Case No. 1100

THE DISCIPLINE APPEALS BOARD OF THE UNIVERSITY TRIBUNAL
UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on September 23, 2020,

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

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

BETWEEN:

R[redacted] S[redacted]

-AND-

UNIVERSITY OF TORONTO

REASONS FOR DECISION ON MOTION

Date: June 8, 2021, via Zoom, with written submissions in June and September 2021

Chair:
Mr. Paul Michell, Associate Chair

Appearances:
Ms. Tina Lie, Assistant Discipline Counsel, Paliare Roland Rosenberg Rothstein LLP

Hearing Secretary:
Ms. Krista Kennedy, Administrative Clerk and Hearing Secretary, Office of Appeals, Discipline and Faculty Grievances

Not In Attendance:
The Student

A. Introduction

1. The Student failed to attend a hearing before the Tribunal concerning charges against him. The Tribunal found him guilty, and imposed a disciplinary sanction. The Student delivered a notice of appeal from the sanction decision, and later sought guidance about appeal procedures. However, he took no further steps, and did not respond to inquiries.

2. The Provost moved to have the Discipline Appeals Board ("Board") dismiss the appeal summarily and without formal hearing. The Provost's motion raises two questions concerning appeals to the Board. First, what is the scope of the Board's jurisdiction to dismiss an appeal summarily and without formal hearing, where the appeal is frivolous, vexatious or without foundation? Second, does a single member of the Board have the jurisdiction to hear and decide such a motion?

3. In my view, the Board's jurisdiction to dismiss an appeal summarily and without formal hearing may be exercised on a motion in writing. Further, a single member of the Board may, in appropriate circumstances, dismiss an appeal summarily and without formal hearing. On the evidence, I conclude that I have the jurisdiction to grant the Provost's motion, and that this is an appropriate case in which to exercise that jurisdiction. For the reasons below, I dismiss the Student's appeal summarily and without formal hearing.

4. The Student has taken no steps to advance his appeal nor has he played any role on this motion. As a result, I received submissions only from the Provost. I raised the issue of my jurisdiction with the Provost's counsel at the June 8, 2021 proceeding management conference, and asked her to make written submissions addressing the issue. She did so. I later raised two additional questions about my jurisdiction with the parties, and sought additional submissions.

The Provost provided additional submissions in September 2021 in response to my request. The Student did not.

5. Ordinarily, such jurisdictional questions might have been raised by counsel for the Student through the adversarial process. However, the Student did not participate in this motion, let alone do so with the assistance of counsel. I thus considered it appropriate to raise concerns about my jurisdiction to hear and decide this motion, and to seek submissions from the parties on them. I am grateful to Ms. Lie for her additional submissions.

B. Decision of the University Tribunal

6. This case arises from a February 2021 decision of the Tribunal. The decision concerned charges that the Provost brought against the Student in September 2020 under the *Code of Behaviour on Academic Matters, 1995* (the "Code").

7. The Student is an undergraduate in the Faculty of Applied Science and Engineering.

8. On January 15, 2021, the Tribunal convened a hearing to consider those charges. The Student did not attend. The Tribunal adjourned the hearing to permit the Student to participate in the hearing should he wish to do so, but made the rescheduled hearing peremptory to the Student.

9. On February 17, 2021, the Tribunal reconvened to hear the charges. Again, the Student did not attend the hearing. The Tribunal ordered that the hearing proceed despite his absence.

10. At the February 17, 2021 hearing, the Tribunal found the Student guilty of one count of knowingly representing an idea or expression or an idea or work of another as his own in connection with the final exam in APS105H1 in Winter 2020, contrary to section B.I.1(d) of the Code, and signed an order accordingly.

11. The Tribunal also ordered the following sanction:

(a) a final grade of zero in the course;

(b) a suspension from the University from the date of the order until December 31, 2022; and

(c) a notation of the sanction on the Student's academic record and transcript from the date of the order until December 31, 2023.

12. The Tribunal indicated that it would release written reasons for its decision.

13. The Appeals, Discipline and Faculty Grievances Office ("ADFG Office") provided the Student with the Tribunal's order on February 17, 2021. It also advised him that the deadline to appeal from the Tribunal's decision was March 10, 2021.

C. The Student's Appeal

14. On March 9, 2021, the Student sent an email with the subject line "Notice of Appeal" to the ADFG Office:

> To appeal for the tribunal's decision:
>
> The academic offense was happened during the final exam of APS105. The school was just locked on due to the COVID-19. The new education model was hard to be adapted in a short time. I admit that I was guilty on the exam of APS105. But for the reason of special situations happened in 2020, I hope that I could get a chance to continue studying at the University of Toronto this year, rather than getting suspended for two years. I can restart the second year this September or any other methods to fix the problem. I really hope I can get the chance to make things right.
>
> Sincerely
>
> [The Student]

15. The Provost has treated this email as an indication of the Student's desire to appeal from the Tribunal's decision on sanction, but not from its finding of guilt. I agree with that interpretation. In my view, the email satisfies the requirement in section E.5 of the Code and

section 1(b) of Appendix B of the Discipline Appeals Board Terms of Reference ("Terms") that a notice of appeal must state briefly "the relief sought and the grounds upon which the appeal is taken." Some might consider the email too brief for this purpose. However, in my view, a practical approach should be taken to interpreting notices of appeal by students, which frequently—as appears to be the case here—are drafted without the assistance of counsel.

16. On March 10 and 11, 2021, the ADFG Office and the Provost's counsel advised the Student that the Tribunal had not yet released its reasons for decision, and that Ms. Lie would be in touch with him to discuss next steps regarding his appeal once the Tribunal did so.

17. On March 19, 2021, the ADFG Office wrote to the Faculty Registrar of the Faculty of Applied Science and Engineering to advise that the Student had filed an appeal, and that accordingly a stay of the Tribunal's sanction would apply.

18. On March 25, 2021, the Student sent an email to Ms. Lie, in which he sought guidance on the appeal process. Ms. Lie responded by email later that day, highlighting points for his consideration. She indicated that she would contact him once the Tribunal had issued its reasons for decision to discuss a timetable for his proposed appeal.

19. The Tribunal issued its reasons for decision on April 23, 2021.

20. Ms. Lie wrote to the Student on April 26, 2021, indicating that she wanted to discuss a timetable for his proposed appeal. The Student did not respond.

21. On May 4, 2021, Ms. Lie followed up on her April 26, 2021 email. Again, the Student did not respond.

22. On May 14, 2021, Ms. Lie wrote to the ADFG Office to request a proceeding management conference with the Senior Chair or her designate to discuss next steps. She indicated that if the Student was not prepared to engage in the process and to move his appeal forward, that the Provost would request that the appeal be dismissed or be treated as abandoned.

23. The Senior Chair designated me to respond to this request in my capacity as an Associate Chair.

D. The Provost's Motion

24. In response to Ms. Lie's request, I convened a proceeding management conference to take place on May 26, 2021, to be held electronically over the Zoom platform. The Student did not attend the proceeding management conference, which proceeded in his absence. Later that day, I issued a direction requiring, among other things, that the Student confirm with the ADFG Office by June 4, 2021 whether he intended to pursue his appeal. I also directed that if the Student did not do so, a further proceeding management conference would take place on June 8, 2021, and that I would consider a motion by the Provost regarding the Student's appeal.

25. The Student did not comply with my May 26, 2021 direction. Accordingly, I convened a further proceeding management conference on June 8, 2021. The Student did not attend. Ms. Lie for the Provost indicated that she wished to bring a motion for an order dismissing the appeal. I asked Ms. Lie for written submissions in support of the motion. I determined that a written hearing of the motion was appropriate, having regard to the factors outlined in rule 48 of the *Rules of Practice and Procedure* ("Rules"), assuming (without deciding) that they apply to this motion:

(a) Suitability: the summary nature of the motion made it suitable for a written hearing.

(b) Nature of evidence: I anticipated that there would be limited evidence on the motion, and that it was unlikely that it would raise issues of credibility.

(c) Convenience of the parties: a written hearing would be more convenient, particularly given the ongoing Covid-19 pandemic, and the fact that the Tribunal did not have specific rules to address it.

(d) Cost, efficiency and timeliness: I considered that a written hearing would best satisfy these concerns.

(e) Avoidance of delay: I considered that a written hearing would be most likely to avoid delay.

(f) Fairness: in my view, a written hearing would not cause unfairness to either party.

(g) Public accessibility: this was a factor weighing against a written hearing, although given the Covid-19 pandemic this factor was arguably less important.

(h) Any other matter: the summary nature of the motion was a factor weighing in favour of a written hearing.

26. Overall, I determined that these factors weighed in favour of a written hearing of the Provost's motion.

27. The ADFG Office wrote to the Student on June 8, 2021 to advise him of the outcome of the proceeding management conference that day. The ADFG Office has advised that it received no response.

28. On June 22, 2021, Ms. Lie made submissions in writing, including a notice of motion. Although these submissions were provided to the Student, he has not responded to them. The

Student has filed nothing further with respect to the Provost's motion or his proposed appeal. Nor has the Student responded to any inquiries from the Provost's counsel or the ADFG Office since his March 25, 2021 email to Ms. Lie.

29. In her motion, the Provost seeks on order dismissing the Student's appeal summarily and without formal hearing pursuant to section E.7(a) of the Code, on the ground that the appeal is frivolous, vexatious, or without foundation. In the alternative, the Provost seeks an order lifting the stay of the Tribunal's order pending the disposition of the Student's appeal.

E. The Jurisdictional Issues

1. Overview

30. The Provost's motion raises two jurisdictional issues:

(a) what is the scope of the Board's jurisdiction to hear and decide a motion to dismiss an appeal summarily and without formal hearing, where the appeal is frivolous, vexatious or without foundation; and

(b) does a single member of the Board have the jurisdiction to hear and decide such a motion?

31. In the discussion that follows, I address these questions, and explain why I have concluded that I should dismiss the Student's appeal summarily and without formal hearing.

2. The Code and Terms

32. A three-member panel of the Board has the jurisdiction to dismiss an appeal summarily and without formal hearing in appropriate circumstances. The Code expressly confers that jurisdiction in section E.7(a):

> The Discipline Appeals Board shall have the power:

(a) to dismiss an appeal summarily and without formal hearing if it determines that the appeal is frivolous, vexatious or without foundation.

33. Section 7(a) of Appendix A of the Terms contains a substantially identical provision.

34. The issue on this motion, however, is whether an Associate Chair of the Board may exercise this power alone. The Provost candidly conceded that the Code itself is silent on this question. The same is true of the Terms, and to the extent they apply, the Rules.

35. In my view, subject to a key exception I discuss below, the Code itself does not grant to a single member of the Board the jurisdiction to hear and decide a motion to dismiss an appeal summarily and without formal hearing. Under the Code, only the Board itself has that jurisdiction.

36. The Code does not define the term "Discipline Appeals Board". While it could be argued that the meaning of the term in the Code depends upon the context in which it is used, there are examples where the Code assigns authority or responsibility to an individual member of the Board (*e.g.*, the Senior Chair), which would be unnecessary if "Discipline Appeals Board" meant only one member in certain circumstances. For example:

(a) section E.5 (Senior Chair has the power "in exceptional circumstances" to enlarge the time for appeal); and

(b) section E.10 (appeal operates as a stay of the decision appealed from unless the Senior Chair, "on behalf of the Discipline Appeals Board", orders otherwise upon application).

37. The conclusion that "Discipline Appeals Board" should be interpreted to mean the Board as a whole (not merely a single member of it) is reinforced by Appendix A of the Terms, which states that appeals from trial decisions "shall be heard" by a panel drawn from the Board

consisting of a three-member panel chaired by the Senior Chair or an Associate Chair she designates.

38. The Provost sought to analogize the provision in the Code (section C.II.(A)22) that addresses the division of responsibilities between the chair of a trial panel and the other members of the trial panel to the position of a single member of the Board on this type of motion:

> At trial hearings of the Tribunal,
>
> 1. The chair of the hearing shall determine all questions of law and has a vote on the verdict and sanction; and
> 2. The panel shall determine all questions of fact and render a verdict according to the evidence.

39. The Provost argued that this division of responsibilities between the chair of a panel of the Tribunal and the other members of a panel also applies by analogy to panels of the Board hearing appeals from decisions of the Tribunal. Implicitly, the suggestion is that whether to dismiss an appeal summarily is, at least in some cases, a "question of law" that can be determined by the chair alone.

40. I am not persuaded by this submission. First, the Code provision specifies a division of responsibilities for deciding different types of questions as between chairs and other members of a panel of the Tribunal. It does specify (and in my view, does not imply) that a chair of a panel can decide questions of law without a full panel ever having been constituted. Second, and in any case, I doubt that all motions to dismiss an appeal summarily raise only a question of law alone. Certainly, the motion here does not. On the Provost's own submission, assuming that I have the jurisdiction to grant her motion, I could only do so where I was satisfied that the appeal is "frivolous, vexatious, or without foundation" under section E.7a). Whether one or more of those grounds has been made out is not a question of law alone. That there may be no facts in dispute

on this motion does not render the application of a legal standard to those undisputed facts a question of law alone.

41. Accordingly, in my view (and subject to what I say below) the Code itself does not grant to a single member of the Board the jurisdiction to hear and decide a motion to dismiss an appeal summarily and without formal hearing.

3. The decision in *B.S.*

42. The Provost's second argument relies on precedent. In *B.S.* (Case No. 810, June 29, 2017), the Associate Chair granted a motion to dismiss an appeal in broadly similar circumstances. Although that decision was premised on a single member of the Board having the jurisdiction to grant a motion to dismiss an appeal summarily in appropriate circumstances, as I read it, the jurisdictional issue was not the focus of the decision, and does not appear to have been in dispute. Certainly, the Associate Chair did not specifically address that issue, as the Provost concedes. For these reasons, I conclude that *B.S.* is not direct authority on the jurisdictional issue before me, although as I discuss below, it provides helpful guidance on the non-jurisdictional issues.

4. The *Statutory Powers Procedure Act*

43. Despite these conclusions, I have nevertheless determined that a single member of the Board *does* have the jurisdiction, in appropriate circumstances, to dismiss an appeal summarily and without formal hearing. However, I reach this conclusion for different reasons than those initially suggested by the Provost.

44. Since the Code does not directly address this question, I have considered whether another source of law might do so. One obvious source is the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"). Whether the SPPA applies to proceedings of the Tribunal or the Board

is determined by section 3 of the SPPA. Section 3 provides that the SPPA applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

45. Whether the SPPA governs appeals to the Board is potentially a complicated question. More than two decades ago, the Board held—without further explanation—that the Tribunal is governed by the SPPA: *Mr. W* (Case No. 2000/01-05, March 8, 2001) at para. 18, application for judicial review dismissed March 29, 2004, sub. nom. *Wojtaszyk v. University of Toronto*, 2004 CanLII 11663 (Ont. Div. Ct.). I note that in a case decided soon afterwards, two students objected to a joint trial before the Tribunal, and relied on section 9 of the SPPA to argue that no joint trial could be held without their consent. The Tribunal read section C.II.(a).7 of the Code ("the procedures of the Tribunal shall conform to the requirements of the *Statutory Powers Procedure Act*, as amended from time to time") to require conformity with the SPPA, but *not* to say that the procedures of the Tribunal are *bound* by the SPPA: *K.U.* and *R.D.* (Case No. 2000/01-02, April 25, 2001) at para. 6. I take the Tribunal to have meant that the SPPA would not itself bind the Tribunal but for the Code provision requiring conformity. In any case, it appears to be inconsistent with the Board's statement in *Mr. W.*

46. Because of this lack of clarity, I sought additional submissions from the parties on the distinct issue of whether the SPPA applies to appeals to the Board from decisions of the Tribunal, and if so, whether subsection 4.2.1(1) of the SPPA applies here. The Provost delivered additional submissions; the Student did not respond.

47. In her additional submissions, the Provost submitted that the SPPA applies to appeals to the Board from decisions of the Tribunal, and that subsection 4.2.1(1) of the SPPA applies here. I agree with both submissions. The basis for the Provost's submissions was that the Code provides, in section C.II.(a)(7), that the procedures of the Tribunal "shall conform" to the requirements of the SPPA, and section C.II(a)11 of the Code defines "Tribunal" to mean both the trial and the appeal divisions of the Tribunal, so that it includes the Board.

48. Whether these provisions in themselves make the SPPA applicable to proceedings before the Tribunal and appeals to the Board is an interesting question. The use of "conform" suggests that the Code and the Terms seek to make their procedures *consistent* with the SPPA, whose application normally arises by operation of section 3 of the SPPA, not simply because a tribunal chooses to make the SPPA apply to it (or to make its procedures "conform to the requirements of" the SPPA). In my view, the effect of the Tribunal's use of the "conform" language in the Code and the Terms is to create a legitimate expectation on the part of the parties before the Tribunal in the sense employed in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 26 and 29, and in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at para. 68, that the Tribunal will conduct a hearing.

49. The consequence is that an appeal to the Board falls within section 3 of the SPPA, because the SPPA applies to a "proceeding by the tribunal" where the tribunal is "required . . . otherwise by law" to hold or to afford the parties an opportunity for a hearing before making a decision. In my view, this is the only way to make sense of the representations in the Code and the Terms that they shall "conform" to the SPPA. Some might call this a "contracting in" to the SPPA to the extent it did not otherwise apply.

50. The application of the SPPA to this appeal has important consequences for this motion. In particular, subsection 4.2.1(1) of the SPPA provides that the chair of a tribunal may decide that a proceeding be heard by a panel of one person and assign the person to hear the proceeding unless there is a statutory requirement in another Act that the proceeding be heard by a panel of more than one person.

51. In her additional submissions, the Provost argued that subsection 4.2.1(1) of the SPPA applies to this motion. As noted above, I agree. In my view, by designating me to respond to the Provost's request for a proceeding management conference, the Senior Chair assigned me to hear and decide any motions that might reasonably arise from it. The *University of Toronto Act, 1971,* as amended by 1978, Chapter 88, contains no requirement that appeals to the Board (or this motion) be heard by a panel of more than one person, nor does any other statute (including the *University of Toronto Act, 1947*, as amended, to the extent it may still be in force). There is thus no "statutory requirement" that appeals (or this motion) be heard by a panel of more than one person. Accordingly, and subject to my additional conclusions below, I conclude that I have the jurisdiction to hear and decide the Provost's motion.

F. The Board's Power to Dismiss an Appeal Summarily and Without Formal Hearing

52. As noted above, both the Code and the Terms specify that the Board has the power to dismiss an appeal summarily and without formal hearing. How should that power be exercised?

53. The Code and Terms confirm that this power applies only where the Board determines that an appeal is frivolous, vexatious or without foundation. Other than *B.S.*, discussed above, I am not aware of a decision that has relied on that power. A similar dismissal power is set out in section 4.6 of the SPPA, which provides that a tribunal may (subject to conditions I discuss

below) dismiss a proceeding without a hearing on various grounds, including that "the proceeding is frivolous, vexatious or is commenced in bad faith". The Tribunal referred to subsection 4.6(1) of the SPPA in *A.A.* (Case No. 528, January 14, 2009 (Motion Decision)) at page 5, but did not rely on that subsection in its decision.

54. There is a critical difference, however, between the Board's summary dismissal power under the Code and Terms, and the power set out in section 4.6 of the SPPA. The Code and Terms speak of dismissal of an appeal "summarily and without <u>formal</u> hearing" [emphasis added]; section 4.6 permits dismissal "without a hearing." So some kind of hearing is required. Neither the Code nor the Terms defines a "formal hearing", or distinguishes it from other types of hearing. The term "formal hearing" is not used elsewhere in either the Code or the Terms, nor is it contrasted with an "informal hearing".

55. In my view, the Code and the Terms contemplate that in appropriate cases an appeal may be dismissed summarily without an *oral* hearing, not that *no* hearing at all is required. A motion in writing is sufficient. That is, the Code and Terms permit the Board (and where a designation has been made, as in this case, a single member) to dismiss an appeal summarily by way of a motion in writing where the appeal is shown to be frivolous, vexatious or without foundation. This conclusion is reinforced by the reference in the Code and Terms to the Board's power to dismiss an appeal <u>summarily</u> and without formal hearing. This phrase must be interpreted together: although the adverb "summarily" modifies the verb "to dismiss", in my view the full adverbial phrase is "summarily and without formal hearing". The Code and Terms contemplate that the Board's ability to dismiss appeals summarily in appropriate circumstances means that it may do so by way of something less than a full (formal) hearing.

56. Because the Code and Terms do not purport to empower the Board to dismiss an appeal summarily without a hearing, in my view section 4.6 of the SPPA is not triggered, and does not apply to this motion. Section 4.6 appears designed to permit tribunals to propose, of their own motion, that a proceeding be dismissed without a hearing, but provides affected parties an opportunity to respond before they do so. That is very different than the summary dismissal power that the Code and Terms contemplate. If section 4.6 applied, I would have concerns about my jurisdiction to decide this motion, because a tribunal shall not dismiss a proceeding under section 4.6 unless it has made rules under section 25.1 of the SPPA respecting the early dismissal of proceedings. Further, subsection 4.6(6) requires those rules to include specified elements: any of the grounds referred to in subsection 4.6(1), the right of parties to receive notice and to make submissions with respect to the dismissal, and the time within which the submissions must be made.

57. Given my conclusion that section 4.6 of the SPPA does not apply, my jurisdiction to hear and decide this motion is unaffected by it.

G. Application to the Student's Appeal

58. The evidence in the Provost's motion record establishes that this is an appropriate case in which to exercise the jurisdiction to grant the Provost's motion.

59. As noted above, the Provost's motion relies on section E.7(a) of the Code and subsection 3(i) of Appendix B of the Terms, and argues that the Student's appeal is frivolous, vexatious or without foundation. These are disjunctive grounds. Whether the appeal is frivolous or without foundation — grounds which are broadly similar — concerns the merits of the appeal; by contrast, whether it is vexatious concerns the Student's motivation in commencing the appeal.

60. I agree that the appeal is frivolous or without foundation, although I do so for reasons slightly different from those suggested by the Provost. I accept the Provost's submission that "frivolous" means "devoid of merit" or "having little prospect of success". However, the Provost's main submission on this point was premised on her characterization of the standard of review applicable to appeals from Tribunal decisions on sanction as a "high" one, and the suggestion that the Student's appeal could not meet this standard.

61. I am not persuaded that this is the proper characterization of the standard of review that the Board applies to appeals as to sanction. The Board has confirmed that it has broad powers on appeal, but adheres to a level of deference. In *D.H v. University of Toronto* (Case No. 848, October 13, 2017) at paras. 53-54, the Board emphasized that the standard of review was broad, and spoke of deferencc only regarding credibility assessments. Elsewhere, the Board has emphasized the breadth of its powers on appeal, while noting deference on such matters as the conduct of the hearing and the weight to be given to the evidence of witnesses: *e.g., C.S.* (Case No. 709, February 2, 2018) at paras. 78-83; *L.S.* (Case No. 841, October 31, 2017) at paras. 7-8; *M.K.* (Case No. 634, October 4, 2012) at paras. 27-31.

62. I need not resolve how best to characterize the standard of review that the Board applies to sanction appeals, because I prefer a different basis for the conclusion that the Student's appeal is frivolous or without foundation — one also suggested by the Provost.

63. Appeals from sanction (unlike appeals from liability) need not be limited to a question of law alone. However, the Student's proposed grounds of appeal from the sanction imposed by the Tribunal identify no errors. In his March 9, 2021 email, the Student claimed that because the University had been locked down due to the COVID-19 pandemic in the period leading up to the

offence, the "new education model" that followed was difficult to adapt to in a short time before the April 2020 examination when he committed the academic offence.

64. The problem for the Student is that there is no basis for this claim in the evidence that was before the Tribunal. As the Tribunal found, the Student provided no submissions, and did not attend the hearing before the Tribunal. The Student would thus need to seek leave to admit new evidence to provide a basis for his proposed appeal. He has not done so. The critical point here is that even if the Student had brought such a motion to admit new evidence, under the Board's case law, there is no realistic prospect that it could be granted.

65. Section E.8 of the Code and para. 8 of Appendix A of the Terms provide that the Board may allow the introduction of further evidence on appeal which was not available or was not adduced at trial "in circumstances which it considers to be exceptional." Here, as in *M.M.* (Case No. 543, April 14, 2011) at para. 64, the Student did not advance the evidence before the Tribunal that he would need to adduce before the Board, not because the evidence was unavailable to him at the time of the hearing before the Tribunal, but rather because he failed to attend the hearing before the Tribunal. As in *M.M.*, absent special circumstances (of which there is no evidence), a student who fails to appear at a hearing before the Tribunal of which he had reasonable notice cannot introduce evidence on appeal that he otherwise could have led before the Tribunal. I note that this approach was recently followed in *D.B.* (Case No. 1107, August 18, 2021) at para. 37.

66. Since there is no realistic prospect that the Student could establish an evidentiary basis for his appeal, it is doomed to fail. It is thus properly categorized as frivolous and without foundation, and I so find. This is an appropriate basis upon which to dismiss his appeal.

67. I also conclude that the appeal is vexatious. Assuming that the Student was initially motivated by a genuine desire to appeal, I find that this is no longer so. The only reasonable inference to be drawn from the Student's failure to take steps to advance his appeal in the months since delivering his notice of appeal is that he no longer has a genuine intention to appeal. The Board took a similar approach in *B.S.*, noted above, although the student's disregard for the process was more flagrant in that case. Nevertheless, here the Student has not communicated with counsel for the Provost since March 25, 2021, and has not responded to subsequent communications from the Provost's counsel or from the ADFG Office, or to my May 26, 2021 direction.

68. A party who commences an appeal but then takes no steps over many months to advance it ceases to have a genuine intention to appeal. Absent a continuing genuine intention to appeal, an appeal must be viewed as vexatious. On the evidence, I find that the Student's failure to take timely (or indeed, any) steps to advance his appeal after March 2021, and his failure to respond to my May 26, 2021 direction, means that he ceased to have a continuing genuine intention to appeal. As a result, I conclude that his appeal is vexatious. This is a separate and independent ground upon which to dismiss his appeal.

69. For these reasons, I grant the Provost's motion, and dismiss the Student's appeal summarily and without formal hearing. In light of this conclusion, it is unnecessary for me to address the alternative relief sought by the Provost.

Dated at Toronto, this 8th day of February, 2022.

Paul Michell, Associate Chair