agents could provide a more specific date - and, due to what the agents for the Student described to your Committee as some "glitches" concerning case assignment, the Student did not actually meet with a representative of DLS until February 22. By that time, the 90-day clock had been running for more than 75 days.

Notably, in his second e-mail message to the Student on December 13, Mr. Nicholson had specifically mentioned DLS to the Student, describing it as a "free service available to UofT

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<sup>25</sup> Appellant's Notice and Statement of Appeal at Tab O.

<sup>26</sup> Appellant's Notice and Statement of Appeal at Tab O

<sup>27</sup> Appellant's Notice and Statement of Appeal at Tab P.

students,” and advising that if he were going to be pursuing an appeal, “they may be willing to work with you on the case.” Within less than two minutes, the Student had replied to Mr. Nicholson to thank him for the suggestion, and to say, “I *may* look into it after my exams [emphasis added].”<sup>28</sup>

When asked by your Committee about his delay in reaching out to DLS when he was already aware that the 90-day clock was running, the Student advised your Committee that he wanted to keep open the option of retaining alternate legal representation.

As it turned out, in mid-March 2017, DLS wrote to the Student to advise him that they would not be able to represent him after all due to resource constraints. To take a very generous interpretation of events, the Student may have thought that his representation by DLS was a foregone conclusion. For that reason, your Committee is prepared to consider the 90-day clock paused for the period of time between the Student’s first meeting with DLS on February 22 and their communication with him of mid-March to advise they could not represent him.

However, there was no evidence submitted to show or suggest that the Student even then made any effort to retain alternative legal representation. In fact, roughly another month (or 30 days) passed between mid-March and April 17, the first date for which medical documentation indicates that the Student’s capacity to address his academic appeal concerns was reduced due to health-related issues<sup>29</sup>. In other words, as of April 17, the clock on his appeal deadline was already showing 105 days since he had been made fully aware of the process and practices that had been applied to the re-reads of his two impugned final examinations; had been advised that an appeal to Governing Council was his only remaining appeal route; and was fully aware of the 90-day deadline for filing his notice of appeal.

Your Committee is prepared to exercise its discretion to find that the clock remained paused until one week after the Student’s release from hospital on or around May 23. Even so, approximately 50 more days would pass before the Student would return to DLS on or about July 20, 2017 to once again ask for assistance with this appeal. By that time, the clock stood at roughly 155 days and counting. By the time his notice of appeal was actually submitted to Governing Council on August 2, 2017, some 165 days – closing in on twice the 90-day limit - had transpired since the appeals clock had first begun to run.

Having arrived at even this approximate count, it is clear that the Student submitted his notice of appeal long after the published and understood deadline for doing so. However, both the Student and the Faculty acknowledged that your Committee can exercise its discretion to allow a late appeal to proceed.

The Student submitted that the decision to grant an extension to file an appeal in an administrative context is “a discretionary one that should be made with regard to all of the evidence.”<sup>30</sup> He then proceeded to outline a multi-part test as presented by Madam Justice Snider in *Canada (Minister of Human Resources Development) v. Gattellaro* [2005] F.C.J. No. 1106 F.C. A decision to grant an

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<sup>28</sup> Appellant’s Notice and Statement of Appeal at Tab O.

<sup>29</sup> Appellant’s Notice and Statement of Appeal at Tab Q

<sup>30</sup> Appellant’s Notice and Statement of Appeal, Submissions at par. 35.

extension or not should be the result of a consideration and a weighing of the following four criteria:

- i. A continuing intention to pursue the application or appeal.
- ii. There is a reasonable explanation for the delay.
- iii. The matter discloses an arguable case; and
- iv. There is no prejudice to the other party in allowing the extension.

Looking at these four criteria in reverse order, your Committee was not persuaded that there would be prejudice to the Faculty if the requested extension were allowed. The granting of such an extension would undoubtedly cause some frustration and inconvenience – the Faculty told your Committee of the importance of finalizing and submitting course marks within a reasonable, finite period of time for the benefit not only of other students who are anxious to know their results but also that of Faculty administrators for both reporting and planning purposes – but the Faculty’s argument that to allow this Student’s appeal to proceed would “open the floodgates to other student (sic) petitioning for re-reads of their exams semesters after the fact”<sup>31</sup> was not substantiated by any supportive data. Your Committee does not see that the granting of an extension in this particular instance would lead to hordes of other past or present students submitting motions for your Committee to accept their appeals outside of the prescribed time limits. Certainly there would still be a strong motivation for students to finalize their marks and resolve their standing in the Faculty with as much expedition as possible. Moreover, no single decision of the Academic Appeals Committee has precedential value on all future decisions, and each case must be considered on its own merits given all of the relevant facts and circumstances.

Looking at the third of the four criteria, your Committee believes that whether or not the Student in this instance was treated fairly in his dealings with the Faculty with respect to the re-reads of his examinations for ECE314 and APM384 is indeed an arguable case. Just given the widely divergent practices concerning re-reads among UofT faculties as adduced by the materials presented to your Committee, there would at very least appear to be value in examining whether the Student in this instance was treated fairly by his Faculty. Your Committee also notes that the implications of this case have such serious implications for the Student’s academic future that, again, any benefit of the doubt should accrue to the Student.

Were the only criteria to be weighed and considered when determining whether or not to grant an extension be the above two criteria, therefore, your Committee would be inclined to exercise its discretion to grant the requested extension. However, that is not the case, and it is upon the first two criteria in the cited case that the Student’s argument falters.

First, the Committee is of the unanimous opinion that the Student failed to demonstrate a continuing intention to pursue the appeal. Your Committee was not presented with any clear evidence to indicate that the student took any immediate, concrete steps to pursue his appeal

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<sup>31</sup> Respondent’s Submissions at par. 63 (d)

options after October 24, 2016 when he first became aware of how the re-reads of his two examinations were being conducted. Fully one month later, on November 24, 2016, the Student continued to exchange communications with the office of the Faculty's Registrar concerning the final outcomes of his re-reads<sup>32</sup>, but there was still no clear indication of an intention to appeal to Governing Council. In fact, it was only in the correspondence between Mr. Nicholson and the Student on or about mid-December that the topic of securing legal representation for a possible appeal appears to have been raised. The "pause" between that point in time and the Student being advised by Ms. Slade on January 19, 2017 that the Faculty had confirmed to her that the only remaining appeal route was to Governing Council has already been explained and accounted for.

However, even if your Committee were to ignore its own conclusions and instead accept the Student's argument that the 90-day appeals clock only began to run on or about January 19, we would still be faced with a lack of evidence that the Student had a continuing intention to pursue an appeal to Governing Council. We note, in particular, a lack of evidence to show that the Student had:

- taken any steps to preserve his appeal right prior to his meeting with DLS on February 22;
- taken any steps to pursue his appeal after the DLS advised him it could not represent him in mid-March and prior to his medical issues arising in mid-April; or
- taken any steps to pursue his appeal between his release from hospital at the end of May and his communication with DLS to request their reconsideration of his need for legal representation on or about July 20.

Similarly, your Committee was not presented with a compelling or reasonable explanation for the Student's delay in pursuing his appeal. Certainly your Committee is very sympathetic regarding the Student's sleep-related troubles and his subsequent hospitalization and medical examination. However, that accounts for only the six-week period between mid-April 2017 and the end of May 2017. It does not account for the delay in either filing an appeal himself or retaining any alternate legal representation after DLS advised him in mid-March they could not represent him and before his sleep disorder arose. It also fails to account for the more than seven-week delay between the end of his hospitalization and his request to DLS to reconsider his case in late July.

Your Committee imagines that the fact that the Student was subject to a Trespass Notice barring him from university property after May 9, 2017 might have temporarily impeded his ability to meet with representatives of DLS, who are based at the University; however, no evidence was led to suggest that was the case. Moreover, the Trespass Notice remained in effect and appeared to pose no obstacle when the Student did eventually reach out to DLS to pursue the present appeal in the latter half of July.<sup>33</sup>

For all these reasons, having weighed the evidence before it and having considered the four-part test laid out by Madam Justice Snider in *Canada (Minister of Human Resources Development) v. Gattellaro*, your Committee has determined that it would not be appropriate to exercise its

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<sup>32</sup> Appellant's Notice and Statement of Appeal at Tab K

<sup>33</sup> Appellant's Notice and Statement of Appeal, Submissions at par. 44.

discretion to extend the deadline for the filing of the Student's appeal in this case. Instead, your Committee finds that the Student was late in bringing his appeal, and his appeal is therefore dismissed for lack of timeliness.

**ii. The Merits of the Appeal**

In case your Committee is wrong in finding that the Student's appeal was out of time, your Committee has also considered the substance of the Student's appeal and the responding position from the Faculty on their respective merits.

In doing so, our consideration has been not the correctness of the AAB's decision or its "aftermath", to adopt the language used by the Student; rather, we have asked ourselves whether the relevant policy of the Faculty has been applied fairly in this instance.

As noted above, the relevant policy is the *University Assessment and Grading Practices Policy*. The Faculty – unlike some other faculties or academic units, including the Faculty of Arts and Science or the School of Graduate Studies, does not have its own, faculty-specific policy regarding re-reads.

As also noted above, it is Part B, section 2.3.1 of the Policy that has the most direct bearing on the current fact situation:

For undergraduate courses, all divisions should provide, in addition to the customary re-checking of grades, the opportunity for students to petition for the re-reading of their examinations where feasible. Divisions/faculties may charge a cost-recovery fee (for re-reading) consistent with the *Policy on Ancillary Fees*.

The written Policy itself is silent as to the matter of who should perform re-reads and whether or not they should be given clean copies to review, but your Committee is interested not only in the Policy as written, but also the Policy as applied within the Faculty. Is it applied in a fair, consistent and objective manner with respect to all students, including the Student appellant?

In this instance, your Committee neither heard nor saw any evidence to suggest that the policy and the related processes acknowledged by both parties to be binding on the Faculty were applied inconsistently, unfairly or with partiality. Representatives of the Faculty could not recall any instances where re-reads were specifically directed to be performed by external examiners or where clean copies of the exams were used, and that the Student in this instance was treated the same as other students in his situation would be treated. For his part, the Student did not adduce any evidence to the contrary, nor did he demonstrate that the Faculty had shown a lack of objectivity or impartiality towards him specifically by declining to assign external examiners to re-read his impugned exams (except where made necessary by the unavailability of the original instructor in ECE314). Similarly, the Student did not allege or demonstrate that other undergraduate students of the Faculty had been given the benefit of having their exams re-read using clean copies.

It is true that the approach taken by the Faculty appears to differ significantly from the practice of some other academic divisions, such as the School of Graduate Studies, whose policy on *Re-reading and Retention of Examinations* specifically requires a clean copy and an external examiners for re-reads.<sup>34</sup> The Student asserts that because the Faculty does not have a specific policy regarding re-reads beyond the provisions laid out in the *University Assessment and Grading Practices Policy* it should automatically be required to apply the provisions of the School of Graduate Studies to undergraduate students in the same way as they are applied to graduate students of the Faculty. However, the argument could also be made that, if any third-party policy should be applied to undergraduate engineering students in the absence of a Faculty-specific policy, it should be that of the Faculty of Arts and Science in order to ensure a consistent approach to re-reads is adopted for as many undergraduates across the University as possible.

In the end, neither argument is persuasive. No evidence was submitted to your Committee to indicate that the Faculty of Applied Science and Engineering is required to have its own, faculty-specific policy regarding re-reads, so to project another faculty's policy onto the Faculty is to attempt to fill a gap that technically does not exist.

Moreover, your Committee does not believe it is inherently unfair for the original instructor of a course to conduct a re-read for one of that instructor's students. Rather, your Committee concurs with the Faculty that it is not unreasonable for the original instructor of a course to re-mark an examination if required, because such a practice promotes consistency of grading among all the students in the class. Without having other students from the same class as comparators, the act of marking a single student's examination in a way that is consistent with the others in his or her class becomes more challenging.

Similarly, we are not persuaded that fairness requires that examinations be re-read using only clean copies. Rather, the system described and practised by the Faculty that involves the re-reader having the opportunity to reference not only the original comments made and marks awarded by the original marker, but also the specific concerns and objections raised by the Student to those comments and marks, appears to us to be a fair one. The combination of the original comments and marks with the Student's replies and explanations goes a long way to providing any re-reader with helpful context and background for consideration. Were only the original reader's comments and marks provided to the re-reader without the corresponding responses from the Student, or *vice versa*, the process would arguably be less fair. However, that is not the case here. The fact that the re-read of ECE314 resulted in a significant increase to the Student's grade also helps to bolster the argument that the process employed by the Faculty was a fair one.

That said, it bears mentioning that your Committee is of the opinion that the Faculty would be helping both itself and its students were it to draft, adopt and disseminate a written, comprehensive Faculty-specific policy regarding examination re-reads that includes, but is not necessarily limited to, clear information regarding how re-reads are to be conducted, by whom, and so forth. However, it extends far beyond the purview of your Committee to opine that the absence of such a policy

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<sup>34</sup> Appellant's Notice and Statement of Appeal, at Tab M.

represents in and of itself a denial of natural justice or procedural fairness to this Student or any other.

The appeal is therefore dismissed on its merits.